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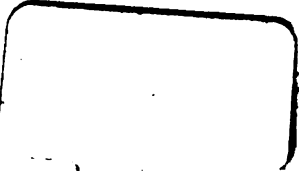
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HARVARD



RY

THE FEDERAL REPORTER.

VOL. 23.

CASES ARGUED AND DETERMINED

IN THE

CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES.

MARCH—JUNE, 1885.

ROBERT DESTY, EDITOR.

KF
105
F42
V. 23-24

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1885.

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¹ Resigned.

² Deceased.

³ Appointed to succeed HON. JOHN ERSKINE.

⁴ Appointed to succeed HON. AMOS MORRILL.

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CASES REPORTED.

	Page		Page
Aalholm v. A Cargo of Iron Ore...	620	Boston & Fairhaven Iron Works, In re.....	880
Abraham v. Western U. Tel. Co....	316	Bowen, Gillett v.....	625
Adams v. County of Republic.....	211	Boxes of Opium v. United States...	867
Addicks v. Three Hundred and Fifty-four Tons Crude Kainit....	727	Bresnahan, Richardson v.....	897
Ætna Life Ins. Co., Prudential Assur. Co. v.....	438	Brewster, Norton v.....	840
Ah Ping, In re.....	329	Brockway, In re.....	583
Alaska, The.....	597	Brooks, Citizens' Bank v.....	21
Alberta, The.....	807	Broughty v. Five Thousand Two Hundred and Fifty-six Bundles of Staves.....	106
Allen v. O'Donald.....	573	Brown v. Fisk.....	228
Allen, Riley v.....	46	Brownlee, Newby v.....	320
Allen, The Charles.....	407	Bryce, D. M. Osborne & Co. v.....	171
Alpin, The, (nine cases,).....	815	Buffalo Lubricating Oil Co., Vacuum Oil Co. v.....	881
Amelia, The.....	406	Bugher v. Prescott.....	20
Amsterdam, The.....	112	Burlingame v. Central R. of Minn..	706
Anchoria, The.....	669		
Anderson, In re.....	482	Cameron, Howes v.....	324
Archer, The.....	350	Canadian Bank of Commerce, Preston v.....	179
Baker, Pioneer Gold Mining Co. v.....	258	Canan v. Pound Manuf'g Co.....	185
Baker, In re.....	30	Candee, Woonsocket Rubber Co. v.....	797
Baker, The S. B.....	109	Cargo of Iron Ore, Aalholm v.....	620
Baldwin, McGriff v.....	222	Cargo of Lumber, A. Parquette v.....	301
Baltimore & O. Tel. Co., Western U. Tel. Co. v.....	12	Carl, The.....	727
Banks v. Manchester.....	143	Carlsdotter v. The E. B. Ward, Jr..	900
Barfield, United States v.....	186	Caro, The.....	734
Barker, Wooster v.....	49	Carroll, Phillips v.....	249
Barry v. United States Mut. Accident Ass'n.....	712	Catchings, Mitchell v.....	710
Bartlett v. His Imperial Majesty, the Sultan.....	257	Celluloid Manuf'g Co. v. Chrolithion Collar & Cuff Co.....	387
Batchelder, Steam Stone-cutter Co. v.....	313	Celluloid Manuf'g Co. v. Comstock	38
Bayaud, United States v.....	721	Central R. of Minn., Burlingame v.....	706
Bayle v. City of New Orleans.....	843	Central Trust Co. v. Ohio Cent. R. Co.	306
Bell Telephone Co., State of Missouri v.....	539	Central Trust Co. v. Texas & St. L. Ry. Co.....	673
Bellici v. The Prinz Georg.....	906	Central Trust Co. v. Texas & St. L. Ry. Co.....	703
Bickelhaupt, Hayes v.....	183	Central Trust Co. v. Texas & St. L. Ry. Co.....	846
Blair v. St. Louis, H. & K. R. Co..	521	Central Trust Co. v. Wabash, St. L. & Pac. Ry. Co.....	513
Blair v. St. Louis, H. & K. R. Co..	523	Central Trust Co. v. Wabash, St. L. & P. Ry. Co.....	675
Blair v. St. Louis, H. & K. R. Co..	524	Central Trust Co. v. Wabash, St. L. & P. R. Co.....	858
Blair v. St. Louis, H. & K. Ry. Co..	704	Central Trust Co. v. Wabash, St. L. & P. Ry. Co.....	863
Blake, Wooster v.....	49	Central Trust Co., Wabash, St. L. & Pac. Ry. Co. v., (two cases,).....	513
Blakemore v. Heyman.....	648		
Bonebrake, Windle v.....	165		
Boston Electric Co. v. Electric Gas Lighting Co.....	838		
Boston Electric Co. v. New England Electric Manuf'g Co.....	838		

	Page		Page
Central Trust Co., Wabash, St. L. & P. R. Co. v.....	738	Doelger, New York Bung & Bushing Co. v.....	191
Central Trust Co., Wabash, St. L. & P. R. Co. v.....	858	Domestic Sewing-machine Co., Wooster v.....	49
Central Trust Co., Wabash, St. L. & P. Ry. Co. v.....	863	Doolittle, In re.....	544
Challenge Corn-planter Co., Farmers' Friend Manuf'g Co. v.....	42	Dorsheimer, Glenn v.....	695
Charles Allen, The.....	407	Douglas, Pennsylvania Coal Co. v.....	226
Chasca, The.....	156	Dudgeon v. Watson.....	161
Chicago, M. & St. P. Ry. Co., Hynes v.....	18	Duff, Steam Stone-cutter Co. v.....	313
Chicago & G. S. Ry. Co., Hack v.....	356	E. B. Ward, Jr., Carlsdotter v.....	900
Chrolithion Collar & Cuff Co., Celluloid Manuf'g Co. v.....	397	E. B. Ward, Jr., The.....	900
Cincinnati, I., St. L. & C. Ry. Co., Watson v.....	443	Edith Godden, The.....	43
Citizens' Bank v. Brooks.....	21	Edwin, The.....	265
City of Alexandria, The.....	826	Electric Gas-lighting Co. v. Smith & Rhodes Electric Co.....	195
City of De Soto, Laird v.....	780	Electric Gas-lighting Co., Boston Electric Co. v.....	838
City of Memphis, Hill v.....	872	E. Luckenback, The.....	725
City of New Orleans, Bayle v.....	843	Ewing, Smith v.....	741
City of New York, The.....	616	Fair Haven & W. R. Co., Day v.....	189
City of Owensboro, Claybrook v.....	634	Farmers' Friend Manuf'g Co. v. Challenge Corn-planter Co.....	42
Clark, McLean v.....	861	Fisher v. Porter.....	162
Claybrook v. City of Owensboro.....	634	Fisk, Brown v.....	228
Cleveland, Hammond v.....	1	Fitton v. Phoenix Assur. Co.....	8
Cleveland Rolling-mill Co. v. Texas & St. L. Ry. Co.....	720	Five Thousand Two Hundred and Fifty-six Bundles of Staves, Broughty v.....	106
Colgate v. Compagnie Francaise du Telegraphe de Paris a N. Y.....	82	Foehrenbach, New York Bung & Bushing Co. v.....	195
Columbus, Hocking Valley & T. Ry. Co., In re.....	306	Foster v. Crossin, (two cases,).....	400
Commercial Tel. Co., Gold & Stock Tel. Co. v.....	340	Foster v. Seymour.....	65
Compagnie Francaise du Telegraphe de Paris a N. Y., Colgate v.....	82	Foster, County of Lauderdale v.....	516
Comstock, Celluloid Manuf'g Co. v. Conroy v. Oregon Construction Co.....	71	Foy, Glenn v.....	695
Coos Bay Wagon Road Co., Green v.....	67	Frank v. Denver & R. G. Ry. Co.....	123
County of Carter, Sinton v.....	535	Frank v. Denver & R. G. Ry. Co.....	757
County of Lauderdale v. Foster.....	516	Frazer Lubricator Co. v. Frazer.....	305
County of Republic, Adams v.....	211	Frazer, Frazer Lubricator Co. v.....	305
Crossin, Foster v., (two cases,).....	400	Fuller v. Wright.....	833
Dausman, Glenn v.....	695	Gage v. Kellogg.....	891
Dawson, Leech v.....	654	Gentry v. Supreme Lodge, Knights of Honor.....	718
Day v. Fair Haven & W. R. Co.....	189	German School Ass'n, Pilla v.....	700
Day, Richardson v.....	227	Gibbony's Adm'r, Ex parte.....	482
De Kuyper v. Witteman.....	871	Gillett v. Bowen.....	625
Delaware, L. & W. Ry. Co., Wilkin-son v.....	561	Gilliland, Goldsmith v.....	645
Delaware, L. & W. Ry. Co., Wilkin-son v.....	562	Glenn v. Dausman.....	695
Denver & R. G. Ry. Co., Frank v.....	123	Glenn v. Dimmock.....	695
Denver & R. G. Ry. Co., Frank v.....	757	Glenn v. Dorsheimer.....	695
Deweese, St. Louis, K. C. & C. R. Co. v.....	519	Glenn v. Foy.....	695
Deweese, St. Louis, K. C. & C. Ry. Co. v.....	691	Glenn v. Hunt.....	695
Dimmock, Glenn v.....	695	Glenn v. Liggett.....	695
District Attorney, In re.....	26	Glenn v. Lockwood.....	695
D. M. Osborne & Co. v. Bryce.....	171	Glenn v. Lucas.....	695
		Glenn v. Noonan.....	695
		Glenn v. Priest.....	695
		Glenn v. Scott.....	695
		Glenn v. Taussig.....	695
		Glenn v. Triplett.....	695
		Glenn v. Von Phul.....	695

	Page		Page
Godden, The Edith.....	43	J. B. Sickles Saddlery Co., Osmer v.	724
Goepel, Premuda v.....	410	Jeffries v. Laurie.....	786
Gold & Stock Tel. Co. v. Commercial		Jenkins v. Garney.....	898
Tel. Co.....	340	Jennings v. Philadelphia & R. R.	
Goldsmith v. Gilliland.....	645	Co.....	669
Goldsmith v. North German Lloyd.	820	Johnson, Peard v.....	507
Goodyear v. Hartford Spring Axle		Jones, Steam Stone-cutter Co. v....	813
Co.....	36		
Gordon v. St. Paul Harvester Works	147	Kane, United States v.....	748
Grain Drill Manuf'rs Co. v. Rude...	348	Kappes v. Hartung.....	187
Green v. Coos Bay Wagon Road Co.	67	Kehler v. New Orleans Ins. Co.....	709
G. Reusens, The.....	403	Kellogg v. Root.....	525
Gunning, United States v.....	668	Kellogg, Gage v.....	891
Gurney, Jenkins v.....	898	Kelly v. Houghton.....	417
		Kelly v. Otis.....	903
Hack v. Chicago & G. S. Ry. Co....	356	Kendall, Mundy v.....	591
Hamblen, Lehigh Valley Coal Co. v.	225	Kent's Adm'r, Ex parte.....	482
Hamilton v. Walsh.....	420	King, United States v.....	138
Hammond v. Cleveland.....	1	Klugman, Pattee Plow Co. v.....	801
Handy, Wooster v.....	49	Kingston, The.....	200
Hanner v. Moulton.....	5	Klein, Valley Nat. Bank of St. Louis	
Hapgood v. Rosenstock.....	86	v.....	676
Harrison v. Merritt.....	653	Knowlton, North v.....	163
Hartford Spring Axle Co., Goodyear		Koehler, Ex parte.....	529
v.....	36		
Hartford Woven-wire Mattress Co.		Laird v. City of De Soto.....	780
v. Peerless Wire Mattress Co.....	587	Lalance & Grosjean Manuf'g Co. v.	
Hartog v. Memory.....	835	United States Stamping Co.....	800
Hartung, Kappes v.....	187	Lancaster, Morley Sewing-machine	
Hassler, Norris v.....	581	Co. v.....	344
Hayes v. Bickelhaupt.....	183	Landsberg, United States v.....	585
Hendryx, Perkins v.....	418	Laurie, Jeffries v.....	786
Heyman, Blakemore v.....	648	Leclanche Battery Co. v. Western	
Hibdon, State of Tennessee v.....	795	Electric Co.....	276
Higgins v. McCrea.....	782	Leech v. Dawson.....	654
Hill v. City of Memphis.....	872	Lehigh Valley Coal Co. v. Hamblen	225
Hill, Roberts v.....	311	Lehman v. Rosengarten.....	642
Hill, Sharon v.....	353	Liberty Bell, The.....	843
Hills v. Stockwell & Darragh Furni-		Liggett, Glenn v.....	695
ture Co.....	432	Lockwood, Glenn v.....	695
Hills, The.....	418	Logwood v. Memphis & C. R. Co. .	318
His Imperial Majesty, the Sultan of		Lucas, Glenn v.....	695
the Ottoman Empire, v. Providence		Luckenback, The E.....	725
Tool Co.....	572	Lydian Monarch, The.....	298
His Imperial Majesty the Sultan,		Lyon, Rawson v.....	107
Bartlett v.....	257		
Hofheimer, Market Nat. Bank v....	13	Mace, McKay v.....	76
Holcomb v. Holcomb.....	781	Mackin v. United States.....	834
Holt v. Menendez.....	869	Magowan, New York Belting &	
Houghton, Kelly v.....	417	Packing Co. v.....	596
Howe Machine Co., Wooster v.....	49	Manchester, Banks v.....	143
Howes v. Cameron.....	324	Mangalore, The.....	462
Hunt, Glenn v.....	695	Mangalore, The.....	463
Hynes v. Chicago, M. & St. P. Ry.		Market Nat. Bank v. Hofheimer....	13
Co.....	18	Mary Bradford, The.....	733
		Mary R. McKillop, The.....	829
Insurance Co., Merrill v.....	245	Marye, Parsons v.....	113
Irving, Woolridge v.....	676	Mathews, United States v.....	74
I. & V. Florio S. S. Co., Mina v....	915	Mauritz v. New York, L. E. & W.	
		R. Co.....	765
Jack Jewett, The.....	927	McAlpine v. Union Pac. Ry. Co....	168
Jamaica, Metropolitan S. S. Co. v..	448	McCarty, Steam Stone-cutter Co. v.	313
Jamaica, The.....	448	McCrea, Higgins v.....	782

	Page		Page
McFarland v. Spencer.....	150	North v. Knowlton.....	163
McGriff v. Baldwin.....	222	North, Orton v.....	163
McKay v. Mace.....	76	North German Lloyd, Goldsmith v..	820
McKinney v. Rosenband.....	785	North Hudson C. R. Co., Railway	
McLean v. Clark.....	861	Register Manuf'g Co. v.....	593
McVey, In re.....	878	Northern Pac. Ry. Co., Wells, Fargo	
Mealey v. Metropolitan L. Ins. Co..	25	& Co. v.....	469
Means v. Montgomery.....	421	Norton v. Brewster.....	840
Mellon v. Smith-Davis Manuf'g Co..	153		
Memory, Hartog v.....	835	O'Donald, Allen v.....	573
Memphis & C. R. Co., Logwood v..	318	Ohio Cent. R. Co., Central Trust Co.	
Menendez, Holt v.....	869	of N. Y. v.....	306
Merrill v. Insurance Co.....	245	Olyphant v. St. Louis Ore & Steel Co.	455
Merritt, Harrison v.....	653	Oregon Construction Co., Conroy v..	71
Merriwether, In re.....	704	Oregon Ry. & Nav. Co., Oregonian	
Metropolitan L. Ins. Co., Mealey v..	25	Ry. Co. v.....	232
Metropolitan S. S. Co. v. The Ja-		Oregonian Ry. Co. v. Oregon Ry. &	
maica.....	448	Nav. Co.....	232
Meyers v. Shurtleff.....	577	Orton v. North.....	163
Miller, In re.....	32	Osmer v. J. B. Sickles Saddlery Co.	724
Mina v. I. & V. Florio S. S. Co....	915	Oteri v. The New Orleans.....	909
Missouri Pac. Ry. Co., Pacific Rail-		Otis, Kelly v.....	903
road v.....	565		
Mitchell v. Catchings.....	710	Pacific, The.....	154
Montgomery, Means v.....	421	Pacific Railroad v. Missouri Pac. Ry.	
Montgomery, Small v.....	707	Co.....	565
Montpelier Carriage Co., Parker v..	886	Palmer, Travers v.....	511
Morley Sewing-machine Co. v. Lan-		Paquette v. A Cargo of Lumber....	301
caster.....	344	Parker v. Montpelier Carriage Co..	886
Morris, Stebbins v.....	360	Parker v. Stow.....	252
Morrisania, The.....	731	Parsons v. Marye.....	113
Morrison v. Price.....	217	Pattee Plow Co. v. Kingman.....	801
Mosher v. St. Louis, I. M. & T. Ry.		Patterson Co., Union Tubing Co. v..	79
Co.....	326	Pavonia, The.....	204
Moulton, Hanner v.....	5	Peard v. Johnson.....	507
Mueller, Willard v.....	209	Peerless Wire Mattress Co., Hart-	
Mundy v. Kendall.....	591	ford Woven-wire Mattress Co v..	587
Murphy v. Western & A. R. R.....	637	Pennland, The.....	551
		Pennsylvania Coal Co. v. Douglas..	226
Nassau Ferry Co. v. The Nereus....	448	Perkins v. Hendryx.....	418
Neal, Wilson v.....	129	Persian Monarch, The.....	820
Nellie Flagg, The.....	671	Philadelphia & R.R. Co., Jennings v.	569
Nereus, The.....	448	Phillips v. Carroll.....	249
Nereus, The, Nassau Ferry Co. v..	448	Phoenix Assur. Co., Fitton v.....	3
Neumann, Roemer v.....	447	Pilla v. German School Ass'n.....	700
Newby v. Brownlee.....	320	Pilot Boy, The.....	103
New Castle N. R. Co. v. Simpson... 214		Pioneer Gold Mining Co. v. Baker..	258
New England Electric Manuf'g Co.,		Ponce, Stachelberg v.....	430
Boston Electric Co. v.....	838	Porter, Fisher v.....	162
New Jersey Lighterage Co., Quinn v.	363	Pound Manuf'g Co., Canan v.....	185
New Orleans Ins. Co., Kehler v.....	709	Premuda v. Goepel.....	410
New Orleans, The.....	909	Prescott, Bugher v.....	20
New Orleans, The, Oteri v.....	909	Preston v. Canadian Bank of Com-	
New York Belting & Packing Co.		merce.....	179
v. Magowan.....	596	Preston v. Smith.....	737
New York Bung & Bushing Co. v.		Price, Morrison v.....	217
Doelger.....	191	Priest, Glenn v.....	695
New York Bung & Bushing Co. v.		Prinz Georg, The.....	906
Foehrenbach.....	195	Prinz Georg, The, Bellici v.....	906
New York, L. E. & W. R. Co.,		Professor Morse, The.....	803
Mauritz v.....	765	Providence Tool Co., His Imperial	
Noonan, Glenn v.....	695	Majesty, the Sultan of the Otto-	
Norris v. Hassler.....	561	man Empire v.....	572

	Page		Page
Providence Washington Ins. Co. v. The Sidney.....	88	Simmons v. Taylor.....	849
Prudential Assur. Co. v. Aetna Life Ins. Co.....	439	Simpson, New Castle N. R. Co. v....	214
Quidnick Co., Randolph v.....	278	Singer Manuf'g Co. of N. J., Wooster v.....	49
Quinn v. New Jersey Lighterage Co.	363	Singer Manuf'g Co. of N. Y., Wooster v.....	49
Railway Register Manuf'g Co. v. North Hudson C. R. Co.....	593	Sinton v. County of Carter.....	535
Randolph v. Quidnick Co.....	278	Small v. Montgomery.....	707
Rawson v. Lyon.....	107	Smith v. Ewing.....	741
Redfield, Ystalifera Iron Co. v.....	650	Smith, Preston v.....	737
Regulus, The.....	98	Smith, Ex parte.....	482
Reusens, The G.....	403	Smith-Davis Manuf'g Co., Mellon v.	153
Richardson v. Bresnahan.....	897	Smith & Rhodes Electric Co., Electric Gas-lighting Co. v.....	195
Richardson v. Day.....	227	Spencer, McFarland v.....	150
Riley v. Allen.....	46	Stachelberg v. Ponce.....	430
Robbins v. Sears.....	874	Standard, The.....	207
Roberts v. Hill.....	311	State of Missouri v. Bell Telephone Co.....	539
Robertson, Windmuller v.....	652	State of Tennessee v. Hibdon.....	795
Roemer v. Neumann.....	447	Steam Stone-cutter Co. v. Batchelder.....	313
Rogers, United States v.....	658	Steam Stone-cutter Co. v. Duff.....	313
Root, Kellogg v.....	525	Steam Stone-cutter Co. v. Jones....	313
Rosenband, McKinney v.....	785	Steam Stone-cutter Co. v. McCarty	313
Rosengarten, Lehman v.....	642	Steam Stone-cutter Co. v. Sears.....	313
Rosenstock, Hapgood v.....	86	Steam Stone-cutter Co. v. Winsor Savings Bank.....	313
Rude, Grain Drill Manuf'rs Co. v....	348	Steam Stone-cutter Co. v. Young..	313
Russell v. Worthington.....	248	Stebbins v. Morris.....	380
St. Louis, H. & K. R. Co., Blair v..	521	Stockwell & Darragh Furniture Co., Hills v.....	492
St. Louis, H. & K. R. Co., Blair v..	523	Stolzenbach, Williams v.....	39
St. Louis, H. & K. R. Co., Blair v..	524	Stow, Parker v.....	252
St. Louis, H. & K. Ry. Co., Blair v.	704	Suliste, The.....	919
St. Louis, I. M. & T. Ry. Co., Mosher v.....	326	Supreme Lodge, Knights of Honor, Gentry v.....	718
St. Louis, K. C. & C. R. Co. v. Dewees.....	519	Talisman, The.....	111
St. Louis, K. C. & C. Ry. Co. v. Dewees.....	691	Taussig, Glenn v.....	695
St. Louis Ore & Steel Co., Olyphant v.	465	Taylor, Simmons v.....	849
St. Paul Harvester Works, Gordon v.	147	Texas & St. L. Ry. Co., Central Trust Co. v.....	673
San Jacinto Tin Co., United States v.	279	Texas & St. L. Ry. Co., Central Trust Co. v.....	703
Saunders, The.....	303	Texas & St. L. Ry. Co., Central Trust Co. v.....	846
S. B. Baker, The.....	109	Texas & St. L. Ry. Co., Cleveland Rolling-mill Co. v.....	720
Scheidler v. Tustin.....	887	Thomas Carroll, The.....	912
Schenck, Wooster v.....	49	Thornton, Wooster v.....	49
Scott v. Seventy-five Tons of Pig-iron.....	197	Three Hundred and Fifty-four Tons Crude Kainit, Addicks v.....	727
Scott, Glenn v.....	695	Three Thousand Eight Hundred and Eighty Boxes of Opium v. United States.....	367
Seaman, United States v.....	882	Titan, The.....	413
Sears, Robbins v.....	874	Tomkinson v. Willets Manuf'g Co..	895
Sears, Steam Stone-cutter Co. v....	313	Tong Ah Chee, In re.....	441
Seventy-five Tons of Pig-iron, Scott v.....	197	Travers v. Palmer.....	511
Seymour, Foster v.....	65	Treadwell, In re.....	442
Shady Side, The.....	731	Triplett, Glenn v.....	695
Sharon v. Hill.....	353	Tustin, Scheidler v.....	887
Shriver, United States v.....	134		
Shurtleff, Meyers v.....	577		
Sidney, The.....	88		
Sidney, The, Providence Washington Ins. Co. v.....	88		

	Page		Page
Union Pac. Ry. Co. v. McAlpine v...	168	Watson, Dudgeon v.....	161
Union Tubing Co. v. Patterson Co..	79	Wells, Fargo & Co. v. Northern Pac.	
United States v. Barefield.....	136	Ry. Co.....	469
United States v. Bayaud.....	721	Western Electric Co., Leclanche Bat-	
United States v. Gunning.....	668	tery Co. v.	276
United States v. Kane.....	748	Western U. Tel. Co. v. Baltimore &	
United States v. King.....	138	O. Tel. Co.....	12
United States v. Landsberg.....	585	Western U. Tel. Co., Abraham v...	315
United States v. Mathews.....	74	Western & A. R. R., Murphy v....	637
United States v. Rogers.....	658	Wilkinson v. Delaware, L. & W. Ry.	
United States v. San Jacinto Tin Co.	279	Co.....	561
United States v. Seaman.....	882	Wilkinson v. Delaware, L. & W. Ry.	
United States v. Shriver.....	134	Co.....	562
United States v. Van Vliet.....	35	Willard v. Muelier.....	209
United States, Mackin v.....	334	Willcox & Gibbs Sewing-machine	
United States, Three Thousand		Co., Wooster v.....	49
Eight Hundred and Eighty Boxes		Willetts Manuf'g Co., Tompkinson v.	895
of Opium v.....	367	William F. McKee, The.....	557
United States Mut. Accident Ass'n,		William Worden, The.....	88
Barry v.....	712	Williams v. Stolzenbach.....	39
United States Stamping Co., Lalance		Wilson v. Neal.....	129
& Grosjean Manuf'g Co v.....	900	Wilson v. Vaughn.....	229
		Windle v. Bonebrake.....	165
Vacuum Oil Co. v. Buffalo Lubricat-		Windmuller v. Robertson.....	652
ing Oil Co.....	891	Winsor Savings Bank, Steam Stone-	
Valley Nat. Bank of St. Louis v.		cutter Co. v.....	313
Klein.....	676	Wisconsin, The.....	831
Van Vliet, United States v.....	35	Witteaman, De Kuyper v.....	871
Vaughn, Wilson v.....	229	Wooldridge v. Irving.....	676
Von Phul, Glenn v.....	695	Woonsocket Rubber Co. v. Candee..	797
		Wooster v. Barker.....	49
Wabash, St. L. & Pac. Ry. Co. v.		Wooster v. Blake.....	49
Central Trust Co., (two cases,)....	513	Wooster v. Domestic Sewing-ma-	
Wabash, St. L. & P. R. Co. v. Cen-		chine Co.....	49
tral Trust Co.....	738	Wooster v. Handy.....	49
Wabash, St. L. & P. R. Co. v. Cen-		Wooster v. Howe Machine Co.....	49
tral Trust Co.....	858	Wooster v. Schenck.....	49
Wabash, St. L. & P. Ry. Co. v. Cen-		Wooster v. Singer Manuf'g Co. of	
tral Trust Co.....	863	N. J.....	49
Wabash, St. L. & Pac. Ry. Co., Cen-		Wooster v. Singer Manuf'g Co. of	
tral Trust Co. v.....	513	N. Y.....	49
Wabash, St. L. & P. Ry. Co., Central		Wooster v. Thornton.....	49
Trust Co. v.....	675	Wooster v. Willcox & Gibbs Sewing-	
Wabash, St. L. & P. R. Co., Central		machine Co.....	49
Trust Co. v.....	858	Worden, The William.....	88
Wabash, St. L. & P. Ry. Co., Central		Worthington, Russell v.....	248
Trust Co. v.....	863	Wright, Fuller v.....	833
Walsh, Hamilton v.....	420		
Ward, Jr., The E. B.....	900	Young, Steam Stone-cutter Co. v...	313
Waters Pierce Oil Co., In re.....	703	Ystalifera Iron Co. v. Redfield.....	650
Watson v. Cincinnati, L. St. L. & C.			
Ry. Co.....	443	Ziebold, In re.....	791

CASES REPORTED.

ARRANGED UNDER THEIR RESPECTIVE CIRCUITS AND DISTRICTS.

FIRST CIRCUIT.

CIRCUIT COURT, D. MAINE.

Stachelberg v. Ponce..... 430

CIRCUIT COURT, D. MASSACHUSETTS.

Boston Electric Co. v. Electric Gas-
Lighting Co..... 833
Boston Electric Co. v. New England
Electric Manuf'g Co..... 833
Boston & Fairhaven Iron Works, In
re..... 880
Jenkins v. Gurney..... 898
Morley Sewing-machine Co. v. Lan-
caster..... 344
Morrison v. Price..... 217
Perkins v. Hendryx..... 418
Richardson v. Bresnahan..... 897
Russell v. Worthington..... 248

CIRCUIT COURT, D. RHODE ISLAND.

Baker, In re..... 30
Foster v. Crossin, (two cases,)..... 400
Hamilton v. Walsh..... 420
Mealey v. Metropolitan L. Ins. Co.. 25
Randolph v. Quidnick Co..... 278

SECOND CIRCUIT.

CIRCUIT COURT, D. CONNECTICUT.

Celluloid Manuf'g Co. v. Comstock 38
Day v. Fair Haven & W. R. Co..... 189
Goodyear v. Hartford Spring Axle
Co..... 36
Hartford Woven-wire Mattress Co.
v. Peerless Wire Mattress Co..... 587
Lalanc & Grosjean Manuf'g Co. v.
United States Stamping Co..... 800
v.23—FED.

Page

Page

Parker v. Stow..... 252
Prudential Assur. Co. v. Aetna Life
Ins. Co..... 438
Woonsocket Rubber Co. v. Candee.. 797

DISTRICT COURT, D. CONNECTICUT.

Scott v. Seventy-five Tons of Pig-
iron..... 197

CIRCUIT COURT, E. D. NEW YORK.

Burlingame v. Central R. of Minn.. 706
E. Luckenback, The..... 725
His Imperial Majesty, the Sultan of
the Ottoman Empire, v. Providence
Tool Co..... 572
Mary Bradford, The..... 783
Quinn v. New Jersey Lighterage Co. 863
Robbins v. Sears..... 874

DISTRICT COURT, E. D. NEW YORK.

Alpin, The, (nine cases,)..... 815
Caro, The..... 734
Goldsmith v. North German Lloyd. 820
Jack Jewett, The..... 927
Mary R. McKillop, The..... 829
Morrisania, The..... 731
Persian Monarch, The..... 820
Shady Side, The..... 731
Wisconsin, The..... 831

CIRCUIT COURT, N. D. NEW YORK.

Broughty v. Five Thousand Two
Hundred and Fifty-six Bundles of
Staves..... 106
Canan v. Pound Manuf'g Co..... 185
Gage v. Kellogg..... 891
Stebbins v. Morris..... 360
Vacuum Oil Co. v. Buffalo Lubricat-
ing Oil Co..... 891
(xiii)

	Page		Page
DISTRICT COURT, N. D. NEW YORK.		DISTRICT COURT, S. D. NEW YORK.	
Nellie Flagg, The.....	671	Aalholm v. A Cargo of Iron Ore...	620
Thomas Carroll, The.....	912	Addicks v. Three Hundred and Fifty-four Tons Crude Kainit....	727
CIRCUIT COURT, S. D. NEW YORK.		Alaska, The.....	597
Amelia, The.....	408	Amsterdam, The.....	115
Archer, The.....	350	Anchoria, The.....	669
Bartlett v. His Imperial Majesty, the Sultan.....	257	Carl, The.....	727
Brockway, In re.....	583	Charles Allen, The.....	407
Celluloid Manuf'g Co. v. Chrollithion Collar & Cuff Co.....	397	Chasca, The.....	156
Colgate v. Compagnie Francaise du Telegraphe de Paris a N. Y.....	82	City of Alexandria, The.....	826
De Kuyper v. Witteman.....	871	City of New York, The.....	616
Dudgeon v. Watson.....	161	Edith Godden, The.....	43
Electric Gas-lighting Co. v. Smith & Rhodes Electric Co.....	195	Edwin, The.....	255
Foster v. Seymour.....	65	G. Reusens, The.....	403
Gold & Stock Tel. Co. v. Commercial Tel. Co.....	340	Jamaica, The.....	448
Happgood v. Rosenstock.....	86	Metropolitan S. S. Co. v. The Ja- maica.....	448
Harrison v. Merritt.....	653	Nassau Ferry Co. v. The Nereus....	448
Hayes v. Bickelhaupt.....	183	Nereus, The.....	448
Hills, The.....	413	Paquette v. A Cargo of Lumber....	301
Holt v. Menendez.....	869	Pavonia, The.....	204
Kappes v. Hartung.....	187	Pennland, The.....	551
Leclanche Battery Co. v. Western Electric Co.....	276	Premuda v. Goepel.....	410
McFarland v. Spencer.....	150	Providence Washington Ins. Co. v. The Sidney.....	88
McKinney v. Rosenband.....	785	Rawson v. Lyon.....	107
New York Bung & Bushing Co. v. Doelger.....	191	S. B. Baker, The.....	109
New York Bung & Bushing Co. v. Foehrenbach.....	195	Sidney, The.....	88
Peard v. Johnson.....	507	Standard, The.....	207
Regulus, The.....	98	Suliotte, The.....	919
Roemer v. Neumann.....	447	William Worden, The.....	88
Saunders, The.....	303	CIRCUIT COURT, D. VERMONT.	
Titan, The.....	413	Citizens' Bank v. Brooks.....	21
Tomkinson v. Willets Manuf'g Co.....	895	Fitton v. Phoenix Assur. Co.....	3
Travers v. Palmer.....	511	Parker v. Montpelier Carriage Co.....	886
Union Tubing Co. v. Patterson Co.....	79	Roberts v. Hill.....	311
United States v. Bayaud.....	721	Steam Stone-cutter Co. v. Batchel- der.....	313
United States v. Gunning.....	668	Steam Stone-cutter Co. v. Duff....	313
United States v. Landsberg.....	585	Steam Stone-cutter Co. v. Jones....	313
United States v. Seaman.....	882	Steam Stone-cutter Co. v. McCarty..	313
Windmuller v. Robertson.....	652	Steam Stone-cutter Co. v. Sears....	313
Wooster v. Barker.....	49	Steam Stone-cutter Co. v. Winsor Savings Bank.....	813
Wooster v. Blake.....	49	Steam Stone-cutter Co. v. Young... 313	
Wooster v. Domestic Sewing-ma- chine Co.....	49	THIRD CIRCUIT.	
Wooster v. Handy.....	49	CIRCUIT COURT, D. NEW JERSEY.	
Wooster v. Howe Machine Co.....	49	Jennings v. Philadelphia & R. R. Co.....	569
Wooster v. Schenck.....	49		
Wooster v. Singer Manuf'g Co. of N. J.....	49		
Wooster v. Singer Manuf'g Co. of N. Y.....	49		
Wooster v. Thornton.....	49		

	Page
Mundy v. Kendall.....	591
New York Belting & Packing Co. v. Magowan.....	596
Norris v. Hassler.....	581
Railway Register Manuf'g Co. v. North Hudson C. R. Co.....	593
Wilkinson v. Delaware, L. & W. Ry. Co.....	561
Wilkinson v. Delaware, L. & W. Ry. Co.....	562

DISTRICT COURT, D. NEW JERSEY.

Kingston, The.....	200
Lydian Monarch, The.....	298
Mina v. L. & V. Florio S. S. Co.....	915
Professor Morse, The.....	803

CIRCUIT COURT, E. D. PENNSYLVANIA.

McKay v. Mace.....	76
--------------------	----

DISTRICT COURT, E. D. PENNSYLVANIA.

Talisman, The.....	111
--------------------	-----

CIRCUIT COURT, W. D. PENNSYLVANIA.

Fuller v. Wright.....	833
Miller, In re.....	32
New Castle N. R. Co. v. Simpson...	214
Phillips v. Carroll.....	249
Scheidler v. Tustin.....	887
Williams v. Stolzenbach.....	39

DISTRICT COURT, W. D. PENNSYLVANIA.

Pacific, The.....	164
-------------------	-----

FOURTH CIRCUIT.

DISTRICT COURT, D. MARYLAND.

Pilot Boy, The.....	103
---------------------	-----

CIRCUIT COURT, W. D. NORTH CAROLINA.

Means v. Montgomery.....	421
--------------------------	-----

CIRCUIT COURT, E. D. VIRGINIA.

Market Nat. Bank v. Hofheimer....	13
Parsons v. Marye.....	113

DISTRICT COURT, W. D. VIRGINIA.

Anderson, In re.....	482
Gibbony's Adm'r, Ex parte.....	482

Kent's Adm'r, Ex parte.....	482
Smith, Ex parte.....	482

FIFTH CIRCUIT.

CIRCUIT COURT, S. D. ALABAMA.

United States v. King.....	138
----------------------------	-----

CIRCUIT COURT, S. D. GEORGIA, W. D.

McGriff v. Baldwin.....	222
-------------------------	-----

CIRCUIT COURT, E. D. LOUISIANA.

Bayle v. City of New Orleans.....	843
Bellici v. The Prinz Georg.....	906
Carlsdöfter v. The E. B. Ward, Jr..	900
E. B. Ward, Jr., The.....	900
Kelly v. Otis.....	903
Liberty Bell, The.....	843
New Orleans, The.....	909
Norton v. Brewster.....	840
Oteri v. The New Orleans.....	909
Prinz Georg, The.....	906

CIRCUIT COURT, S. D. MISSISSIPPI.

Valley Nat. Bank of St. Louis v. Klein.....	676
Wooldridge v. Irving.....	676

DISTRICT COURT, E. D. TEXAS.

United States v. Barefield.....	136
---------------------------------	-----

CIRCUIT COURT, N. D. TEXAS.

Hanner v. Moulton.....	5
------------------------	---

SIXTH CIRCUIT.

CIRCUIT COURT, D. KENTUCKY.

Blakemore v. Heyman.....	648
Claybrook v. City of Owensboro....	634
Sinton v. County of Carter.....	535

DISTRICT COURT, D. KENTUCKY.

Leech v. Dawson.....	654
----------------------	-----

CIRCUIT COURT, E. D. MICHIGAN.

Holcomb v. Holcomb.....	781
Lehman v. Rosengarten.....	642

	Page		Page
McLean v. Clark	861	Howes v. Cameron	324
DISTRICT COURT, E. D. MICHIGAN.		Mackin v. United States	334
Alberta, The	807	Richardson v. Day	227
United States v. Van Vliet	35	DISTRICT COURT, N. D. ILLINOIS.	
William F. McRae, The	557	Lehigh Valley Coal Co. v. Hamblen	225
CIRCUIT COURT, W. D. MICHIGAN, S. D.		Pennsylvania Coal Co. v. Douglas	226
Farmers' Friend Manuf'g Co. v.		Preston v. Canadian Bank of Com-	
Challenge Corn-planter Co.	42	merce	179
Hills v. Stockwell & Darragh Furni-		DISTRICT COURT, S. D. ILLINOIS.	
ture Co.	432	United States v. Shriver	134
Kellogg v. Root	525	CIRCUIT COURT, D. INDIANA.	
CIRCUIT COURT, N. D. OHIO, E. D.		Gentry v. Supreme Lodge, Knights	
Higgins v. McCrea	782	of Honor	718
CIRCUIT COURT, N. D. OHIO, W. D.		Grain Drill Manuf'rs Co. v. Rude ..	348
Central Trust Co. v. Ohio Cent. R. Co.	306	Hack v. Chicago & G. S. Ry. Co.	356
Columbus, Hocking Valley & T. Ry.		Wabash, St. L. & P. R. Co. v. Cen-	
Co., In re	306	tral Trust Co.	738
CIRCUIT COURT, S. D. OHIO, E. D.		Watson v. Cincinnati, I., St. L. & C.	
Banks v. Manchester	143	Ry. Co.	443
CIRCUIT COURT, S. D. OHIO, W. D.		Western U. Tel. Co. v. Baltimore &	
United States v. Mathews	74	O. Tel. Co.	12
Willard v. Mueller	209	CIRCUIT COURT, E. D. WISCONSIN.	
Wilson v. Neal	129	Barry v. United States Mut. Accl-	
CIRCUIT COURT, E. D. TENNESSEE, S. D.		ident Ass'n	712
Murphy v. Western & A. R. R.	637	D. M. Osborne & Co. v. Bryce	171
CIRCUIT COURT, M. D. TENNESSEE.		Mauritz v. New York, L. E. & W.	
State of Tennessee v. Hibdon	795	R. Co.	765
CIRCUIT COURT, W. D. TENNESSEE.		EIGHTH CIRCUIT.	
Bugher v. Prescott	20	DISTRICT COURT, W. D. ARKANSAS.	
County of Lauderdale v. Foster	516	United States v. Rogers	658
Logwood v. Memphis & C. R. Co.	318	CIRCUIT COURT, D. COLORADO.	
DISTRICT COURT, W. D. TENNESSEE.		Frank v. Denver & R. G. Ry. Co.	123
Riley v. Allen	46	Frank v. Denver & R. G. Ry. Co.	757
SEVENTH CIRCUIT.		Gillett v. Bowen	625
CIRCUIT COURT, N. D. ILLINOIS.		United States v. Kane	748
Hartog v. Memory	835	CIRCUIT COURT, S. D. IOWA, C. D.	
		Simmons v. Taylor	849
		CIRCUIT COURT, D. KANSAS.	
		Adams v. County of Republic	211
		McAlpine v. Union Pac. Ry. Co.	168
		Newby v. Brownlee	320

	Page
Pacific Railroad v. Missouri Pac. Ry. Co.	565
Wilson v. Vaughn	229
Windle v. Bonebrake	165
Ziebold, In re	791

CIRCUIT COURT, D. MINNESOTA.

Frazer Lubricator Co. v. Frazer	305
Gordon v. St. Paul Harvester Works	147
Hynes v. Chicago, M. & St. P. Ry. Co.	18
Merrill v. Insurance Co.	245
North v. Knowlton	163
Orton v. North	163

CIRCUIT COURT, E. D. MISSOURI.

Blair v. St. Louis, H. & K. R. Co.	521
Blair v. St. Louis, H. & K. R. Co.	523
Blair v. St. Louis, H. & K. R. Co.	524
Blair v. St. Louis, H. & K. Ry. Co.	704
Brown v. Fisk	228
Central Trust Co. v. Texas & St. L. Ry. Co.	673
Central Trust Co. v. Texas & St. L. Ry. Co.	703
Central Trust Co. v. Texas & St. L. Ry. Co.	846
Central Trust Co. v. Wabash, St. L. & Pac. Ry. Co.	513
Central Trust Co. v. Wabash, St. L. & P. Ry. Co.	675
Central Trust Co. v. Wabash, St. L. & P. R. Co.	858
Central Trust Co. v. Wabash, St. L. & P. Ry. Co.	863
Cleveland Rolling-mill Co. v. Texas & St. L. Ry. Co.	720
Doolittle, In re	544
Glenn v. Dausman	695
Glenn v. Dimmock	695
Glenn v. Dorsheimer	695
Glenn v. Foy	695
Glenn v. Hunt	695
Glenn v. Liggett	695
Glenn v. Lockwood	695
Glenn v. Lucas	695
Glenn v. Noonan	695
Glenn v. Priest	695
Glenn v. Scott	695
Glenn v. Tausig	695
Glenn v. Triplett	695
Glenn v. Von Phul	695
Hill v. City of Memphis	872
Jeffries v. Laurie	786
Kehler v. New Orleans Ins. Co.	709
Laird v. City of De Soto	780
Mellon v. Smith-Davis Manuf'g Co.	153
Merriwether, In re	704
Mitchell v. Catchings	710
Mosher v. St. Louis, I. M. & T. Ry. Co.	326

Olyphant v. St. Louis Ore & Steel Co.	465
Osmer v. J. B. Sickles Saddlery Co.	724
Pattee Plow Co. v. Kingman	801
Pilla v. German School Ass'n	700
Preston v. Smith	737
St. Louis, K. C. & C. R. Co. v. Dewees	519
St. Louis, K. C. & C. Ry. Co. v. Dewees	691
Small v. Montgomery	707
State of Missouri v. Bell Telephone Co.	539
Wabash, St. L. & Pac. Ry. Co. v. Central Trust Co., (two cases)	513
Wabash, St. L. & P. R. Co. v. Central Trust Co.	858
Wabash, St. L. & P. Ry. Co. v. Central Trust Co.	863
Waters Pierce Oil Co., In re	703

DISTRICT COURT, E. D. MISSOURI.

District Attorney, In re	26
--------------------------	----

CIRCUIT COURT, D. NEBRASKA.

Fisher v. Porter	162
------------------	-----

NINTH CIRCUIT.

CIRCUIT COURT, D. CALIFORNIA.

Ah Ping, In re	329
Kelly v. Houghton	417
Pioneer Gold Mining Co. v. Baker	258
Sharon v. Hill	363
Three Thousand Eight Hundred and Eighty Boxes of Opium v. United States	367
United States v. San Jacinto Tin Co.	279

DISTRICT COURT, D. CALIFORNIA.

Mangalore, The	462
Mangalore, The	463
McVey, In re	878
Tong Ah Chee, In re	441
Treadwell, In re	442

CIRCUIT COURT, D. OREGON.

Abraham v. Western U. Tel. Co.	315
Allen v. O'Donald	573
Conroy v. Oregon Construction Co.	71
Goldsmith v. Gilliland	645
Green v. Coos Bay Wagon Road Co.	67
Hammond v. Cleveland	1
Koehler, Ex parte	529
Meyers v. Shurtleff	577
Oregonian Ry. Co. v. Oregon Ry. & Nav. Co.	232
Smith v. Ewing	741
Wells, Fargo & Co. v. Northern Pac. Ry. Co.	469

CASES

ARGUED AND DETERMINED

IN THE

United States Circuit and District Courts.

HAMMOND *v.* CLEVELAND.

(Circuit Court, D. Oregon. February 25, 1885.)

1. SCIT BY AN ASSIGNEE IN THE NATIONAL COURTS.

The clause in section 1 of the judiciary act of 1875 prohibiting the assignee of a non-negotiable contract from maintaining a suit thereon in the national courts, unless his assignor might have done so, has reference solely to the assignor's right to maintain such suit on account of his citizenship, and not to the amount of the claim or demand arising out of such contract.

2. SAME—MATTER IN DISPUTE THEREIN.

An action may be maintained in the national courts where the sum or value of the matter in dispute, or money sought to be recovered therein, exceeds \$500 in amount, although the complaint contained distinct demands or causes of action of less value than \$500; and it is immaterial whether the plaintiff is the original owner of such demands, or acquired them by assignment from such owner.

Action to Recover Money.

Henry Ach, for plaintiff.

O. F. Paxton, for defendant.

DEADY, J. This action is brought by the plaintiff, a citizen of California, against the defendant, a citizen of Oregon, to recover the sum of \$3,093.36. The action is brought on three distinct demands or causes of action arising out of contract, which, by section 91 of the Oregon Code of Civil Procedure may be united in one complaint. The first demand is for \$1,136.85, the agreed price of goods sold to the defendant by the plaintiff; the second one is for \$1,648, the agreed price of goods sold to the defendant by the firm of Greenbaum, Sachs & Freeman, citizens of California, and by the latter assigned to the plaintiff; and the third one is for \$308.29, the agreed price of goods sold to the defendant by the firm of Murphy, Grant & Co., citizens of California, and by the latter assigned to the plaintiff; for the aggregate of which sums the plaintiff asks judgment. The defendant demurs to the statement containing the last cause of action, for that

v.23F,no.1—1

"the court has no jurisdiction of the matter thereof." On the argument of the demurrer, counsel for the defendant cited and relied on the clause of section 1 of the judiciary act of 1875 (18 St. 470) which reads:

"Nor shall any circuit or district court have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes negotiable by the law-merchant, and bills of exchange."

The exposition of this clause, by counsel for the defendant, is to the effect that, as the assignor could not have maintained a suit on the contract in question to enforce the payment of a sum less than \$500, therefore the plaintiff cannot as assignee thereof. And it must be admitted that the proposition is not without plausibility. But, in construing this restriction on the assignee's right to sue, reference must be had to the manifest aim and object of the provision. The jurisdiction of this court, so far as the same depends on the amount in controversy, is prescribed by an earlier clause in the same section, which in effect limits such jurisdiction to cases where "the matter in dispute" exceeds the sum or value of \$500. But the jurisdiction of the court may also depend on the citizenship of the parties to the suit, and the provision in question is intended to prevent a party to a non-negotiable contract, who cannot, for want of such citizenship, sue his debtor thereon in the national courts, from conferring such right upon a citizen of another state by an assignment of his demand to him. And, so far as this provision is concerned, it matters not what is the sum or value of "the matter in dispute."

The assignor of the contract upon which the third cause of action is founded appears to be a citizen of California. He might, therefore, so far as the question of citizenship is concerned, have prosecuted a suit on such contract in this court, and therefore his assignee may do so. Of course, no one can maintain a suit in this court on this demand alone. The value of it is not sufficient to give the court jurisdiction. But the plaintiff is also the owner of other demands against the defendant,—one in his own right and the other as assignee. As authorized by the Code, (section 91,) he has united these several demands or causes of action in the complaint in this action. And the only other question in the case is, what is the sum or value of "the matter in dispute" in this action? In considering this question, each item or demand in the complaint is not to be taken by itself, as if it were the subject of a separate action, but the sum of these items,—the aggregate value of the three distinct demands contained in the complaint, which constitute the subject of the action, and the amount sought to be recovered by it. The sum which a plaintiff seeks to recover in an action for money is the measure of the value of "the matter in dispute" therein between himself and the defendant. The right of the plaintiff to recover this sum is to be

contested and determined thereby, according to the established mode of procedure; and, so long as it exceeds \$500 in amount, it is immaterial how or whence the plaintiff became the owner of the several items that may constitute or enter into this sum or demand. Indeed, cases may arise in which the assignee of a demand may maintain an action thereon in this court, so far as the value of "the matter in dispute" is concerned, when the assignor could not. For instance, where the demand bears interest, the sum due thereon at the time of the assignment may be less than \$500; but when suit is brought on it by the assignee, the value of it may exceed \$500. Of course, a collusive or pretended assignment of an item in the plaintiff's demand may be set up as a defense to a recovery thereon by the *pseudo* assignee. But when the transaction is *bona fide*, and the legal title is transferred to the assignee, he may maintain an action thereon in this court without reference to its value, provided that the whole sum sought to be recovered therein exceeds \$500, and the citizenship of the assignor and defendant was such at the time of the assignment that a suit might have been maintained between them herein. See *Stanley v. Board of Sup'rs*, 15 FED. REP. 483; *Judson v. Macon Co.* 2 Dill. 213.

The demurrer is overruled.

FITTON and Wife v. PHOENIX ASSUR. Co. and others.

(Circuit Court, D. Vermont. February 10, 1885.)

EQUITY PRACTICE—REFERRING ISSUES OF FACT TO JURY—REV. ST. § 648.

The United States circuit court may send issues of fact, properly raised by the pleadings in an equity case, to a jury for trial.

In Equity.

James L. Martin, for defendants.

Martin H. Goddard, for orators.

WHEELER, J. This cause has been heard before on demurrer to the bill, which was overruled as to the defendants now before the court, with leave to answer over. *Fitton v. Fire Ins. Ass'n*, 20 FED. REP. 766. The defendants have answered that the agreement to bind insurance was procured by fraudulent representations of the orators as to the situation of the property, as to exposure to and precautions against loss from fire; that the loss occurred through want of the precautions represented to be employed, and the wrongful, willful, and negligent acts of the orators. Issues of fact are raised by the traverse of the answers, and the defendants now move that these issues be sent to a jury. The motion is opposed upon the ground that by the statutes of the United States the power to send issues of fact to a jury is

not given to, but rather taken from, the circuit courts as courts of equity, and that these issues should be tried by the court, and not sent to a jury, if the power to send them exists. The provision of the statute chiefly relied upon to show want of such power is that found in section 648, providing that "the trial of issues of fact in the circuit courts shall be by jury, except in cases of equity, and of admiralty and maritime jurisdiction."

It is argued that the exception excludes that mode of trial in the excepted cases. But that is not understood to be the meaning of the provision. The object of it seems to have been to carry out the constitutional provision guarantying the right to trial by jury in common-law cases, and at the same time not to require a trial in that mode in equity and admiralty cases. This provision was enacted in early times, and the power of a circuit court under it to send issues to a jury has always been recognized. *Field v. Holland*, 6 Cranch, 8; *Harding v. Handy*, 11 Wheat. 103; *Brockett v. Brockett*, 3 How. 691. It is expressly stated to exist in *Garsed v. Beall*, 92 U. S. 684. The motion cannot be denied upon that ground. The inconvenience of so sending the issues has been dwelt upon in the argument, but as the trial must be in the same court, with the difference only that it is upon the law side by jury, according to the course of the trial of common-law cases, instead of on the equity side by the judges, according to the ordinary course of equity procedure, that consideration is entitled to but little weight. The principal question is as to the propriety of so sending the issues in this particular case. The issues are the same that they would have been if an insurance in fact by delivery of a policy, instead of a mere agreement to insure, had been effected. The orators have standing in this court merely on account of that difference. The right to trial by jury of an issue of fact proper for their cognizance is valuable as it exists, and is guaranteed by the constitutions and laws of this country, notwithstanding the hostility shown to it in some quarters. The defendants have not an absolute right to that mode of trial in this case, because it is not within the constitutional or statutory provisions; but they have the right to have their request for it carefully considered when it falls so naturally in the line of the right in other cases. These issues seem to be very proper for the cognizance of a jury in this case.

Motion granted.

HANNER, Jr., and others v. MOULTON and others.

(Circuit Court, N. D. Texas. January Term, 1885.)

WILL.—INTENTION.—EXTRINSIC EVIDENCE.—LATENT AMBIGUITY.

A will contained the following devise: "I will to J. W. H., Jr., J. P., and J. P., Jr., my tract of land, containing near 1,500 acres first-rate land, lying, I believe, in Ellis county, Texas." At the date of his will, and at the time of his death, the testator was the owner of a head-right certificate for 1,476 acres, but he never owned any land whatever in Ellis county, and he never owned any lands elsewhere in Texas to which the devise applied. *Held*, that parol evidence was not admissible to show that the testator supposed that such certificate had been located in Ellis county, making him the owner of the lands covered thereby, or that it was his intention, as shown by his declarations and conversations, to devise this certificate, if it should turn out that it had not been located, and that he was advised by the attorney who wrote the will that the devise would be effectual to carry out such purpose.

In Equity. Final hearing upon pleadings and evidence.

John L. Henry and John D. Park, for plaintiffs.

Sawnie Robertson, for defendants.

Before Woods and McCORMICK, JJ.

Woods, Justice. The bill was filed January 27, 1882, for a decree to establish the title of the plaintiffs to several tracts of land in the state of Texas; one of 586 acres in Ellis county; one of 640 acres in Falls county; and one of 250 acres in Clay county, and to declare that the deeds under which the defendants claimed title to said lands were null and void. The plaintiffs asserted title to the lands, as devisees under the will of James Park, deceased, who died September 4, 1866, at his domicile, in the county of Williamson, in the state of Tennessee. The devise under which the plaintiffs claimed title was in these words:

"I will to John W. Hanner, Jr., James Park, and John Park, Jr., my tract of land, containing near fifteen hundred acres first-rate land, lying, I believe, in Ellis county, Texas. My papers are in the hands of J. A. N. Murray and W. H. Gill, of Clarksville, Texas, who must account for all papers of mine in the hands of Wm. A. Park's widow at his death."

The testator did not, at the date of his will or at his death, own any lands in Ellis county, Texas, nor did he, as the plaintiffs insisted, own any lands in any other county of Texas to which said devise referred. But the testator, at his death, was the owner of a head-right certificate for one-third of a league of land—1,476 acres—issued in the year 1838 by the republic of Texas to one William H. Ewing, which was transferred by Ewing to him by deed dated April 9, 1846. C. B. Johns, one of the defendants, having been, in July, 1867, appointed by the probate court of Travis county, in the state of Texas, administrator, with the will annexed, of the estate of James Park, the testator, by order of the same probate court, sold, at public sale, in April, 1869, for \$110.70, the head-right certificate above mentioned, shown

to be worth about \$200, to J. C. Kerbey, another of the defendants. Kerbey afterwards located the certificate on the several tracts of land in Ellis, Falls, and Clay counties.

The charge of the bill was that all the proceedings of Johns in the probate court of Travis county by which he obtained the order for the sale of the certificate, and the sale itself, were fraudulent; that Kerbey had knowledge of and participated in the fraud; and that the other defendants who were in possession of said lands, claiming title thereto under Kerbey, bought with notice of the fraud. Upon the trial of the case the plaintiffs, conceding that the testator at his death owned no land in Ellis county, or elsewhere in Texas, to which said devise referred, to prevent the devise from being inoperative, and to prove their title to the lands in question, offered evidence tending to show that the testator, when he executed his will, and at the time of his death, believed that the Ewing head-right certificate had been located in Ellis county, making him the owner of the lands covered thereby; that it was the purpose of the testator, shown by his declarations to and conversations with the witnesses, to devise to the plaintiffs the Ewing certificate if it should turn out that it had not been located; and that he was advised by the lawyer who drew his will that the devise above quoted would be effectual to carry out such purpose. The contention of the plaintiffs was that if this evidence was admitted, it would show them to be the owners of the Ewing head-right certificate under the devise in the will of James Park, and establish their title to the lands located by Kerbey under that certificate.

It is evident that the title of the plaintiffs to the relief prayed by their bill depends upon the admissibility of this evidence. The defendants object to the testimony. I am of opinion that the objection is well taken, and that the evidence should be excluded.

It has been held by the supreme court of Texas that head-right certificates, like that which it is alleged the testator owned, are personal and not real estate. *Randon v. Barton*, 4 Tex. 289; *Johnson v. Newman*, 43 Tex. 628; *Porter v. Burnett*, 60 Tex. 222. The offer of the plaintiffs is to show by extrinsic evidence the intention of the testator, in case the Ewing head-right certificate had not been located, to bequeath it to them in lieu of the land devised to them by his will; thus, by parol evidence, changing a devise of land to a bequest of personal property. The admission of this evidence would, in my judgment, be in violation of the established rules of the law of evidence relating to the subject. The rules for the admission and exclusion of parol evidence are the same in respect to wills as to contracts in writing generally. *Doe v. Martin*, 4 Barn. & Adol. 771; *Holsten v. Jumpson*, 4 Esp. 189; *Brown v. Thorndike*, 15 Pick. 400; *Lancey v. Phoenix Ins. Co.* 56 Me. 562; Cruise, Dig. (Greenl. Ed.) tit. 38, c. 9, §§ 1-15, inclusive; 2 Powell, Dev. (Jarman's Ed.) 5-11. They are the same in courts of equity as in courts of law. *Bertie v. Falkland*, 1 Salk. 231; *Towes v. Moor*, 2 Vern. 98; *Bennet v. Davis*, 2 P. Wms. 316;

Ware v. Cowles, 24 Ala. 446; *Forsythe v. Kimball*, 91 U. S. 291; *Hunt v. White*, 24 Tex. 643.

The rule on the subject under consideration has been thus stated: "Parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument." *Adams v. Wordley*, 1 Mees. & W. 379, 380; *Boorman v. Jenkins*, 12 Wend. 573; *Lazare's Ex'rs v. Peytavin*, 4 Mart. (La.) 684; 1 Greenl. Ev. § 275. As applied to wills, the rule is thus stated in 2 Powell, Dev. (Jarman's Ed.) 5-11: "Extrinsic evidence is not admissible to alter, detract from, or add to the terms of a will, though it may be used to rebut a resulting trust attaching to a legal title created by it."

The writing, if it be a contract, may be read in the light of the surrounding circumstances in order more perfectly to understand the meaning of the parties. If it be a will, the circumstances under which the testator executed it, or the state of his property, his family, and the like may be shown in order to throw light upon his intention, as expressed by the words used in the will. 1 Greenl. Ev. 277; 2 Powell, Dev. pp. 5-11, rule 8; *Hunt v. White*, 24 Tex. 643. But in both cases, as the writing is the only outward and visible expression of the meaning of the party or parties to it, no other words are to be added to it, or substituted for those used. "The duty of the court in such cases is to ascertain, not what the parties may have secretly intended as contradistinguished from what their words expressed, but what is the meaning of the words they have used." Greenl. Ev. § 277; *Doe v. Gwillim*, 5 Barn. & Adol. 122, 129; *Doe v. Martin*, 4 Barn. & Adol. 771-786; *Beaumont v. Field*, 2 Chit. 275.

In *Hunt v. White*, *ubi supra*, the rule was expressed, in substance, as follows: "The intent of the testator must be ascertained from the meaning of the words used in the will, and those words alone; but extrinsic evidence is admissible of such facts and circumstances as will enable the court to discover the meaning attached by the testator to the words used in the will, and to apply them to the particular facts of the case.

A distinguished writer lays down the rule of law upon this subject, as applicable to wills, as follows:

"As the law requires wills, both of real and personal estate to be in writing, it cannot consistently with this doctrine permit parol evidence to be adduced to contradict, add to, or explain the contents of such will; and the principle of this rule evidently demands an inflexible adherence to it, even when the consequence is the partial or total failure of the testator's intended disposition; for it would have been of little avail to require that a will *ab origine* should be in writing, or to fence a testator round with a guard of attesting witnesses, if, when the written instrument failed to make a full and explicit disclosure of his scheme of disposition, its deficiencies might be supplied, or its inaccuracies corrected from extrinsic sources." 1 Jarm. Wills, 409.

This exposition of the law is sustained by a large array of authorities cited in the notes. This rule was applied by the supreme court of the United States in the case of *Mackie v. Story*, 93 U. S. 589. The

question in that case was whether the whole legacy bequeathed by a will to two brothers accrued to Benjamin Story, the survivor, or whether one-half of it did so, leaving the deceased intestate as to the other half. On the trial the children of Henry C. Story offered parol evidence to show the good will and affection of the deceased towards him for the purpose of demonstrating the intention of the testator in the bequest. The court ruled that the evidence was properly rejected; Mr. Justice BRADLEY, who delivered the judgment of the court, remarking: "The paper must speak for itself, and its meaning and effect be ascertained by the court."

The rule is further illustrated and sustained by the following authorities: In *Brown v. Selwin*, Cas. t. Talb. 240, the testator bequeathed the residue of his personal estate to two persons, whom he appointed his executors, and one of whom was indebted to him by bond. It was attempted to be proved by the evidence of the person who drew the will that he received the testator's written instructions to release the bond debt by the will, but that he refused to do so under the impression that the appointment of the obligor to be one of the executors extinguished the debt. Lord TALBOT held the evidence to be inadmissible, and his decree was affirmed on appeal by the house of lords. In *Strode v. Lady Falkland*, 3 Ch. Cas. 90, letters and oral declarations of the testator being offered to prove the intention to include a revision in the words "all other, my lands, tenements, and hereditaments out of settlement," it was unanimously agreed that this kind of evidence could not be admitted, for that, where a will was doubtful and uncertain, it must receive its construction from the words of the will itself, and no parol proof or declaration ought to be admitted out of the will to ascertain it. So, in *Mann v. Mann*, 14 Johns. 1, it was held that where a testator bequeathed to his wife "all the rest, residue, and remainder of the moneys belonging to his estate at the time of his decease," the word "moneys" did not comprehend bonds, mortgages, or other choses in action, and that the declarations of the testator to show a different intent were inadmissible. In the case of *Jackson v. Sill*, 11 Johns. 201, G. devised as follows: "I give and bequeath to my beloved wife, for and during her widowhood, the farm which I now occupy, with the whole of the crops of every description which may be thereon at the time of my death," etc., and after the remarriage or death of his wife, he devised the same to S. and his heirs. It was held that extrinsic or parol evidence to show that the testator intended to devise the whole of his real estate at W., which included a farm of 90 acres in the tenure of B., under a lease from the testator for seven years, and that he gave such instructions to the attorney who drew the will, was inadmissible, there being no latent ambiguity in the will, but only a mistake. See, also, Wig. Wills, props. 5, 6, 7; *Tucker v. Seaman's Aid Soc.* 7 Metc. 188; *Lord Walpole v. Earl of Cholmondley*, 7 Term. R. 138; *Herrick v. Storer*, 5 Wend. 580; *Williams v. Crary*, 4 Wend. 443; *Ryers v. Wheeler*,

22 Wend. 148; *Doe v. Hiscocks*, 5 Mees. & W. 369; *Miller v. Travers*, 8 Bing. 244; *Okeden v. Clifden*, 2 Russ. 309; *Nourse v. Finch*, 1 Ves. Jr. 358; *Selwood v. Mildmay*, 3 Ves. Jr. 306; *Cambridge v. Rous*, 8 Ves. 22; *Bengough v. Walker*, 15 Ves. 514; *Herbert v. Reid*, 16 Ves. 485; *Brett v. Rigden*, Plow. 340; *Cesar v. Chew*, 7 Gill & J. 127; *Andrew v. Weller*, 2 Green, Ch. 604, 608; *Comstock v. Hadlyme*, 8 Conn. 254; *Abercrombie v. Abercrombie*, 27 Ala. 489. In the case last cited, it was declared: "There is no legal principle more firmly established, none that has received a more constant and uniform support, than the rule which declares that an omission in a written will cannot be supplied by parol evidence." The authorities cited show the general rule applicable to the admission of extrinsic evidence to aid in the construction of written instruments, and are conclusive against the admissibility of evidence to establish a bequest which the testator did not make, when the testimony offered only showed his intention to make it.

But the plaintiffs contend that the devise to them of lands in Ellis county involves a latent ambiguity, and that the devise was in fact a bequest to them of the head-right certificate, and they insist on their right to introduce the evidence objected to, on the ground that it serves to remove the latent ambiguity. What is a latent ambiguity, is thus illustrated in *Bac. Law Tracts*, 99, 100:

"If I grant my manor of S. to J. F. and his heirs, here appeareth no ambiguity at all. But if the truth be that I have the manors both of South S. and North S., this ambiguity is matter of fact, and therefore it shall be holpen by averment whether of them it was that the party intended should pass."

So where a testator had two sons both baptized by the name of John, and, believing the elder son to be dead, devises his lands to his son John generally, and in fact the elder son was living, it was held that extrinsic evidence was admissible to remove the ambiguity and show which of the sons was intended to be the devisee. *Lord Cheney's Case*, 5 Rep. 686. The rule in respect to the admission of parol evidence to remove a latent ambiguity is thus stated by Lord ABINGER, in *Doe v. Hiscocks*, 5 Mees. & W. 363:

"There is but one case in which it appears to us that this sort of evidence of intention can properly be admitted, and that is where the meaning of the testator's words is neither ambiguous nor obscure, and where the devise is on the face of it perfect and intelligible, but from some of the circumstances admitted in proof an ambiguity arises as to which of two or more things, or which of two or more persons, each answering to the words of the will, the testator intended to express."

The case of *Miller v. Travers* is a leading case on this subject, and has always been regarded as of high authority. TINDAL, the chief justice of the common pleas, and LYNDEHURST, the chief baron of the exchequer, were called in to assist BROUGHAM, the lord chancellor in the case. Their joint opinion was delivered by TINDAL, the chief justice, and is reported in 8 Bing., *ubi supra*. The case was this: The testator, by his will duly executed, devised "all his freehold and real

estates whatsoever, situate in the county of Limerick and in the city of Limerick," to certain trustees therein named and their heirs. At the time of making the will he had no real estate in the county of Limerick, but he had a small real estate in the city of Limerick and considerable real estate in the county of Clare. The plaintiff concluded that he was at liberty to show by his parol evidence that the real estate in the city of Limerick was inadequate to meet the charges of the will, that the testator intended his estates in Clare also to pass under the same devise. He offered to prove by parol that the estates in the county of Clare were devised to him in the draught of the will, that the draught was sent to a conveyancer to make certain alterations not affecting the estates in the county of Clare; and that by mistake he erased the words "county of Clare," and that the testator afterwards executed the will without noticing the erasure. The court held that the evidence was inadmissible. In delivering judgment the chief justice said that cases of latent ambiguity range themselves into two separate classes:

"The first class is when his description of the thing devised or of the devisee is clear upon the face of the will, but upon the death of the testator it is found that there are more than one estate or subject-matter of devise, or more than one person, whose description follows out and fills the words used in the will. The other class of cases is that in which the description contained in the will of the thing intended to be devised, or of the person who is intended to take, is true in part, but not true in every particular."

The court then proceeded as follows:

"But the case now before the court does not appear to fall within either of these distinctions. There are no words in the will which contains an imperfect, or, indeed, any description of the estates in Clare. The present case is rather one in which the plaintiff does not endeavor to apply the description contained in the will to the estates in Clare, but in order to make out such intention is compelled to introduce new words and a new description into the body of the will itself. * * * This, it is manifest, is not merely calling in the aid of extrinsic evidence to apply the intention of the testator, as it is to be collected from the will itself, to the existing state of his property; it is calling in extrinsic evidence to introduce into the will an intention not apparent upon the face of the will itself. It is not simply removing a difficulty arising from a defective or mistaken description: it is making the will speak upon a subject on which it is altogether silent, and is, in effect, filling up a blank which the testator might have left in his will. It amounts, in short, by the admission of parol evidence, to the making of a new devise for the testator which he is supposed to have omitted."

These extracts from this opinion are directly in point. There is no latent ambiguity in this case which falls under either of the classes mentioned by Chief Justice TINDAL. The devise is of lands which, upon the face of the will, are well described. Now, if the testator had two tracts of land answering equally well the description, this would raise a latent ambiguity, and it would be competent by parol evidence to show which of the two was meant. Or if he owned but one tract of land, which, in some respects, was truly described in the devise, but in other respects not, parol evidence might be received to

remove the ambiguity of the description. But in this case it turns out that he has no land at all. There is, therefore, no ambiguity or imperfect description, but simply a mistake of the testator, who undertook to devise property of which he supposed himself to be the owner, but was not.

The plaintiffs are claiming title under the will to a piece of personal property; namely, a head-right certificate. There are not two head-right certificates to which the words of the will equally apply, nor is the description of the certificate which the plaintiffs claim true in part and incorrect in part. The certificate is not referred to at all in the will, in the remotest manner. But the plaintiffs offer to show by parol evidence that the testator, if he had no land which filled the description contained in the devise, intended them to have the certificate. This is not removing a latent ambiguity. In the language of Chief Justice TINDAL, it amounts to the making of a new devise for the testator, which he is supposed to have omitted. Its effect, if allowed, would be to show that the testator was mistaken in reference to the condition of his property, and to introduce into the will words not used by him, to obviate the consequences of the mistake. In fact, the plaintiffs, by the testimony offered, seek to introduce into the will an additional provision to the effect that if the head-right certificate purchased by the testator of Ewing had not been located, then instead of near 1,500 acres of land in Ellis county, the testator bequeathed to the plaintiffs the head-right certificate. This would not be the removing of an ambiguity for the purpose of giving effect to the will of the testator as he had written and executed it, but the making of another will for him. If the testator desired to make any such disposition of the certificate, in case it had not been located, he should have expressed his desire by proper words in his will, duly executed. But his will contains no devise of the certificate. The plaintiffs, under the pretext of removing a latent ambiguity, seek to establish such a devise for the testator by the testimony of witnesses, given 16 years after his death, to their recollection of the testator's verbal declarations. I think this is a case for the enforcement of the rule which excludes parol evidence to alter or add to the terms of a will.

I am, therefore, of opinion that the evidence offered should be excluded. Without its aid the plaintiffs show no ground for the relief prayed in their bill. It must therefore be dismissed, at their costs; and it is so ordered.

McCORMICK, J., concurred.

WESTERN UNION TEL. Co. and others v. BALTIMORE & O. TEL. Co.

(Circuit Court, D. Indiana. 1885.)

TELEGRAPH COMPANIES—EXCLUSIVE PRIVILEGES—PUBLIC POLICY.

A contract granting any person or company the exclusive privilege to do telegraphing upon or along any railroad is contrary to public policy, and void. This doctrine applied to Belt Railroad & Stock-yards at Indianapolis.

Application for Temporary Restraining Order.

McDonald, Butler & Mason, for complainants.*Harrison, Miller & Elam*, for defendants.

WOODS, J. Upon the facts, as deduced from bill and answer, it seems to me that the contract between the plaintiffs, in so far as it stipulates for an exclusive right on the part of the Western Union to do telegraphing business at and from the stock-yards, and especially in and from "the principal office" of the Union Railroad Transfer & Stock-yard Company, is illegal as being against public policy. To say that the cases in which this doctrine has been enunciated do not apply, or that the doctrine itself does not apply, to a contract for an exclusive right in respect to a particular building, such as the one in question is shown to be, would, as it seems to me, be unreasonable. Of the particular rooms, or parts of the building, leased to it, the Western Union Telegraph Company is, of course, entitled to the exclusive occupation and use; but, in respect to other parts, or rooms, of which it acquired and attempted to acquire no use or right of possession, the effort to restrict or limit the uses to which they should be put by others in competition with that company is clearly obnoxious to the doctrine, now well established, that an exclusive privilege to do telegraphing upon or along any railroad cannot be given to any person or company. *W. U. Tel. Co. v. Amer. W. Tel. Co.* 9 Biss. 72; *W. U. Tel. Co. v. Burlington & S. W. Ry. Co.* 3 McCrary, 130; S. C. 11 FED. REP. 1; *W. U. Tel. Co. v. Baltimore & O. Tel. Co.* 19 FED. REP. 660; *Pensacola Tel. Co. v. W. U. Tel. Co.* 96 U. S. 1; *W. U. Tel. Co. v. Amer. U. Tel. Co.* 65 Ga. 160; S. C. 38 Amer. Rep. 781; Rev. St. § 3964.

If, therefore, there is any ground upon which the injunction prayed for can issue, it must be because the defendant has, without right previously acquired, entered upon the right of way and lands of the defendant, the Union Railway, Transfer, etc., Co., and erected its poles thereon. But of this wrong, if it be a wrong, for which an injunction might issue, the Western Union Telegraph Company, for the reason already stated, either by itself or jointly with its co-plaintiff, has no right to complain; and in respect to its co-plaintiff the answer shows that its name as plaintiff has been used by the telegraph company under and by virtue of the provision to that effect in the contract between the two companies, and that otherwise the suit is not prosecuted

at the instance or for the benefit of the Belt Railroad & Stock-yard Company, but solely at the instance and for the benefit of the Western Union Telegraph Company. Even if, therefore, the Belt Railroad & Stock-yard Company, in a suit in its own name and for its own benefit, might enjoin such use of its land by the defendant until the right should be condemned and paid for, in accordance with the constitution of the state, the relief ought not to be granted in this action.

Quære, whether or not, as against the Belt Road & Stock-yard Company, the Baltimore & Ohio Railroad Company, under its lease, has not the implied right to carry a telegraph wire or wires into its office, in the building in question, for purposes incident to its own business; and if so, to erect on the lands and right of way of that company the necessary poles. If it had these rights, as I am inclined to believe it had, it could employ (as in fact it did employ) the defendant telegraph company to do the work for it, and this would be a complete defense to the action as predicated upon the constitutional provision against the appropriation of property without compensation first duly assessed and paid, and leave the case to stand wholly upon the contract for an exclusive privilege, which, as we have seen, cannot be permitted.

The application for a temporary restraining order is therefore overruled.

MARKET NAT. BANK and others v. HOFHEIMER and others.

(Circuit Court, E. D. Virginia. December, 1884.)

1. ASSIGNMENTS FOR BENEFIT OF CREDITORS—HOW FAR VALID.

A deed of assignment may be valid as to *bona fide* debts which it secures, and void as to fictitious and fraudulent debts attempted to be secured thereby.

2. SAME—PARTNERSHIP ASSIGNMENT.

An insolvent partnership makes a deed of assignment of specific property to a trustee, which provides for the payment equally and without preference of certain alleged creditors named in Schedule A, with the amounts purporting to be due them, and provides that, after the payment in full of the creditors in Schedule A of the amounts stated to be due them, certain creditors in Schedule B shall be paid the amounts therein stated to be due them. *Held*: (1) That the deed conveyed integral amounts to a series of integer creditors, and its provisions were several by the terms of the grant; (2) that as it did not provide for the contingency of some of the debts in Schedule A being fictitious, which they in fact proved to be, the amounts which were intended for them were not disposed of by the deed, remained in the grantor as to attacking creditors, and were subject to their claims.

3. SAME—PREFERENCES—CONSTRUCTION OF ASSIGNMENT.

That deeds of assignment giving preferences are to be construed strictly, and courts of equity will not interpolate phrases to carry out a possible intent to give preferences otherwise than as expressed.

4. SAME—SETTING ASIDE ASSIGNMENT—EFFECT.

That a successful attack by creditors upon a deed of assignment does not enlarge its operation as to those who claim under it.

5. SAME—ATTACKING CREDITOR ENTITLED TO BENEFIT.

Creditors attacking a deed of assignment and unearthing a fraud intended to be consummated thereby, are entitled to the rewards of their vigilance.

6. SAME—VIRGINIA RULE.

Wallace v. Treukle, 27 Grat. 479, followed as to such attacking creditors.

In Equity.

Tunstall & Thom, for complainants and petitioners.

W. G. Elliott and *Borland & Brooke*, for defendants.

Wm. H. White, for trustee.

HUGHES, J. The defendant firm, Hofheimer, Son & Co., of Norfolk, Virginia, executed a deed of assignment, dated the twenty-third of July, 1883, to Theodore S. Garnett as trustee. They conveyed a stock of goods in a wholesale shoe business which they had been conducting in a double tenement, Nos. 84 and 86 Water street. They conveyed not only the goods then in their building, but their books, accounts, and choses in action to this trustee, who is also a defendant in this suit. The assignment was for the benefit—*First*, of certain persons described as creditors of the firm, enumerated in Schedule A annexed to the deed, who were to be paid in full, and whose claims aggregate \$88,714; and, *second*, of another set of creditors enumerated in Schedule B, whose claims aggregate \$34,320, and who were to be paid after the creditors of Class A had been satisfied. The creditors upon Schedule A, and the debts acknowledged by the deed to be due them respectively, were as follows:

Henshaw & Co.,	-	-	-	-	-	-	-	\$25,844 09
Burruss, Son & Co.,	-	-	-	-	-	-	-	6,250 00
The Exchange Nat. Bank of Norfolk,	-	-	-	-	-	-	-	10,000 00
Ottenburg Bros.,	-	-	-	-	-	-	-	3,796 54
Nathan Metzger,	-	-	-	-	-	-	-	700 00
A. E. Jacobs,	-	-	-	-	-	-	-	100 00
Isaac Gutman,	-	-	-	-	-	-	-	15,624 18
Isaac Moritz,	-	-	-	-	-	-	-	12,500 00
Henrietta Samuels,	-	-	-	-	-	-	-	9,400 00
L. W. Roberts,	-	-	-	-	-	-	-	4,500 00
								<hr/>
								\$88,714 81

The property which was conveyed by the deed has been sold and proceeds collected, and has produced in cash the sum of \$66,307.

No other property was conveyed by this deed, and the deed did not purport to convey any other than the goods and choses in action that have been mentioned. The deed contained no clause for the contingent benefit of any other creditors than those enumerated in Schedules A and B. It made no provision for a large number of creditors who were not embraced in either schedule; none for the benefit of the three complainants, or the three petitioners in the suit, whose claims aggregate about \$32,900, and are evidenced by negotiable notes. Fraud is not apparent on the face of the deed. It is conceded that the claims of all the creditors named in the two sched-

ules are *bona fide*, except of the four hereafter to be mentioned; and that the holders of the *bona fide* claims, and the trustee, T. S. Garnett, had no notice of the fraud affecting the four exceptional claims.

Soon after the execution of the deed, a bill was filed in this court by Edward Henshaw & Co., a beneficiary under it, against Hofheimer, Son & Co. and Garnett, trustee, on behalf of complainants and of all other creditors named in Schedules A and B, praying, among other things, that the trust should be administered under the supervision and control of this court. In that suit there were several consent decrees; among others one entered on November 26, 1883, making a distribution of a portion of funds in hand among the creditors of Class A. But there were excepted and withheld from this distribution the sums that would have been due to Isaac Gutman, Isaac Moritz, Henrietta Samuels, and L. W. Roberts, the aggregate of whose claims acknowledged and provided for by the deed was \$42,024; and whose dividends, withheld by the decree, would have been about \$31,209 in amount. To the decree of partial distribution entered in the suit brought by Henshaw & Co., just mentioned, the complainants in the present suit, by their counsel, consented.

The dividends of these four persons—Gutman, Moritz, Samuels, and Roberts—were withheld in consequence of the filing of the bill in the present suit. This bill charges that the deed of assignment under consideration was fraudulent in respect to the debts, or pretended debts, for which it provided in favor of those four persons, and was, as to those debts, a deed to hinder, delay, and defraud creditors. The suit was brought under section 2 of chapter 175 of the Code of Virginia, which authorizes creditors at large to bring suits in equity just as creditors by decree or judgment may do in other jurisdictions. The bill makes Gutman, Moritz, Samuels, and Roberts parties defendant. These persons have answered, and in their answers admitted of record that the debts were not due to them, and waive all claim under the deed. Among the agreed facts in this case is the concession that the deed was, as to the four exceptional claims, fraudulent; that these four persons were parties to the fraudulent intent; and that the deed was made to hinder, delay, and defraud creditors.

None of the creditors of Hofheimer, Son & Co., mentioned in the Schedules A and B, have made assault upon the deed on the ground of the latent fraud which it contained. They all claim under it, and none of them have repudiated it. Nor has any other creditor of this defendant firm assailed the deed, except the three complainants and the three petitioners in this suit. The fraud of the deed was detected and has been unearthed and assailed in court by them alone, so far as the proofs and pleadings in this cause speak upon the subject.

The complainants in this cause contend that, having by their vigilance, and at their own cost and risk, saved from distribution in payment of fictitious debts, the fund now in the hands of the trustee amounting, I believe, to a principal of \$31,209, they are entitled to

receive this fund, which is the fruit of their labor; and that the creditors in Schedule A, whose claims were *bona fide* are entitled to receive no more than they would have done if the four fraudulent claims had been valid; and that the creditors in Schedule B can take, as against complainants no other surplus than such as would have accrued to them if all the debts in Schedule A had been valid, and, as such, satisfied in full.

On the principle, *id certum est quod reddi certum potest*, I consider that, as the value of the property conveyed by Hofheimer, Son & Co. is now known to be \$66,307, or only about 74½ per cent. of the debts named in Schedule A alone, the deed of July, 1883, in effect and result provided that the fund arising from the property conveyed should be paid as follows, namely, (I use approximate amounts merely for illustration:)

To Henshaw & Co.,	-	-	-	-	-	-	-	-	\$19,262
Exchange Nat. Bank,	-	-	-	-	-	-	-	-	7,460
Burruss, Son, & Co.,	-	-	-	-	-	-	-	-	4,766
Ottensburg Bros.,	-	-	-	-	-	-	-	-	2,848
N. Metzger,	-	-	-	-	-	-	-	-	558
A. E. Jacobs,	-	-	-	-	-	-	-	-	74
I. Gutman,	-	-	-	-	-	-	-	-	11,650
I. Moritz,	-	-	-	-	-	-	-	-	9,323
H. Samuels,	-	-	-	-	-	-	-	-	7,013
L. W. Roberts,	-	-	-	-	-	-	-	-	3,362
									<hr/>
									\$66,307

If the incapacity of the fund to pay off these creditors of Class A had been known when the deed was executed, the provisions as to the contingent payment of the creditors in Schedule B would have been omitted; or, if inserted, would have been nugatory.

The deed conveyed integral amounts to a series of integer creditors. It was several by the terms of the grant. It did not provide for the contingency of some of the debts of Class A turning out *per fas aut nefas* to be *nil*. It did not provide that, if any of these debts in Schedule A should prove to be fictitious, then the fund arising from the non-payment of them should go, first to the creditors of Class A, and the residue, after paying these, to the creditors of Class B. The deed was silent as to such a fund. It cannot be made to provide for such a fund, except by the interpolation into it of words that are now wanting, and are necessary for the purpose. This fund was not in its contemplation, and is a *casus omissus*. Being silent as to this fund, the deed made no disposition whatever of it, as against assailing creditors. Not being disposed of at all by the deed, the fund remained in the grantors unassigned, and subject to the claims of any creditors of Hofheimer, Son & Co., who should pursue it; the most vigilant in the pursuit obtaining priority of right over it, according to the degree of their vigilance. It is useless to refer to authorities to show that a deed of assignment may be valid as to *bona*

fide debts which it secures, and void as to fraudulent debts. See *Billups v. Sears*, 5 Grat. 31, decided in 1848. See, also, as to other states, *Harris v. De Graffenreid*, 11 Ired. 89; *Anderson v. Hooks*, 9 Ala. 704; *Troutstine v. Lusk*, 4 Baxt. (Tenn.) 162.

Much learning and ability were displayed at bar in discussing this feature in the deed of Hofheimer, Son & Co. Many collateral principles of law incidentally relating to this feature have been ably presented and elucidated. I do not feel called upon to review these arguments, and the authorities cited in support of them, by learned counsel. This deed conveyed specific property, for the payment of several debts particularly described, in equal ratio. It provides that the amounts "set down opposite the several names in said Schedule A are to be paid equally and in full, without priority one above the other." Some of the debts were fictitious; and, as already said, the deed made no provision for the fund released from the payment of them. Does it require reasoning or authority to prove that the deed failed to make conveyance at all of that fund? We cannot interpolate omitted clauses in a deed, to suit the developments of a transaction like that of this defendant firm. Deeds of preference are to be construed strictly. They are in conflict with that prime and favorite maxim of chancery courts that "equality is equity." When they fail to make conveyance of property to creditors intended to be preferred over others, it is neither the duty nor disposition of the courts to supply, by construction, phrases necessary to effect their purpose. If express and appropriate language is wanting in them for such purpose, then the grant fails and falls.

Authority is not wanting for the propositions of law thus announced. See *Smith v. Post*, 3 Thomp. & C. (Sup. Ct. N. Y.) 647; *Prince v. Shepard*, 9 Pick. 184; *Green v. Morse*, 4 Barb. (Sup. Ct. N. Y.) 344, 345; *Tate v. Liggat*, 2 Leigh, 106. In the case of *Prince v. Shepard*, Chief Justice PARKER said: "We also consider this deed as capable of being construed as a several conveyance to each of the grantees in proportion to his debt." The learned judge was commenting on a deed in which the Princes had, by deed of assignment, secured a debt which was *bona fide*, and had also secured a debt to one Hodges, which was fictitious and fraudulent, as in the case at bar. The chief justice continued: "The attaching officer had a right to attach, as belonging to the debtors, so much of the property as was fraudulently assigned to Hodges, that being still, in regard to the creditors, left in the Princes," etc. As showing that in the event of a grant in favor of a fraudulent and fictitious claim being embodied in a deed it is no grant at all, the property pretended to be conveyed remaining in the grantor as absolutely as if no deed had been made, see *Prince v. Shepard*, *supra*; *Shipe v. Repass*, 28 Grat. 729; *Boyn-ton v. McNeal*, 31 Grat. 462; *Cox v. Wilder*, 2 Dill. 45.

It being clear that the quotas of the fund in the hands of the trustee dedicated to fictitious debts were not assigned at all as against

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assailing creditors, but were "left in" the Hofheimers, and the complainants in their suit having established a lien upon it from the filing of their bill, the fund so intercepted by this suit must be disposed of in accordance with the rules laid down by the Virginia supreme court of appeals in *Wallace v. Treakle*, 27 Grat. 479. I will so decree.

HYNES, by her Guardian *ad litem*, v. CHICAGO, M. & ST. P. RY. CO.¹

(Circuit Court, D. Minnesota. February 14, 1885.)

1. PRACTICE IN CIRCUIT COURT—MOTION FOR NEW TRIAL—SETTLED CASE.

As no writ of error lies to the action of a circuit court in granting or overruling a motion for a new trial, and the only use of a case settled or stated in the state court is to prepare the case for review in an appellate court, a motion for a new trial may be heard in the circuit court without such settled case.

2. SAME—ARGUMENT BEFORE CIRCUIT JUSTICE AT WASHINGTON—JUDGMENT, WHEN RENDERED.

Although a circuit justice who has tried a case while on the circuit may hear argument on a motion for a new trial in Washington, he cannot there, without consent of the parties, render a judgment setting aside the one entered in the circuit court, but the motion may be continued from time to time until he can attend the court and make the necessary order.

3. SAME—VERDICT—EVIDENCE—CONTRIBUTORY NEGLIGENCE.

Evidence of contributory negligence held sufficient to justify setting aside verdict for plaintiff.

Motion for a New Trial.

O'Brien, Eller & O'Brien, and *I. v. D. Heard*, for plaintiff.

J. W. Cary, W. H. Norris, and *D. S. Wagg*, for defendant.

MILLER, Justice. On this motion I am aided by liberal briefs of counsel on both sides. The case was tried before me at St. Paul in July, 1884, and judgment rendered on a verdict in favor of the plaintiff. An order was made under section 987 of the United States Revised Statutes, giving the defendant 42 days to file a petition for a new trial, which has been done. Neither party took any exceptions to the ruling of the court on the trial, and I am quite sure that no injustice was done the defendant in the course of the court. The question to be considered now is whether the verdict and judgment should be set aside because the former is not sufficiently supported by the evidence. Two questions of fact were controverted before the jury, viz., was the injury to plaintiff the result of the negligence of defendant's servants in charge of a car which struck the sleigh in which plaintiff was crossing the track of defendant? and if this is established, were plaintiff and those in charge of the sleigh guilty of such contributory negligence as would defeat the right to recover? As regards the first of these, while the evidence of the plaintiff was rather weak, there

¹ Reported by Robertson Howard, Esq., of the St. Paul Bar.

was enough of it to forbid me to set aside the verdict on that ground. In regard to the second ground, I think the evidence was very strong, and very little to contradict it. It would serve no useful purpose here to go over it, as I recollect it; and my impression is clear, full, and strong now as it was then that the contributory negligence on the part of those in charge of the sleigh was fully established; that with any care,—I will not say reasonable care, but with any care which a prudent person would have practiced in crossing the railroad track at that time and place,—no collision would have happened. For this reason I am of the opinion that a new trial should be granted.

It is objected by counsel for plaintiff that this motion can only be heard upon a case settled, or stated according to the state practice. That rule, however, is established as a means of preparing for a review of the action of the trial court on the motion in some appellate court. In the courts of the United States no writ of error lies to the action of a court in granting or overruling a motion for a new trial. Such a statement is therefore useless. Mr. Heard objects to this motion being heard upon an affidavit upon the part of defendant setting out the evidence. I think this wholly immaterial, and have not read the affidavit, and do not need anything to remind me of what took place at the trial.

The counsel for plaintiff objects to a hearing of the motion at Washington city, and says while he files a brief he does not waive the objection. I do not deem it important where the argument of the case is heard. The effect of it upon the mind of the judge is not likely to be modified by that circumstance. But I do agree that I have no right, setting here in Washington, to render a judgment setting aside the one already entered in this case. This has been often done by consent and agreement of counsel; and without such agreement I think my order made here would be of no force. But I see nothing to hinder the district judge or the circuit judge, or both, sitting in that court from adopting my views, if they believe them to be correct; or with the aid of these views hearing the case on the motion, and making such order there in term-time as they think right to make. If none of these methods can be adopted, the motion for a new trial can be continued from time to time until I can attend the court and make the necessary order. I return the papers in the case, with this opinion, to the office of the clerk of the circuit court.

BUGHER and others v. PRESCOTT and others.

(Circuit Court, W. D. Tennessee. February 21, 1885.)

1. CONSTITUTIONAL LAW—STATUTE WITH DEFECTIVE TITLE—TENNESSEE ACT OF 1873, CH. 118; CONSTITUTION OF 1870, ART. 2, § 17—TAX SALES.

A tax sale under the Tennessee act of 1873, c. 118, for the assessment and collection of taxes, is void, because the act contains legislation not expressed in its title, relating to state and county taxation, in which the subject of municipal taxation is not properly included.

2. SAME SUBJECT—TENNESSEE CODE, § 612 ET SEQ.

A proceeding to sell land for taxes, under the unconstitutional act of 1873, cannot be sustained as a proceeding under the Code, (sections 612 *et seq.*), because the two methods of procedure for the sale of lands for taxes are radically different.

In Ejectment.

W. M. Randolph, for plaintiffs.

W. S. Flippin, for defendants.

HAMMOND, J. The defendants claim to have purchased the plaintiff's land at a tax sale, made under the act of the general assembly of the state of Tennessee of March 25, 1873, c. 118, entitled "An act to provide more just and equitable laws for the assessment and collection of revenue for state and county purposes, and to repeal all laws now in force whereby revenue is collected from the assessment of real estate, personal property, privileges, and polls." On the authority of the case of *Knoxville v. Lewis*, 12 Lea, 180, the foregoing act must be pronounced unconstitutional, because it violates article 2, § 17, of the constitution of the state, which provides as follows: "No bill shall become a law which embraces more than one subject, that subject to be expressed in its title. All acts which repeal, revive, or amend former laws shall recite in their caption, or otherwise, the title or substance of the law repealed, revived, or amended." Const. 1870, art. 2, § 17. That case declared unconstitutional an act of the general assembly of April 7, 1881, (chapter 171,) with precisely the same title as the act of 1873, because its section 50 related to *municipal* revenues, while no reference was made to that subject in the title. The same infirmity exists in this act of 1873, which, in section 81, legislates on the subject of *municipal* revenues under the very same title as the other. No two cases could be more alike, for any difference between the two acts in the character of the legislation on the subject of municipal revenue is wholly immaterial. The infirmity does not depend on the distinctive features of the eccentric legislation, but its subject matter. Any legislation concerning municipal revenues, under the title above quoted, must be, according to that decision of the supreme court of the state,—which is binding on us, whatever we may think of it,—sufficient to avoid the whole act as obnoxious to the constitution. *State v. McCann*, 4 Lea, 1; *Murphy v. State*, 9 Lea, 373, 379.

It is too plain for any argument that a tax title, acquired by a sale in pursuance of this act of 1873, cannot be supported as a sale held in conformity to the provisions of the previously existing tax laws found in the Code, (T. & S. Ed.) §§ 612 *et seq.* The act of 1873 was intended to be a radical change of the mode of selling lands for taxes, and it is vain to seek to support the defendants' title by the former acts, which were in no sense complied with, nor intended to be, in making the sale.

It is not necessary to decide any other question argued. The tax deed of the defendants cannot stand if the act under which the proceeding took place is void. The case having been submitted without a jury, there must be a judgment for the plaintiffs. So ordered.

CITIZENS' BANK v. BROOKS.

(Circuit Court, D. Vermont. October Term, 1884.)

1. ACTION ON JUDGMENT OBTAINED IN ANOTHER STATE—AUTHORITY OF ATTORNEY TO APPEAR FOR DEFENDANT.

In an action in a circuit court on a judgment obtained in another state, the record of the appearance of attorneys of the court for the defendant is not conclusive upon him, and he may show that they had no authority to act in his behalf.

2. SAME—RENDITION OF PERSONAL JUDGMENT—KNOWLEDGE OF DEFENDANT—TAKING DEPOSITION—PAYING COUNSEL.

Taking the deposition of a defendant, who is a citizen of another state, by the plaintiff, in an action under the Kansas statute to enforce the liability of stockholders, will not render the judgment obtained personally binding on such defendant, although he contributed to the common defense afterwards by furnishing funds to pay counsel.

3. PRACTICE—RENDITION OF JUDGMENT—DEATH OF DEFENDANT.

When the whole case is in the hands of the court, and before its decision is rendered the defendant dies, a judgment may be entered as of the day in the term when the last of the evidence was submitted.

At Law.

Martin & Eddy, for plaintiff.

Harkins & Stoddard, for defendant.

WHEELER, J. This is an action of debt on a judgment recovered in the circuit court of the United States for the district of Kansas for \$9,337.16 damages, and \$108.30 costs. The defendant has pleaded five pleas, in the last of which he alleges that he was not a citizen of Kansas, nor in Kansas, at the time of the commencement of that action, nor at any time afterwards; that no process in it was ever served upon him; that he never authorized or employed any attorney or other person to appear for him and in his behalf, nor authorized or empowered any person to employ or procure an attorney or other person to appear for him and in his behalf, and that no attorney or

other person ever had any authority to appear for him and in his behalf in that suit; and that he never entered his appearance therein in person. To this plea the plaintiff replies that the defendant had knowledge of the commencement and pendency of the suit, and did by his agents procure attorneys of the court there to appear for him and in his behalf in that cause, and that he did, by those attorneys, voluntarily appear in said cause and defend it, and after the judgment had been rendered, he paid the attorneys for their appearance in the cause and for defending it, and ratified and confirmed their appearance in and defense of it. The defendant traversed this replication, and issue to the country is joined upon it. The other pleadings are disposed of in such manner as to leave this one for trial, and it is tried by the court upon waiver in writing of a jury. The record shows service by attachment of property of the defendant as a non-resident of Kansas only, and an appearance and answer for the defendant by the attorneys named in the replication. The plaintiff claims that the record of the appearance in the cause of attorneys of the court for the defendant is conclusive of their right to appear for him, and that evidence to the contrary should not be considered. There are cases which perhaps go to this length. *Mills v. Duryee*, 7 Cranch, 481; *Lapham v. Briggs*, 27 Vt. 26. But it is now well settled in the courts of the United States that want of jurisdiction to bind the person may be shown in an action upon the judgment against the person. *Thompson v. Whitman*, 18 Wall. 457; *Knowles v. Gas-light Co.* 19 Wall. 58; *Hall v. Lanning*, 91 U. S. 160; *Graham v. Spencer*, 14 FED. REP. 603. The fact that the attorneys entered an appearance for the defendant is, perhaps, conclusively shown by the record, but that they had authority in fact, or any more than that they assumed to have authority, is not shown at all by it. The presumption that all was rightly done arising from their being officers of the court, is admitted to, and doubtless does, cast the burden upon the defendant of showing that the appearance was without his authority. The defendant testifies distinctly that he never employed, nor authorized the employment of any attorney to appear for him in the case, and there is no proof that he ever did. Three attorneys appeared; one at first, and two others afterwards. The testimony of the last two shows that they were engaged by the first, and he is dead, and nothing is produced to show that the defendant ever had any communication with him. A deposition of the defendant was taken by the plaintiff in Vermont, where the defendant resided, on notice accepted by the attorneys in Kansas, and filed in that cause, in which it is stated that the deponent "is the defendant" in the cause. After the judgment was rendered the attorneys telegraphed to the defendant: "Simonds writes refusing to be responsible for fees. Are we to be paid for services, and by whom? Answer definitely, quick." He answered: "We expect to pay our counsel." In a few days he sent \$300 for them.

The plaintiff relies upon this to sustain the allegation of the replication that he knew of the suit, and of the employment and appearance of the attorneys in it, and ratified their doings, and paid them for their services. The substance of the replication is that he voluntarily submitted himself to the jurisdiction of the court, and that the cause was thereupon tried.

If he was heard there upon the trial he has no right to be heard again upon the questions involved except upon appeal, but is bound. That he had notice of the suit, however full and formal, out of the jurisdiction would not bind him. He could not be compelled to appear by anything done without the jurisdiction. *Bischoff v. Wethered*, 9 Wall. 812. Therefore taking his deposition would not bind him. The other party had the right to take it in order to obtain a judgment to bind the property attached, but he could not be made a party personally in that manner; if he could, the jurisdiction of courts could be extended without their territorial limits by merely resorting to that proceeding.

The suit was founded upon an alleged liability of the Adams bank, a state bank of Kansas, of which the defendant and Simonds mentioned in the telegram and others were stockholders, to the plaintiff, and a statute of Kansas making stockholders personally liable on the dissolution of the corporation. The statute also provided for contribution between stockholders when any were made to pay. Comp. Laws Kan. 233, § 44. The defendant testifies that he understood that there was litigation going on in Kansas in respect to the liability of the Adams bank to the plaintiff, but not that it was against him personally, and that some of the other stockholders were defending it, and that the telegram referred to that litigation; and he testifies that the money which he sent was contributed by other stockholders residing near him as well as himself, and sent to one of those whom he understood to be defending to aid in paying the attorneys, and not to the attorneys as his attorneys. No one is called to contradict this testimony, and there is nothing opposed to its correctness unless the circumstances contradict it.

From the circumstances it is apparent enough that the other stockholders, or some of them, employed the attorneys to appear and defend this case on account of their interest in the result; and from his testimony, that he did not know that his personal liability was being passed upon, although he knew that what might affect him ultimately was involved. Although he knew of, and was willing to and did contribute to, the common defense, he does not appear to have in any way ratified or confirmed the submission of his personal liability to the judgment of the court. As the plaintiff had, and was entitled to, no proceedings to compel his personal appearance, it could not be had without he knowingly and voluntarily yielded it, and he could not ratify the assumption of others to appear and submit his case for him without knowledge of what they had assumed

to do for him. This is not intended to imply that what was done without jurisdiction over his person could be made binding upon him by any ratification after the judgment. Jurisdiction over the person at the time of the judgment is necessary to its validity as a personal judgment. A defendant might probably compensate any one who had, without his knowledge, undertaken the defense of a suit against him which might bind his property and failed, and not subject himself to the consequences of making the judgment bind him personally, when before it would only bind his property. The issue joined upon the replication to the fifth plea is found for the defendant.

The testimony in the case was closed on February 5th, except that there was reserved to the plaintiff the privilege of having the testimony of a witness who was sick and unable to attend, taken by the court at the residence of the witness on the next day, to the same effect in all respects, by consent of the parties, as if taken in court on that day. The death of the defendant was suggested on the opening of court the next day as having taken place after adjournment on the evening before. The plaintiff objected to anything further being done, but waived the taking of the testimony of that witness. The whole case was in the hands of the court during the life of the defendant. The arguments of counsel are in aid of its consideration.

In *Broas v. Mersereau*, 18 Wend. 653, a verdict was taken after the death of the party. In *Trelawny v. Bishop of Winchester*, 1 Burr. 219, judgment was rendered as of a time prior to the death, which occurred while the case was pending for argument. This was a common proceeding in the English courts from early times. Bac. Abr. "Abatement," F. And it is said by METCALF, J., in *Springfield v. Worcester*, 2 Cush. 52, to be the common course when an action which would fail by the death of either party before judgment is continued for argument or advisement, whether there has been a verdict or demurrer or agreed statement of facts, and one of the parties afterwards dies, to enter judgment as of a former term. This is all in the same term, and it seems proper that the case should be argued, considered, and judgment rendered as of the day in the term when the last of the evidence was submitted.

Judgment for defendant as of February 5th.

MEALEY v. METROPOLITAN LIFE INS. CO.

(Circuit Court, D. Rhode Island. February 26, 1885.)

PRACTICE—MOTION TO FILE INSTRUMENTS PLEADED IN DEFENSE IN CLERK'S OFFICE—PUB. ST. R. I. c. 214, § 45.

In an action on a policy of life insurance defendant filed several pleas, setting out that the statements and answers to certain questions contained in the application and medical examination which formed part of the contract of insurance, were untrue, and specifying the particular statements so alleged to be untrue, and making profert of the application and medical examination. Plaintiff moved for an order on defendant to file the application and medical examination in the clerk's office. *Held*, that the motion could not be granted.

Motion for Production and Filing of Certain Papers.

W. F. Angell and C. Bradley, for plaintiff.

W. G. Roelker, for defendant.

CARPENTER, J. This is an action on a policy of life insurance; and the defendant files several pleas setting out that the statements and answers to certain questions contained in the application and medical examination, which form part of the contract of insurance, are untrue, and specifying the particular statements so alleged to be untrue, and making profert of the application and medical examination. The plaintiff now moves for an order on the defendant to file the application and medical examination in the clerk's office. The motion is not properly framed as a demand of oyer, since the order granting oyer would provide only that the plaintiff have a copy of the instrument, and not that the original instrument be put on file. The motion has, however, been argued as though it were a proper demand of oyer, and in that light I have considered it. In the first place, it is to be noted that the plea does not show that the agreement is under seal, and, consequently, profert was unnecessary, and oyer cannot be demanded. The authorities cited by the defendant abundantly sustain this position. 1 Chit. Pl. *430, *431; *Sneed v. Wister*, 8 Wheat. 690. Indeed, the order here asked seems to be prohibited by implied exclusion, by the twenty-third law rule for this circuit, which reads as follows:

"Oyer of all specialties declared on may be had on motion at the return term, but not afterwards, unless by special order of court, on affidavit of special cause."

It was, however, the practice of the English courts, and is the practice with us, in cases where oyer is not demandable, but in which the court can see that a knowledge of the instrument in question is proper and necessary for either party, to make an order that he have a copy. But in the practice of the courts of Rhode Island, which is followed by this court, the proceeding to be taken in order to obtain an order of this kind is prescribed by the law of the state in Pub. St. c. 214, § 45, which is as follows:

Whenever either party to any proceeding at law or equity in the supreme court, or to any proceeding at law in the court of common pleas, shall set

forth in writing, under oath, upon his knowledge or belief, that the opposite party is in the possession or control of some document to which the applicant is entitled, such court or a justice may order such opposite party, or if the same be a body corporate, then some officer thereof, to make answer on oath at or before a time to be fixed in said order, as to what document he so has relating to the matter in dispute between the parties, or what he knows as to the custody of such document, and if in his possession or control, whether he objects to the production of the same and the grounds of such objection; and thereupon such court or justice may require the production of said document, or may compel the party having the same in his possession or control to allow the applicant to inspect the same, and, if necessary, to take examined copies of the same; and may make such further order thereon as shall be just.

This present motion is not framed in accordance with the statute, and it must be dismissed.

*In re Account of DISTRICT ATTORNEY.*¹

(*District Court, E. D. Missouri. January 30, 1885.*)

DISTRICT ATTORNEY'S FEES—SECTION 838, REV. ST., CONSTRUED.

Expenses and services of district attorneys, in examining revenue reports upon which no actions are thereafter instituted, fall within the rule for compensation prescribed by section 838 of the Revised Statutes.

William H. Bliss, U. S. Dist. Atty., per se.

TREAT, J. An account of the United States district attorney is presented for the certificate of the judge, under section 838, as to certain cases enumerated. Under section 824 his fees in most cases become certain, as the court records show them; yet there are many concerning which evidence *dehors* the court records are necessary, viz., presence before commissioners, travel, etc. It is important to look at the dates of the statutes, so that the imperfections or mischiefs to which later statutes are aimed may furnish guides for interpretation. Under section 824 (looking to the dates of the acts consolidated) the district attorney was allowed fees only in cases actually instituted in this court, or with respect to proceedings before United States commissioners, and attendant travel. It became apparent to this court, years ago, that such proceedings before United States commissioners were liable to abuse, involving injury to parties proceeded against, and instituted, it might be, to give fees to deputy-marshals and commissioners, and involving unnecessary fees and traveling expenses for the district attorney. Hence the following rule of court was made, and later the proper department suggested a like rule for all United States courts:

In every criminal proceeding before a United States commissioner, he shall, before issuing subpoenas for the hearing of the case, cause the proper United States district attorney to be informed thereof, and await a reasonable time

¹ Reported by Benj. F. Rex, Esq., of the St. Louis bar.

his action with reference thereto; and when the commissioner has disposed of the case he shall cause the original complaint, together with a brief statement of his action thereunder, and the original recognizance, if any, and copy of the commitment or *mittimus*, duly certified, to be promptly filed in the clerk's office of the proper United States court; and before taking bail, when the prisoner is held for the action of a grand jury, the commissioner should cause notice of the time and place for hearing the application for bail to be given to the district attorney.

In the ordinary administration of the law, when complaints were made, the district attorney was bound to act thereunder, by refusing to proceed thereon, or by causing examination to be had before commissioners, etc. If he was of opinion that the complaint was groundless, it was his duty to proceed no further. It is true, that a large measure of responsibility was thus cast upon him, yet, as he represented the government that prosecutes offenses, and never prosecutes the innocent, the duty to determine when complaints were frivolous, or otherwise, rested primarily with him. Were not this so, he would make, through his office, the government the agent of private malice or of blackmail. There must be, in the very nature of judicial administration, a preparatory examination by the district attorneys as to private complaints; otherwise, the innocent as well as the guilty would be alike confounded by indiscriminate prosecutions, at the instigation of those who have only personal ends to subserve. As the law then stood, and now stands, the accused, however wronged, pays his own costs and expenses; so that it often happens that the innocent, when acquitted, suffer more than the guilty. Such a condition of affairs caused this and other courts to exact careful scrutiny from district attorneys prior to the prosecution before commissioners or the court. But under the revenue systems collectors undertook to discriminate in cases of violations of law, and on their judgment reported or refused to report alleged offenses. They made themselves thereby judges, in a modified sense, of such offenses. Congress cut up (section 838) such arbitrary power or conduct, by requiring all such matters to be reported to the district attorney. On the incoming of such reports it was made the duty of the district attorney to examine the same, and institute proper proceedings in court, "*unless upon inquiry and examination he shall decide that such proceedings cannot probably be sustained, or that the ends of public justice do not require that such proceedings be instituted.*"

This statutory rule sought to enforce elemental principles, coupled with an obligation upon revenue officers to report to the district attorney. It is obvious that if the district attorney, in order to accumulate fees, caused judicial proceedings to be instituted on every report so made, not he alone, but other officers, would devour the government, or the accused, with useless costs and expenses; hence the wise provision of section 838, viz.:

"And for the expenses incurred and services rendered in all such cases, [where it was decided not to bring suits,] the district attorney shall receive

and be paid from the treasury such sum as the secretary of the treasury shall deem just and reasonable, upon the certificate of the judge before whom such cases are tried or disposed of."

Resting upon an extremely narrow and technical construction of the words last quoted, it is said that the treasury department has ruled that the provisions of this section apply only to cases actually instituted, thereby defeating the broad purpose and just ends sought to be obtained by the statute. There was no need of a new statute to give the district attorney fees in cases instituted; but there was need of compelling him to bring no suits until full examination first had in his office. If suits were to be brought on all reports made, however frivolous, and thereby his and other costs incurred to the detriment of the public treasury, and the outrage of the citizen, the statute in question would not have been passed. To prevent so lamentable a condition of affairs, and to secure an honest and diligent investigation, congress provided that for such investigation proper compensation be awarded, without compelling the unjustifiable and expensive process of useless litigation. But it is urged that the language of section 838 is confined in terms to a "certificate of the judge before whom such cases are tried or disposed of;" and hence the district attorney, who by the section is required to make due "inquiry and examination" to avoid wrongful suits, must loose all compensation, or bring suits regardless of their merits. Such an interpretation seems suicidal. In a very narrow sense no "case" is tried or disposed of by a judge until formally instituted in court; yet many accusations and proceedings, through *habeas corpus*, or before commissioners, etc., are "disposed of" without technical trial. The term "case," as used in the statute, was intended to cover, and does cover, all complaints reported by revenue officers to the district attorney, which might be subject to the final determination of the court, by trial or other action therein. They have come within the reach of judicial administration, and are within the purview of the statute. If this be not so, then the mischief sought to be cured will still exist with increased force.

It is held, therefore, that the expenses and services of the district attorney's office in examining revenue reports, when no judicial action thereon is thereafter formally instituted, fall within the rule for compensation prescribed. True, the judge must be satisfied as to said expenses and services in order to certify what is "just and reasonable." Some of the cases involve as large a measure of "inquiry and examination" as if they had passed through indictments to a final trial, with heavy costs for witnesses and jury service; all of which can be saved to the government, and consequently are within the purview of the statute.

What is meant, under section 838, by "cases tried or disposed of before the judge?" Section 824 fixed the fees of the district attorney in case formally prosecuted before the court. Hence, if section 838

is to be limited to such cases, then there is no ground for the action of the judge, unless section 824 is to be construed to override the provisions of section 838. If the latter section is designed to cover all "cases" instituted in court formally, and no others, then what becomes of the fixed rates under section 824? May the judge disregard statutory fees? What are tried, etc., before the judge as contradistinguished from the court? If the views suggested limiting compensation to "cases" formally instituted, are to prevail, then a direct conflict between those sections is presented. The two sections are reconcilable. They pertain to different matters. Section 824 fixes rates of compensation when suits, etc., are formally instituted, and section 838 provides for the compensation to be given when suits are not instituted on revenue reports made, but disposed of by the district attorney in his office. Section 838 must be limited to the latter "cases," and is designed to provide therefor. Otherwise section 824 is in conflict. The purpose of the statute is to fix fees in prescribed cases under section 824, and to leave to the judge, under section 838, the determination of the proper measure of compensation in cases disposed of in the district attorney's office, which, though not formally before the court, may be brought there. Otherwise the judge might allow, under section 838, compensation regardless of section 824. In one sense cases are not determined by the judge as such, but by the court. Certainly narrow distinctions of that nature should not defeat the clear intent of the statute.

It is not necessary to enter upon a discussion, heretofore presented to this court, of the constitutional validity of acts of congress devolving on judges, *eis nominibus*, the functions of auditors. It must suffice that the measure of compensation should be largely measured by rates named in section 824. Taking those rates as a guide, I have examined the account in open court. Until the act of February 22, 1875, (Supplement, p. 145, c. 95,) the acts of congress seemingly contemplated the immediate auditing by the judge, without formal proceedings in open court. Since that act all accounts for fees, etc., whether under section 824 or 838, should be considered as within the act of February 22, 1875. Hence I have caused this account to be presented in open court, and after consideration thereof the court orders the same approved.

In re BAKER.

(Circuit Court, D. Rhode Island. February 13, 1885.)

1. ENLISTMENT OF MINOR IN ARMY—DISCHARGE ON HABEAS CORPUS.

A minor who has been enlisted in the army without the written consent of his parents or guardians entitled to his custody and control, will be released on *habeas corpus* issued on petition of such parents or guardians.

2. SAME—JURISDICTION OF COURT-MARTIAL—DESERTION.

In such case, a court-martial cannot retain jurisdiction of the enlisted man under charges of desertion.

Habeas Corpus.

Darius Baker, for relator.

Cyrus M. Van Slyck, for respondent.

CARPENTER, J. This is a writ of *habeas corpus* issued on the petition of Augustus E. Baker and Augustus T. Baker, and directed to Clement L. Best, colonel of the Fourth Artillery, commanding him to produce the body of the said Augustus E. Baker. The return, and the proofs, which are not disputed, show that Baker enlisted in the army on the eighteenth day of December, 1884; that he afterwards deserted the service, and was apprehended and returned to Fort Adams; and that charges of desertion have been filed against him pursuant to the forty-seventh article of war, (Rev. St. § 1342,) and that he is now held for trial on said charges. The proofs further show that he was, at the time of his enlistment, and still is, under the age of 21 years; that the relator, Augustus T. Baker, is his father, and is entitled to his custody and control, and has never consented to the enlistment. The forty-seventh article of war is as follows:

"Any officer or soldier, who having received pay, or having been duly enlisted in the service of the United States, deserts the same, shall, in time of war, suffer death or such other punishment as a court-martial may direct; and in time of peace, any punishment, excepting death, which a court-martial may direct."

The language of Rev. St. § 1117, is as follows:

"No person under the age of twenty-one years shall be enlisted or mustered into the military service of the United States without the written consent of his parents or guardians: provided, that such minor has such parents or guardians, entitled to his custody and control."

The relators contend that the enlistment, being made contrary to law, is absolutely void; that, consequently, Baker has not, at any time, been "duly enlisted in the service of the United States," and has not been capable to commit the crime of desertion; and that a court-martial has no jurisdiction over him on such charges; and that, finally, the respondent has no right to restrain him, either to service under his enlistment, or for punishment for the offense with which he is charged. On the other hand, it is contended on behalf of the military authorities that the enlistment is voidable only, and not void, and that the recruit remained subject to military authority, and hence

liable to punishment for violation of the articles of war, until such time as the contract of enlistment should be avoided, and, consequently, that he may be lawfully restrained by the respondent, at least until the judgment of the court-martial shall be pronounced on the pending charges.

In cases where there was no statutory prohibition against the enlistment, and where the contract was sought to be avoided on the sole ground that it was made by a person under age, it is well settled that the recruit is to be taken to be an enlisted man, and subject to punishment for violation of his duty as such, until the contract shall be avoided by proper proceedings. This rule is plainly laid down by Judge LOWELL, *In re Wall*, 8 FED. REP. 85, and is abundantly supported by the cases there cited. It is to be noted, however, that in *Wall's Case*, as well as in all the cases there cited, with two exceptions, to which reference will be hereafter made, it appeared that there was no statute prohibiting the enlistments. Those cases are not, therefore, of authority here. In *Com. v. Fox*, 7 Pa. St. 336, the prisoner had enlisted in the army, and had deserted and surrendered himself, and it appeared that he was the minor son of the relator, who had never consented to the enlistment. He was discharged from custody. It seems also to be a clear inference from the language of Judge WALLACE, *In re Davison*, 21 FED. REP. 618, that a similar order would have been made in that case if the parent of the soldier entitled to his custody and control had made application for his discharge. In *U. S. v. Hanchett*, 18 FED. REP. 26, the soldier, in a case similar to this, was discharged on his own application. On the other hand, it is to be noted that in *McNulty's Case*, 2 Low. 270, the prisoner, who had enlisted in the marine corps contrary to the prohibition of the statute, was discharged on the ground, as stated in the opinion, that the enlistments were "voidable by the minors themselves, or by their parents, as well as by the government;" and this case was referred to in *Wall's Case*, cited above, as authority for the decision there made. It seems, therefore, to be declared in both cases that an enlistment such as that now in question is not to be held absolutely void. If such a conclusion had appeared to be deliberately expressed by the learned judge who delivered the opinion in both those cases, it would undoubtedly be entitled to much consideration, although not necessary to the decision of the cases then in hand. But it appears to me that the opinions do not contain clear evidence of such deliberate conclusion. In the first place, the opinion in *McNulty's Case* contains no discussion, and no express statement, as to whether the enlistment is voidable in distinction from being void; and it seems to me, from the reading of the whole opinion, that when the argument of the case had progressed so far in the mind of the judge as to reach the conclusion that the enlistment was voidable, from which it necessarily followed that the prisoner must be discharged, the consideration of the further question, whether it was not also absolutely void, may have been postponed.

In the second place, it is a significant observation that in *Wall's Case* the authority of *Com. v. Fox* is denied, on the express ground that in that case the judges found that the statute made the enlistment absolutely illegal. It does not indeed appear that the authority of that case would have been followed if it could not have been distinguished; but it seems extremely probable that the case would have been distinctly overruled if the judge, on consideration of *McNulty's Case*, had deliberately determined to announce the doctrine here contended for on behalf of the military authorities.

It seems to me that the effect of the statute is to make the enlistment absolutely void, and that it must be so held on the application of any person who is not estopped from setting up the prohibition. In this case, the application being made both by Baker and by his father, I do not find it necessary to decide whether he could be discharged on his own application alone. My conclusion is that the enlistment is void as to the father, and must be so held on his application. It follows that Baker was not "duly enlisted," that he could not commit the crime of desertion, and that the court-martial cannot retain jurisdiction under the pending charges. He will therefore be discharged.

In re MILLER.

(Circuit Court, W. D. Pennsylvania. February 18, 1885.)

1. EXTRADITION—TREATY WITH GREAT BRITAIN OF 1842—HOLDING FUGITIVE—CRIME.

Under the treaty of 1842, between the United States and Great Britain, an extradited fugitive may be held by the receiving government on his prior conviction and sentence for a non-extraditable crime.

2. SAME—DEFENSE—GOOD FAITH OF EXTRADITION PROCEEDINGS.

In the tribunals of his own country the surrendered fugitive cannot question the good faith of the extradition proceedings.

Habeas Corpus.

J. T. Maffett and Wm. R. Blair, for petitioner.

E. A. Montooth, *contra*.

ACHESON, J. The petitioner claims his discharge on the ground that he is unlawfully held in custody in violation of the tenth article of the treaty of 1842 between the governments of the United States and Great Britain. Briefly, the facts of the case are these:

The petitioner was convicted of burglary in the court of oyer and terminer of Clarion county, Pennsylvania, and thereupon was sentenced on August 23, 1881, to undergo an imprisonment for the period of seven years in the Western Penitentiary of Pennsylvania, to which prison he was duly committed. In December, 1881, he escaped therefrom and fled to Canada. Burglary not being an extradition crime,

informations were made in January, 1882, in said county of Clarion, against the petitioner, charging him with robbery and assault with intent to commit murder, and under extradition proceedings had on these charges he was surrendered on March 11, 1882. He was then taken back to the Western Penitentiary of Pennsylvania, where he has since been held. Bills of indictment against him on the said charges of robbery and felonious assault were ignored by the grand jury of Clarion county on January 17, 1883. The petition alleges that said informations were gotten up by the penitentiary authorities as a mere pretext to secure the petitioner's surrender, to the end that they might seize and imprison him on his conviction for burglary. The return of the warden of the penitentiary sets up, as his authority for holding the petitioner, his commitment to the penitentiary by the court of oyer and terminer of Clarion county under his conviction and sentence for burglary.

The application for the petitioner's discharge proceeds upon the theory that the treaty between the United States and Great Britain secures to the extradited person immunity from detention for any crime other than that upon which the surrender is made; or, at least, exemption from detention for any offense not within the treaty. Now, it is indeed true that it has been held by Judge HOFFMAN, in *U. S. v. Watts*, 14 FED. REP. 130, and by the supreme court of Kentucky, in *Com. v. Hawes*, 13 Bush, 697, that an extradited person under this treaty cannot be tried for any offenses other than extradition crimes; and in *State v. Vanderpool*, 39 Ohio St. 273, the supreme court of Ohio carried the doctrine of exemption still further, holding that the extradited person could be put on trial only for the particular offense for which he had been surrendered. Upon these adjudications, which, on account of the eminence of the judges and courts pronouncing them, are certainly entitled to great respect, the petitioner's counsel confidently rely as establishing a principle applicable to and decisive of this case. But then, on the other hand, in *U. S. v. Caldwell*, 8 Blatchf. 131, and *U. S. v. Lawrence*, 13 Blatchf. 295, it was held by Judge BENEDICT (who gives most cogent reasons for the conclusion) that extradition proceedings do not by their nature secure to the person surrendered for one crime immunity from prosecution for other offenses, whether within the treaty or not; and he distinctly ruled that no such immunity is conferred by the treaty now under consideration. A like determination was reached by the court of appeals of New York in *Adriance v. Lagrave*, 59 N. Y. 110, where an extradited person, surrendered by the government of France under treaty stipulations, was arrested on civil process.

The question whether the treaty of 1842 between the United States and Great Britain prohibits the trial of the extradited person for an offense not specified in the proceedings or named in the treaty, must, therefore, be regarded as still open, while the precise question now before me, it would seem, is altogether new. If the treaty affords

the petitioner the immunity he claims, it is by mere implication, for assuredly it does not in express terms confer on extradited persons any immunity whatsoever. It provides that the respective governments, upon requisition made and upon satisfactory evidence of the alleged criminality, shall "deliver up to justice" all persons who, being charged with any of seven specified crimes, (of which burglary is not one,) committed within the jurisdiction of either, shall seek an asylum or be found within the territories of the other. There is, however, no provision in the treaty guarantying to the extradited person the right to leave the demanding country after his trial for the offense for which he was surrendered, in case of acquittal, or, in case of his conviction, after his endurance of the punishment therefor. Nor is there any express limitation upon the causes of his detention. Indeed, as to his disposition after his surrender the treaty is altogether silent. The high contracting parties might have provided for a surrender upon conditions, but they have not seen fit to do so. Whence, then, springs the petitioner's supposed immunity? Upon what sound principle can the demand of this convicted criminal, to be set at liberty before the expiration of his sentence, be allowed? Clearly, an offender can acquire no rights against the claims of justice by flight to a foreign jurisdiction, (*State v. Brewster*, 7 Vt. 118; *Dow's Case*, 18 Pa. St. 37;) and extradition treaties are not made in the interest of fugitive criminals. In the absence, then, of express stipulation imposing restraints upon the receiving government, it seems to me the intention is not to be imputed to the parties to the treaty to exempt the surrendered fugitive from deserved punishment for an offense (regarded by the laws of both countries as a gross crime) of which he had previously been duly convicted. It may have been open to the petitioner, when before the Canadian courts, to show that the extradition proceedings were not prosecuted in good faith. But, having been surrendered, it is not for him to raise that question before the tribunals of his own country. *Adrianse v. Lagrave*, *supra*; *Dow's Case*, *supra*.

I am of opinion that the petitioner's complaint, that he is in custody in violation of the treaty under which he was extradited, is groundless. Hence his discharge must be denied; and it is so ordered.

UNITED STATES v. VAN VLIET.

*(District Court, E. D. Michigan. February 23, 1885.)***1. CRIMINAL LAW—TAKING EXCESSIVE PENSION FEE—U. S. v. VAN VLIET, 22 FED. REP. 641, REVERSED.**

The right to prosecute for a violation of Rev. St. § 5485, in demanding and receiving a greater compensation for services in procuring a pension than is allowed by law, when the offense was committed prior to the act of July 4, 1884, is saved by section 13 of the Revised Statutes. The case of *U. S. v. Van Vliet*, 22 FED. REP. 641, reversed.

2. SAME—DEMURRER TO INFORMATION—MISTAKE OF LAW.

If a demurrer to a valid information be sustained under a mistaken view of the law, and the judgment is afterwards reversed, the defendant may be rearrested, and put upon his plea to the merits.

On Rehearing of Demurrer to Information.

Defendant was prosecuted by information of the district attorney for a violation of Rev. St. § 5485, in demanding and receiving a greater compensation for his services and instrumentality in prosecuting certain claims for pensions than was allowed by law. A demurrer was interposed, upon the ground that the law fixing the compensation for such services had been repealed, and hence that there could be no conviction. This demurrer was sustained, and the district attorney moved for a rehearing.

S. M. Cutcheon, Dist. Atty., for the United States.

I. T. Cowles, for defendant.

BROWN, J. Upon the original argument I sustained this demurrer, upon the ground that the act of 1878, fixing the amount which pension agents were entitled to charge for their services, had been repealed by the act of July 4, 1884, without saving the right to prosecute for offenses committed prior to the repealing act. *U. S. v. Van Vliet*, 22 FED. REP. 641. Since then my attention has been called to section 13 of the Revised Statutes, which enacts that "the repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide; and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability." This section escaped the notice both of court and counsel. I consider it a complete answer to the demurrer. It was at one time doubted whether it applied to criminal prosecutions, but the case of *U. S. v. Ulrici*, 3 Dill. 582, and *U. S. v. Barr*, 4 Sawy. 254, have apparently put the question at rest. The case of *U. S. v. Tynen*, 11 Wall. 88, was decided in view of the law in force before the act of February 23, 1871, which first contained this section, was passed.

There is no legal objection to the rearrest of the defendant. The constitutional provision, that no person shall "be subject for the same offense to be twice put in jeopardy," has no application until a jury

has been impaneled and sworn. 1 Bish. Crim. Law, (5th Ed.) §§ 1014-1016. The very case presented by the record here is thus stated by Mr. Bishop, (section 1027:)

"For example, if, without a trial, the court quashes a valid indictment, or gives the defendant judgment on demurrer, under the erroneous belief that it is invalid, a trial may be had after the prosecutor has procured the reversal of this judgment, because, as we have already seen, the prisoner is not in jeopardy until the jury is impaneled and sworn."

The motion of the district attorney for a *capias* is therefore granted.

GOODYEAR and another v. HARTFORD SPRING AXLE Co.

(Circuit Court, D. Connecticut. February 27, 1885.)

PATENTS FOR INVENTIONS—NOVELTY—STEELE SAND-BOX FOR CARRIAGE AXLES.

Letters patent No. 62,231, granted to John S. Steele, February 19, 1867, for an improved sand-box upon carriage axles, examined, and held void for want of novelty.

In Equity.

Henry T. Blake, for plaintiffs.

Wm. Edgar Simonds, for defendant.

SHIPMAN, J. This is a bill in equity to prevent the alleged infringement of letters patent granted to John S. Steele, February 19, 1867, for an improved sand-box upon carriage axles. The patentee says in his specification:

"My invention consists in a light, extra sand collar, C, placed upon a common axle a short distance from the wearing collar, A. The chamber, E, thus formed by the collar, A, collar, C, and covering, D; prevents the mud and dust from coming in contact with the wearing collar, A. The housing or covering, D, is formed by an expansion and continuation of the pipe-box, F."

The claim was for "the sand collar, C, and chamber, E, in combination with the extended pipe-box, F, for the purpose set forth."

The question in the case is that of patentable novelty.

A "common axle" is an axle that has a single nut in front, with a solid collar, or collar "shrunk on," at the inside end. The collar at the back forms a bearing surface, which receives the endwise play of the hub or of the edge of the axle-box, which is driven through the hub. The advantages of the axle were that it was "easily made and convenient to oil;" its disadvantage was that sand would find its way to the inside end, so that the surface at the collar was liable to be rapidly worn away. The "half-patent axle" was the common axle with the axle-box enlarged at the inner end, and projecting over and inclosing the collar. This was a slight improvement upon the common axle, but obviously did not exclude the sand from the surface of the wearing collar.

The "sand-band axle" of Asa Miller was another attempt to avoid the defect of the common axle. A loose collar was slipped over the square bar of the axle, and was pushed to a point within an eighth or a quarter of an inch of the wearing collar, thus leaving a chamber between the two collars. The second or loose collar was screwed into the wooden bed of the axle and was held firmly in position. A cast-iron circular band inclosed and covered both collars. This band was attached to the hub either by surrounding it or being driven into it. The design of the device was to form, by means of the two collars and the encompassing band, a "sand-box" which should collect and retain whatever dirt worked under the sand-band. The result was successful, although it made a somewhat clumsy hub, and the several parts could not easily be attached to each other with precision.

Steele's object was to improve upon the "half-patent axle" so as to prevent sand from wearing away the axle at its inner end. He added to the "half-patent axle," whose axle-box extended over the single solid collar, another and light solid collar, whereby a chamber was formed like that of Asa Miller, which collected and held the sand, and so prevented it from abrading the wearing surface of the collar. The device was both an actual and a commercial success, and remedied the defects of the different axles which have been described. The improvement consisted in adding to the half-patent axle the extra collar of Asa Miller, with whose invention Steele was familiar, and making it solid, like the ordinary wearing collar. This improvement would, very probably, have been formerly considered patentable, but since the decision in *Pennsylvania R. Co. v. Locomotive-engine Safety Truck Co.* 110 U. S. 490, S. C. 4 Sup. Ct. Rep. 220, illustrated by the decisions in *Collins Co. v. Coes*, 21 Fed. Rep. 38, and *Spill v. Celluloid Manuf'g Co.* Id. 631, it cannot be so regarded. The collar of the Asa Miller box became the collar of the Steele box, and was used for the same purpose, and with the same result, as in the Miller device, with no change in the manner of its application, except that it was made solid with the axle. When it is remembered that the wearing collar had also long been made in the same manner, this alteration was an obvious and ordinary improvement.

The bill is dismissed.

CELLULOID MANUF'G Co. and others v. COMSTOCK and others.

(Circuit Court, D. Connecticut. February 21, 1885.)

PATENTS FOR INVENTIONS—CELLULOID COVERING FOR PIANO KEYS—INFRINGEMENT—PATENT No. 210,780.

Defendant covered piano keys in the following manner, after the service of the injunction granted in *Celluloid Manuf'g Co. v. Pratt*, 21 FED. REP. 313: Two strips of muslin were glued to the upper surface of a sheet of celluloid. The sheet having been turned over, was fed into a machine, the knife of which partially cut and severed successive keys of the proper width as the sheet progressed over the table of the machine. By pressure, which was applied successively to each partially severed key, each key was broken and entirely separated from its fellows, but not from the muslin, which adhered to the row of keys and kept them in place so that the row could be easily handled. Cement was then spread upon the under surface of the keys, and the whole row was laid upon the key-board at the same time and subjected to pressure, as when an uncut sheet is fastened to the board. *Held*, not an infringement and a violation of the injunction.

In Equity.

Frederic H. Betts, for plaintiffs.

John K. Beach and John S. Beach, for defendant.

SHIPMAN, J. This is a motion to punish the defendants for contempt in violating the injunction heretofore granted to compel them to file with the master an account of the key-boards which they had covered with celluloid since the service of the injunction. The opinion which was given upon the final hearing of the case described the invention and construed the patent. *Celluloid Manuf'g Co. v. Pratt*, 21 FED. REP. 313. Since the service of the injunction, the defendants cover their keys in the following manner: Two strips of muslin are glued to the upper service of a sheet of celluloid. The sheet having been turned over, is fed into a machine, the knife of which partially cuts and severs successive keys of the proper width as the sheet progresses over the table of the machine. By pressure, which is applied successively to each partially severed key, each key is broken and entirely separated from its fellows, but not from the muslin, which adheres to the row of keys and keeps them in place so that the row can be easily handled. Cement is then spread upon the under surface of the keys, and the whole row is laid upon the key-board at the same time, and subjected to pressure as when an uncut sheet is fastened to the board. The plaintiff insists that this row of keys, attached to each other by strips of muslin, is, practically, the "continuous strip or roll" of celluloid which is described and claimed in the patent, and that as the gist of the patent "lies in handling the covering for the whole, or a substantial portion of the whole, key-board as a single piece," the defendants still infringe.

If the plaintiff's definition of the invention was a complete one, their conclusion might follow; but the invention did not consist merely in the fact that the covering of the board is handled as a single piece.

It consisted, also, in the fact that it is a single piece when put upon and fastened to the key-board, and thereby it possesses advantages over detached and separate pieces, whether made of ivory or celluloid. The complainants' record is quite clear on this point. For example, the inventor endeavored to fasten separate celluloid keys in the same manner that ivory strips are secured to the wood, but was unsuccessful, because, as he testified, separate celluloid strips warped the wood of the keys in a series of short curves, which difficulty was prevented by the use of a continuous sheet. When the single sheet is cut into a series of strips for each key, before being cemented to the wood, the invention, as described and claimed in the patent, no longer exists; because, no matter how skillfully the separate strips are manipulated so as to be placed upon the board with ease, the invention was the continuous strip or roll, as contrasted with separate strips for each key.

The motion is denied.

WILLIAMS v. STOLZENBACH and others.

(Circuit Court, W. D. Pennsylvania. February 6, 1885.)

1. **PATENTS FOR INVENTIONS—APPARATUS FOR OBTAINING AND WASHING SAND.**
Letters patent No. 206,514, for an improvement in apparatus for obtaining and washing sand, granted July 30, 1878, to David C. Williams, construed, and held to be limited to a combination having as one of its elements a vessel of water in which the screen is immersed, and therefore not infringed by defendants' apparatus, the screen of which works in the unconfined water of the river.

2. **SAME—CONSTRUCTION OF CLAIMS.**

It is beyond the province of judicial construction to eliminate from a claim an explicitly declared constituent of a combination merely because it is in fact unnecessary in effecting the desired result.

In Equity.

D. F. Patterson, for complainant.

George H. Christy, for respondents.

ACHESON, J. The plaintiff's invention relates to apparatus for obtaining and washing sand, and, as described in his specification and illustrated by the accompanying drawings, consists of a cylindrical riddle or screen, D, "the lower portion of which is immersed in a vessel of water," C, through which riddle or screen and vessel flows a stream or currents of water, in combination with an ordinary dredging-boat having elevators for supplying the interior of the screen with unwashed sand, a receptacle, F, for receiving the washed sand, and elevators for removing it therefrom. As the screen rotates, the sand becomes separated from the coarser materials by the revolving movement, and passing through the meshes drops into the vessel, C, from which it is removed and thrown into the receptacle, F, by means of

wings or projecting longitudinal flanges attached to the outside of the screen. The specification states that the riddle or screen, D, in its "construction and operation," is substantially the same as that described in a previous patent, granted April 23, 1867, to David Furnier. That this is so, is evident upon comparing the two patents; and it may be added that in the Furnier apparatus the cylindrical screen is provided with exterior wings or longitudinal flanges like those above mentioned, and performing the same function. The vessel, C, and the receptacle, F, are partly sunk below the surface of the stream in which the dredging-boat is operating, and the inflowing supply of water to the vessel, C, (to take the place of that swept out of it with the washed sand) is obtained by means of openings or holes in the side of the vessel below the water-line. Of this feature of the apparatus the specification thus speaks:

"The riddle or screen, D, is placed in a vessel, C, into which is constantly flowing through openings, *x*, currents of water, whereby the lower portion of the riddle, D, is always immersed in water, and a current of water is constantly flowing through the riddle, thereby keeping the meshes of it clean."

There are four claims. The first is as follows:

"A screen or riddle immersed in a vessel of water, and through which is flowing a stream of water, in combination with an ordinary dredging-boat for supplying the said screen with unwashed sand, substantially as herein described, and for the purpose set forth."

The second claim is for the same combination, with the addition of elevators for supplying and charging into the interior of the screen unwashed sand. The third claim is for the same combination as the second, with the addition of a receptacle for receiving the washed sand and elevators for conveying it therefrom. In each of these claims occurs the language, "a cylindrical screen immersed in a vessel of water." The fourth claim is for the combination of the screen, D, the vessel, C, the receptacle, F, two elevators, and four designated chutes.

It is quite clear to me, from the descriptive portion of the specification, that the inventor regarded it as essential to the desired end that the water in which the screen rotates should be segregated by an inclosing vessel. The riddle or screen, he instructs us, is to be "*placed in a vessel into which is constantly flowing, through openings, *x*, currents of water,*" etc. He perhaps thought that unless the water was thus cut off from the body of the stream the sand would be washed out of the screen by the action of the natural current, or by reason of the agitation of the water. But with his conjectures we need not concern ourselves. It is enough that by his explicit language, "a riddle or screen immersed in a vessel of water," is a constituent of the several combinations claimed. *Tate v. Thomas*, 30 O. G. 345; S. C. 22 FED. REP. 660.

Now, indisputably, the defendants' screen is not immersed in a vessel of water, nor placed in any vessel whatsoever. On the contrary,

it rotates and performs its work in the open river. The defendants, therefore, do not use the plaintiff's patented invention, unless the immersion of the screen directly in the river is the same thing as its immersion in a vessel containing water let in from the river by means of the openings described in the plaintiff's specification, or other equivalent means. But who will affirm this? It is in vain to urge that, the use of a vessel being, in fact, unnecessary, the claims should be read as if they called broadly for the immersion of the screen in the water of the river. To eliminate what is a plainly declared element of a combination is beyond the province of judicial construction. *Water-meter Co. v. Desper*, 101 U. S. 332. Besides, from first to last, the specification contains no hint that the inclosing vessel could be dispensed with, and I think it manifest that it had not occurred to the inventor that the screen could successfully perform its work in the open stream. It is, indeed, true that underneath the defendants' screen there is a pan or vessel which catches the screened sand. Their screen, however, is not immersed or placed therein, but rotates and does its whole work above it, in the unconfined water of the river. The outside wings move therein, but they are no part of the screen, and their work is distinct from and follows the screening.

The prior state of the art here was such that the plaintiff's claims were necessarily very narrow. Dredging and sand-washing boats equipped with cylindrical screens, elevators to feed the screen, receptacles to hold the washed sand, and elevators to carry it away, were old. How much the plaintiff borrowed from Furnier we have already seen. Moreover, Furnier's first claim calls for a hollow screen revolving on an axis, with one portion always immersed in a vessel, through which a stream of water constantly flows from some convenient reservoir. Now, what more has the plaintiff done than devise his vessel, C, with sides raised above the water-line so as to embrace the screen, and provided with its water-supply openings? Within the restricted limits of his claims, his patent may well stand; but, as the defendants do not use the plaintiff's vessel, or any equivalent therefor, they do not infringe his rights.

Let a decree be drawn dismissing the plaintiff's bill, with costs.

FARMERS' FRIEND MANUF'G CO. v. CHALLENGE CORN-PLANTER CO.

(Circuit Court, W. D. Michigan, S. D. January 16, 1885.)

PATENTS FOR INVENTIONS—REISSUE No. 10,155—CORN-PLANTER.

Reissued letters patent No. 10,155, issued to the Farmers' Friend Manufacturing Company as assignee of Michael Runstetler, on July 11, 1882, is not for the same invention covered by the original letters, and is invalid.

In Equity.

Wood & Boyd and *E. W. Withey*, for complainant.

Stem & Peck and *Edward T'aggart*, for defendant.

BAXTER, J. This is a bill to enjoin an alleged infringement of reissued letters patent No. 10,155, issued to the complainant, as assignee of Michael Runstetler, on July 11, 1882. We have not the time to enter upon a full discussion of the facts of the case, and hence will content ourselves with a simple announcement of the conclusion to which we have arrived on one question made and relied on by the defendant.

In a former suit, prosecuted by the complainant in this court against the Waite Manufacturing Company, for an alleged infringement of the same reissued letters patent, we rendered a decree in complainant's favor, affirming their validity, and ordered an account of the damages. This, of course, would be conclusive of this case on that point if the facts of the two cases were the same; but the defendant did not introduce in the former case any testimony in support of its defenses. The decree made therein was predicated upon the *prima facie* case made by the production of complainant's said reissued letters patent and proof of the alleged infringement; but here the defendant comes with full proof. Among other testimony, it has put in evidence a copy of the original letters patent, and insists that upon comparison thereof with the reissued letters patent it will appear that the latter is not for the same invention covered by the former.

The first claim of the original patent is in these words:

(1) In a corn-planter having the rear main frame mounted on supporting wheels, the front runner-frame hinged or pivoted to the main frame, and operated by an elevating and depressing lever pivoted to the main frame, having its front end slotted and connected to the runner-frame by a bolt passing through said slot, in combination with the shaft, A, and lifting hand-lever, D, rigidly attached to said shaft, for elevating, depressing, and controlling the runner-frame, substantially as herein set forth.

A reissue was applied for and obtained, in which the foregoing claim was expanded into the four following claims:

(1) In a corn-planter having the rear main frame mounted on supporting wheels and the front runner-frame hinged or pivoted to the main frame, the combination of a foot-treadle and a hand-lever adapted to be used in conjunction or independently for the purpose of elevating or depressing the runners, substantially as herein set forth. (2) In a corn-planter having the rear main frame mounted on supporting wheels and the front runner-frame hinged or

pivoted to the main frame, a foot-treadle for elevating or depressing the runner-frame, in combination with a hand lock-lever, the foot-treadle and hand-lever adapted to be used in conjunction for forcing and locking the runners into the ground or lifting and locking them out of the ground, substantially as herein set forth. (3) In a corn-planter having the rear main frame mounted on supporting wheels and the front runner-frame hinged or pivoted to the main frame, a foot-treadle for elevating or depressing the runner-frame, in combination with a hand-lever rigidly connected therewith, that either hand-lever or treadle may be used for forcing the runners into the ground or lifting them out of the ground, substantially as herein set forth. (4) The combination, in a corn-planter having the rear main frame mounted on supporting wheels and a front runner-frame hinged or pivoted to the main frame, of a foot-treadle for elevating the runner-frame, and a hand-lever for elevating or depressing the same, both arranged to move simultaneously when either is acted upon by an operator.

The foregoing first claim of the original patent ought, in view as well of its own terms as of the correspondence relating thereto, which passed between the office and the inventors' solicitors, shown by the file-wrapper, to be restricted to the specific combination therein described. This was all to which the inventor was entitled, (everything else having been anticipated by others.) Thus construed, the defendant's planter is not an infringement of the original patent. This was conceded by complainant's expert in his testimony and by counsel in the argument of the cause. But defendant's planter is, as they contend and as the court concedes, an infringement of the reissued patent. The reissue is not, as we think, for the same invention covered by the original letters, and is invalid. Complainant's bill will be dismissed, with costs.

THE EDITH GODDEN.

(*District Court, S. D. New York. January 30, 1885.*)

PERSONAL INJURIES — LIABILITY OF SHIP-OWNER TO SAILOR FOR INJURIES RECEIVED IN CONSEQUENCE OF INADEQUATE MACHINERY—MODERN APPLIANCES—MARITIME LAW AS DISTINGUISHED FROM THE MUNICIPAL.

Ship-owners, in furnishing modern appliances for the convenience of the ship, such as a steam-winch, in connection with a derrick, for loading and unloading, are held to the strictest rule of diligence and care as to the sufficiency of such appliances. If inadequate for the purpose designed, or to which they are put by authority of the owners, the latter will be held liable to a seaman injured by reason of such inadequacy. The ancient maritime rule, limiting a seaman's compensation to wages and expenses of cure, should not be extended to these modern conditions and appliances, not strictly belonging to the navigation of the ship, for which these limitations were never designed; but, as regards accidents from such causes, the analogies of the municipal law should be followed. On the steamer *E. G.* a derrick was used, in connection with a steam-winch, for the purpose of loading and unloading. At Port Maria, Jamaica, a fruit boat, taken aboard the day previous, being an old long-boat, and weighing about $1\frac{1}{2}$ tons, was being lowered away by this means, but as it was swung over the rail, the hook which held the derrick in place broke, and the boom

of the derrick fell upon the deck. In falling, it struck the libelant upon the shoulder, causing severe injuries. The same appliance had been used the day before, in hoisting the boat aboard, with safety, but in a quiet harbor. Port Maria is an open roadstead, and on this occasion there was considerable rolling and lurching of the ship. There was no latent defect in the hook that broke. *Held*, that the owner was bound to furnish appliances adequate for the place and occasion where used, and these being, in fact, inadequate, and never tested for sufficiency under the circumstances of a rolling sea, held negligence in the owners, and that the vessel was liable for the damages; and \$1,500 were awarded to the libelant.

In Admiralty. Action for personal injuries.

H. J. Schenck, for libelant.

H. Putnam, for claimant.

BROWN, J. On the nineteenth of January, 1883, the libelant, being a seaman on the steam-ship Edith Godden, was ordered, with others, to help hoist and lower away from the steam-ship, while lying at Port Maria, Jamaica, a fruit boat, formerly a long-boat, designed to be used for the lading of cargo there. A derrick was made use of in connection with a steam-winch, and the boom of the derrick was held in place by means of a block, through which ran double ropes to the foretop-mast, and the block was attached by an iron hook running inside of an iron collar which surrounded the derrick boom. After the boat had been raised and got over the ship's rail, the hook that held the derrick in place broke, and the boom fell down upon the deck, across the hatch and the rail. In falling it struck the libelant upon the shoulder, causing severe injuries, for which this libel was filed.

The evidence varies considerably, both as to the weight of the fruit boat, and as to the weights that the derrick was designed to sustain. There was a brake, designed to be applied by the foot, attached to the winch; but it was out of order. The fruit boat had been taken on board the day before by the use of the same derrick, winch, and tackle, in a quiet harbor. Port Maria is an open, unsheltered roadstead; and when the boat was lowered away, there was considerable rolling and lurching of the ship. Considerable evidence for the claimants was offered to the effect that the brake, if in order, would not be proper to be used in lowering weights so heavy as this boat, which weighed somewhere from one to two tons; that the only proper mode, and the mode ordinarily in use, was by reversing the steam-winch, and managing the steam-valve by hand. In behalf of the libelants, the evidence of some experts was to the effect that the reversing of the steam-winch, and managing it by hand, was a somewhat delicate operation, that required care to prevent sudden jerks; and that special difficulty was likely to arise in this way where there was any rolling or lurching of the ship. An examination of the hook showed no defects in the iron at the place of breakage, and no apparent insufficiency. In this respect the case differs from that of *The Nederland*, 7 FED. REP. 926. The only cause for breakage that could be assigned was either too great a weight, or some sudden strain. The weight of proof indicates

that the hook broke at the time when the order was given by the mate to reverse the winch, when there was a lurch of the vessel.

I cannot doubt that the real cause of this accident was in the overweight, or strain incident to the use of this derrick and winch, in lowering so heavy a weight in a rolling sea. It is not a case of any latent defect; for the testimony of the experts negatives any such cause. Nor is there proof of any definite act of negligence on the part of the men that were using or handling the winch or the derrick. The machinery must therefore be deemed itself insufficient for the use to which it was applied, under the particular circumstances where it was thus used. Upon the evidence it must be inferred, moreover, that the owners were responsible for the use of this machinery under the circumstances that caused it to break and injure the libellant. The fruit boat belonged to the owners of the ship. It had been taken on board at another port in Jamaica, for the purpose of being used at Port Maria, and this was clearly done under the direction of the owners or their agents, and for their benefit. In providing that this boat should be taken on board the steam-ship, and then launched at Port Maria under the disadvantages of a rough sea, to which the latter port was exposed, I think the owners must be held answerable for any insufficiency of the derrick for the use to which it was there necessarily subjected under the more hazardous circumstances at Port Maria. Their legal duty, by the municipal law, was to exercise due care in providing machinery adequate and proper for the use to which it was to be applied, and to maintain it in like condition. *Kain v. Smith*, 80 N. Y. 458, 467; *Devlin v. Smith*, 89 N. Y. 470; *The Ilheola*, 19 FED. REP. 926.

This derrick and winch do not appear to have been designed for use under circumstances of sudden strain and jerks, or to have been tested in such circumstances. In providing that the fruit boat should be launched at Port Maria by means of this derrick and winch, the owners, or their agents who directed it, were answerable for their insufficiency in the absence of any reasonable tests of ability to undergo such strains. The libellant had no means of knowing their strength, and he had no option but to obey orders. A seaman on board ship has not the privilege of using his own judgment, or of quitting the ship's service if he apprehends danger, like an ordinary workman on shore. If owners cannot be held as insurers of the appliances furnished to the ship for the safety of seamen, they ought, at least, to be held to the strictest rule of diligence and care. As there was no negligent act shown on the part of those using the derrick that caused it to break, and no latent defects, I must ascribe the breakage, as I have said, to the insufficiency of the derrick itself for the strain to which it was subjected when used in a rolling sea in connection with a steam-winch, and hold the owners responsible therefor, in the absence of any previous tests of fitness to undergo such sudden strains as it was liable to under such circumstances.

For the claimants it is urged that by the maritime law the liability of the ship, in case of injury to seamen, extends only to proper care and nursing, and the expenses of cure, so far as cure is possible; and this court has so held in regard to accidents arising in the ordinary course of navigation. *The City of Alexandria*, 17 FED. REP. 390. In that case, however, the proper equipment and outfit of the ship were assumed. Pages 393, 396. There is no question that in modern maritime law the owners are responsible for due care and diligence in the proper equipment of the vessel for the contingencies of the voyage. *Halverson v. Nisen*, 3 Sawy. 562. See *The Explorer*, 20 FED. REP. 135; *The Wanderer*, Id. 140. In the use of modern appliances, such as a steam-winch in connection with a derrick, as in this case, not for the prosecution of her ordinary navigation, but for the conveniences of the ship in loading or unloading, it is more reasonable and equitable to apply the analogies of the municipal law in regard to the obligation of owners and masters, rather than to extend the limited rule of responsibility under the ancient maritime law to these new, modern conditions, for which those limitations were never designed. And, in applying the analogies of the municipal law, the helplessness of seamen, and the imperative duty of obedience, as I have above said, ought to impose upon masters and owners the highest rule of diligence and care in ascertaining the sufficiency of all such modern appliances for the exigencies to which they are to be subjected. As that was not done in this case, the breaking of the derrick through its own insufficiency must be deemed evidence of negligence on their part, which equitably imposes the consequences upon them, rather than upon the seaman, who is an innocent sufferer through their want of proper care.

The injuries to the libelant were severe. He was partially paralyzed; but, after being cured so far as possible, he is permanently disabled from pursuing his former occupations, though able to follow lighter pursuits upon land. On the whole, I think \$1,500 will be a proper allowance by way of damages, with costs.

RILEY v. ALLEN and others.

(District Court, W. D. Tennessee. February 21, 1885.)

1. ADMIRALTY—PERSONAL INJURY—BEATING A DECK HAND OR ROUSTABOUT.

The officers of a steam-boat are liable for injuries caused by severely beating a deck hand or roustabout.

2. SAME SUBJECT—DISCHARGE—IMPROPER TIME AND PLACE.

A deck hand cannot, for mere inefficiency, be driven from a steam-boat at an inhospitable place on a dark, cold night, whereby he was subjected to unnecessary suffering and discomfort, without rendering the officers liable to damages for such treatment.

In Admiralty.

W. S. Flippin, for libelant.

H. C. Warinner, for defendants.

HAMMOND, J. This is a libel *in personam* against the officers and owners of a steam-boat for personal injuries. The plaintiff is a "roustabout,"—a name by which negro deck hands on the steamers plying the Mississippi river and its tributaries are known. He shipped on the *Rene Macready* for a trip up the St. Francis river. He alleges and proves by his own testimony and that of three other roustabouts that the mate beat him with a stick or club, severely bruising his arm and disabling him for several weeks. The mate swears he did not strike him at all, and so does the captain, who saw the occurrence. Another witness not connected with the boat also testifies that the mate did not strike the libelant. There is no doubt, however, that on a cold night in January, when the ground was covered with water, this man was paid off, discharged, and made to leave the boat at a place where there was no accommodation for him; that, being wet from rain and mud, he had to go to a negro cabin some distance away, where he stayed all night, and the next morning was compelled to walk through the overflowed swamp some five miles to a railroad, where he walked the track about thirty miles to his home in Memphis. The cause assigned for his discharge is that "he was no account;" that is, did not work satisfactorily. He proves by himself and one of his witnesses that he begged to be allowed to stay on the boat, and offered to pay his way back to Memphis, which was refused. This again is denied by the officers, who say that one Collins offered to hire him, and they thought he had done or would do so; but Collins is not produced to prove this, and it is denied by the libelant and his witnesses.

A very earnest argument is made by counsel for defendants to the effect that these roustabouts are a very degraded class of laborers, and so vicious in their instincts that they are uninfluenced by any ordinary consideration that would impel a man to do his work most efficiently; and that it would imperil the interests of commerce and obstruct the navigation of this river to apply to complaints like this the customary rules of law that govern the contract of sea-going mariners. It is urged that nothing but the severest compulsion will make them work; that they understand this, and engage in the service with a knowledge of the fact that they may be subjected to rough measures to prevent them from shirking their labor under circumstances where inefficiency is disastrous to their employers. There is a good deal of force in this, but it is the old-time argument in favor of flogging seamen and soldiers, and cannot override the humane policy of our statute which abolishes it in the army, in the navy, and "on board vessels of commerce." Rev. St. § 4611. It is no more lawful to flog a "roustabout" than it is to so discipline a common seaman, and it never was lawful to beat and wound them with sticks and clubs, for which the

officers are liable, both civilly and criminally. Rev. St. § 5347; *U. S. v. Collins*, 2 Curt. 194. It is often done with brutish violence. I have seen them come about this court-house with a vague idea that in some way they were under the protection of the officers of the United States, and having the marks of violence upon them showing how cruelly they had been beaten. They have been sent to attorneys, but in some way it has been arranged so that this court has never had the opportunity of imposing the penalty of damages for such brutality. The ordinary remedies of withholding wages, discharging for misconduct, putting in confinement or in irons, and the like, must suffice as methods of discipline for inefficiency, if the penalties of the statutes by criminal prosecution for disobedience of orders do not apply. Certainly, beating cannot be sanctioned by the courts. The beating is not satisfactorily proven in this case, and the testimony of the only disinterested witness must turn the scale against the libelant on that point.

But these officers had no right to discharge this man at the place they did, late at night, and under circumstances which show that it was imposing upon him unnecessary suffering. His wages were paid him, but they might have been withheld, if it was just to do that, or used to pay for his shelter on the boat. I do not decide that he could not be discharged at all until the return of the boat, and express no opinion as to that; but he should not, for mere inefficient work, have been driven from the boat on a dark, cold, and wet night, at the time and place where he was compelled to go ashore. Common hospitality and humanity should have prevented this, and the admiralty law forbids it. The proper and humane care of even inefficient seamen is the duty of every master, and whatever he may lawfully do must be done with due consideration for this principle. 1 Conkl. Adm. 429-442.

It is not difficult to determine the measure of damages in this case. If severe beating had been proved, the court would yield to the demand for not less than \$100; but it is disproved. He had been paid his wages, and might have come home on the cars, but chose to walk when he reached the railroad. I think \$30 amply sufficient to compensate the libelant, and emphasize the determination of this court to insist on humane treatment even of "roustabouts." Decree accordingly.

WOOSTER v. HANDY. (No. 1.)

SAME v. SINGER MANUF'G Co. OF NEW YORK. (No. 2.)

SAME v. HOWE MACHINE Co. (No. 3.)

SAME v. WILLCOX & GIBBS SEWING-MACHINE Co. (No. 4.)

SAME v. DOMESTIC SEWING-MACHINE Co., impleaded, etc. (No. 5.)

SAME v. SCHENCK, impleaded, etc. (No. 6.)

SAME v. SINGER MANUF'G Co. OF NEW JERSEY. (No. 7.)

SAME v. BARKER. (No. 8.)

SAME v. THORNTON and others. (No. 9.)

SAME v. BLAKE and others, impleaded, etc. (No. 10.)

*(Circuit Court, S. D. New York. February 16, 1885.)***1. EQUITY PRACTICE—COSTS—FINAL HEARING IN EQUITY OR ADMIRALTY—SECTION 824, REV. ST.**

To constitute "a final hearing in equity or admiralty," within the meaning of section 824, there must be a hearing of the cause on its merits; that is, a submission of it to the court, in such shape as the parties choose to give it, with a view to a determination whether the plaintiff or libelant has made out the case stated by him in his bill or libel as the ground for the permanent relief which his pleading seeks, on such proofs as the parties place before the court, be the case one of *pro confesso*, or bill or libel and answer, or pleadings alone, or pleadings and proofs.

2. SAME—SEVERAL TRIALS—DOCKET FEE.

The statute does not forbid the allowance of a docket fee on or for each trial before a jury, where there is a verdict, or on or for each final hearing in equity or admiralty, if there are two or more final hearings, such as are above defined, in the same cause.

3. SAME—DEPOSITIONS ADMITTED IN EVIDENCE BY STIPULATION—TAXABLE FEES.

Where, on the hearing of one of several suits heard at the same time, brought by the same plaintiff against different defendants, for the infringement of the same patent, the depositions of a number of witnesses, taken in others of said suits, are admitted in evidence by virtue of a stipulation that all the evidence taken for the final hearing on both sides, in the other suits, may be read on the final hearing herein with the same force and effect as if taken herein, a solicitor's fee of \$2.50 for each deposition in each one of the cases is not taxable.

4. SAME—COPIES OF PAPERS.

Copies of papers obtained for use on interlocutory or preliminary or incidental motions or hearings are not obtained for use on trials, within the meaning of section 983.

5. SAME—TRAVELING EXPENSES OF MESSENGERS AND ATTORNEYS.

The traveling expenses of attorneys to take evidence and attend court, and the expenses of messengers, are no part of taxable costs. Such expenses were never taxable before or since the act of 1853.

6. SAME—MACHINE EXHIBITS.

The expense of copies of models in the patent-office, properly procured for use as a part of the evidence in the suit, may be allowed for as part of the taxable costs; but the expense of other models and machines are not allowed to be so taxed.

7. SAME—PHOTOLITHOGRAPHIC EXHIBITS.

Photolithographic exhibits, not being drawings from the patent-office, but sketches introduced by witnesses in giving their evidence, fall under the rule as to machine exhibits, and are not taxable as costs.

8. SAME—WITNESSES' FEES NOT PAID.

Where witnesses are paid in one or more cases, and not in others, the evidence is strong that they are never to be paid; especially where the lapse of time is great between the rendering of the service and the taxation.

9. SAME—DEPOSITIONS OF WITNESSES SWORN IN MORE CASES THAN ONE.

Where the deposition of a witness was taken and entitled in several suits, he being sworn in each, but his deposition was written down only once, and there was no agreement that the solicitor's fee of \$2.50 should be taxed but once for the group of cases, such fee is taxable for the deposition, in each case.

10. SAME—FEES PAID THE SAME WITNESS IN MORE THAN ONE CASE.

In the absence of any rule of court, or special order, or stipulation of parties, a witness is entitled under section 848 to his fee for each day's attendance in court in each suit in which he attends.

11. SAME—CERTIFIED COPIES OF PAPERS PUT IN EVIDENCE.

Where, under section 983, copies of papers necessarily obtained for use are put in evidence, and no order is made rejecting them as evidence, it is the duty of the clerk to allow, on taxation, the disbursements paid for the various copies put in evidence and forming part of the record for final hearing.

12. SAME—INCOMPETENT AND IMMATERIAL TESTIMONY.

Where, upon an appeal from the taxation of costs, a party for the first time applies to the court to declare certain depositions to be incompetent and immaterial, it is a sufficient ground for denying the application that the party did not, at or before the final hearing, or before the taxation of costs, move to strike out the evidence in question.

In Equity.

Henry S. Hoyt and Frederic H. Betts, for plaintiff.

W. H. L. Lee, B. F. Lee, and John Dane, Jr., for defendants.

BLATCHFORD, Justice. In suits Nos. 1, 9, and 10, hearings were had on pleadings and proofs, and decrees directed for the plaintiff, in April, 1881. *Wooster v. Blake*, 8 FED. REP. 429. Afterwards, on the application of the defendants, those cases were reheard, because of decisions made by the supreme court in January, 1882, and the bills were dismissed in July, 1884. *Wooster v. Handy*, 21 FED. REP. 51. At the same time, after hearings on pleadings and proofs, the bills were dismissed in the other seven cases. *Wooster v. Howe Machine Co.* 21 FED. REP. 67.

The questions now to be considered arise on appeals by both parties from the taxation by the clerk of the defendants' bills of costs. The amounts of the bills in the several cases, as offered for taxation, the amounts disallowed, and the amounts taxed, were as follows:

SUITS.	OFFERED.	DISALLOWED.	TAXED.
No. 1,	\$1,555 29	\$ 486 40	\$1,068 89
No. 2,	2,707 46	840 19	2,867 27
No. 3,	261 86	24 25	237 61
No. 4,	203 42	89 25	114 17
No. 5,	237 92	25 50	212 42
No. 6,	249 67	27 25	222 42
No. 7,	168 52	122 50	46 02
No. 8,	157 57	115 00	42 57
No. 9,	190 63	38 74	151 89
No. 10,	160 27	28 35	131 92
	<hr/> \$5,892 61	<hr/> \$1,297 43	<hr/> \$4,595 18

The questions to be considered arise mainly under the statutory provisions in regard to fees and costs. The fee bill of February 26, 1853, (10 St. at Large, 161,) provided as follows:

Section 1. "In lieu of the compensation now allowed by law to attorneys, solicitors, and proctors in the United States courts, * * * witnesses * * * in the several states, the following and no other compensation shall be taxed and allowed. But this act shall not be construed to prohibit attorneys, solicitors, and proctors from charging to and receiving from their clients, other than the government, such reasonable compensation for their services, in addition to the taxable costs, as may be in accordance with general usage in their respective states, or may be agreed upon between the parties.

"FEES OF ATTORNEYS, SOLICITORS, AND PROCTORS. In a trial before a jury in civil and criminal causes, or before referees, or on a final hearing in equity or admiralty, a docket fee of twenty dollars. Provided, that in cases in admiralty and maritime jurisdiction, where the libellant shall recover less than fifty dollars, the docket fee of the proctor shall be but ten dollars; in cases at law, where judgment is rendered without a jury, ten dollars, and five dollars where a cause is discontinued; for *scire facias*, and other proceedings in recognizances, five dollars; for each deposition taken and admitted as evidence in the cause, two dollars and fifty cents."

"Sec. 3. * * * WITNESSES' FEES. For each day's attendance in court, or before any officer pursuant to law, one dollar and fifty cents, and five cents per mile for traveling from his place of residence to said place of trial or hearing, and five cents per mile for returning. When a witness is subpoenaed in more than one cause between the same parties in different suits at the same court, but one travel fee and one *per diem* compensation shall be allowed for attendance, to be taxed in the first case disposed of, and '*per diem*' only in the other causes, to be taxed from that time in each case, in the order in which they may be disposed of. * * * The bill of fees of clerk, marshal, and attorneys, and the amount paid printers and witnesses, and lawful fees for exemplifications and copies of papers necessarily obtained for use on trial in cases where by law costs are recoverable in favor of the prevailing party, shall be taxed by a judge or clerk of the court, and be included in and form a portion of a judgment or decree against the losing party. * * * That before any bill of costs shall be taxed by any judge or other officer, or allowed by any officer of the treasury, in favor of clerks, marshals, commissioners, or district attorneys, the party claiming such bill shall prove, by his own oath, or some other person having a knowledge of the facts, to be attached to such bill and filed therewith, that the services charged therein have been actually and necessarily performed as therein stated."

The foregoing provisions appear in the following form in the Revised Statutes:

"Sec. 823. The following, and no other, compensation shall be taxed and allowed to attorneys, solicitors, and proctors in the courts of the United States, to * * * witnesses * * * in the several states and territories, except in cases otherwise expressly provided by law. But nothing herein shall be construed to prohibit attorneys, solicitors, and proctors from charging to and receiving from their clients, other than the government, such reasonable compensation for their services, in addition to the taxable costs, as may be in accordance with general usage in their respective states, or may be agreed upon between the parties.

"FEES OF ATTORNEYS, SOLICITORS, AND PROCTORS. Sec. 824. On a trial before a jury, in civil or criminal causes, or before referees, or on a final hearing in equity or admiralty, a docket fee of twenty dollars: provided, that in

cases of admiralty and maritime jurisdiction, where the libellant recovers less than fifty dollars, the docket fee of his proctor shall be but ten dollars. In cases at law, when judgment is rendered without a jury, ten dollars. In cases at law, when the cause is discontinued, five dollars. For *scire facias*, and other proceedings on recognizances, five dollars. For each deposition taken and admitted in evidence in a cause, two dollars and fifty cents."

"WITNESSES' FEES. Sec. 848. For each day's attendance in court, or before any officer pursuant to law, one dollar and fifty cents, and five cents a mile for going from his place of residence to the place of trial or hearing, and five cents a mile for returning. When a witness is subpoenaed in more than one cause between the same parties, at the same court, only one travel fee and one *per diem* compensation shall be allowed for attendance. Both shall be taxed in the case first disposed of, after which the *per diem* attendance fee alone shall be taxed in the other cases in the order in which they are disposed of."

"Sec. 983. The bill of fees of the clerk, marshal, and attorney, and the amount paid printers and witnesses, and lawful fees for exemplifications and copies of papers necessarily obtained for use on trials in cases where by law costs are recoverable in favor of the prevailing party, shall be taxed by a judge or clerk of the court, and be included in and form a portion of a judgment or decree against the losing party."

"Sec. 984. Before any bill of costs shall be taxed by any judge or other officer, or allowed by any officer of the treasury, in favor of clerks, marshals, commissioners, or district attorneys, the party claiming such bill shall prove by his own oath, or that of some other person having a knowledge of the facts, to be attached to such bill and filed therewith, that the services charged therein have been actually and necessarily performed as therein stated."

The objections taken by the defendants to the disallowance of items which were disallowed will first be considered.

1. *Docket fees.* In suits Nos. 1, 9 and 10, a solicitor's docket fee in each case was claimed, of \$20, for each one of the two hearings, but only one docket fee of \$20 was taxed in each one of the three cases. It is contended, for the plaintiff, that only one docket fee of \$20 in each one of the three cases was taxable; that the first hearing was not the "final hearing" referred to in the statute; that the docket fee of \$20 is only taxable once in a suit, although there is more than one trial or more than one hearing of the case; that a final hearing in an equity suit is the hearing pursuant to which the final decree is entered; and that there can be but one final hearing of a cause in the same court. The words of section 824 are, "on a final hearing in equity or admiralty." The same words were used in section 1 of the act of 1853. The words "final hearing" had a recognized meaning, in the practice and procedure of courts, in 1853. Those words are found in the removal act of July 27, 1866, (14 St. at Large, 306.) in the provision for a removal by a petition filed "at any time before the trial or final hearing of the cause," which provision is reproduced in that language in subdivision 2 of section 639 of the Revised Statutes. They are also found in the removal act of March 2, 1867, (14 St. at Large, 558,) in the provision for a removal by a petition filed "at any time before the final hearing or trial of the suit," which provision is reproduced in subdivision 3 of section 639

of the Revised Statutes, in this language: "at any time before the trial or final hearing of the suit."

In reference to this act of 1867 it was said by Chief Justice WAITE, in *Vannevar v. Bryant*, 21 Wall. 41, 43: "The act authorizes the petition for removal to be filed 'at any time before the final hearing or trial of the suit.' The hearing or trial here referred to is the examination of the facts in issue. 'Hearing' applies to suits in chancery and 'trial' to actions at law." In the same case, *sub nom. Bryant v. Rich*, 106 Mass. 180, 192, it was said by Justice GRAY, that the words "final hearing or trial," in the act of 1867, would seem to be equivalent in meaning to the words "trial or final hearing," in the act of 1866. In reference to these words in the acts of 1866 and 1867, it is said by Judge DILLON, in his work on the Removal of Causes, (3d Ed. c. 15, § 59, p. 73,) as the result of numerous authorities cited: "Under this language, the petition for the removal *may*, it is certain, be made at any time before entering upon the final trial, or the hearing on the merits."

In *Doughty v. West, Bradley & Cary Manuf'g Co.* 8 Blatchf. C. C. 107, it was said by WOODRUFF, J., in 1870, in reference to the allowance of a docket fee under section 1 of the act of 1853:

" 'Trial' and 'final hearing' have well-known definite meanings in the law, and they are used in this statute in that well-known sense. 'Trial' is used to describe the process of determining the issues in an action at law; and 'final hearing,' the submission of the case, for a determination thereof, upon the pleadings, or pleadings and proofs, or otherwise, so that the case may be finally disposed of."

The distinction between interlocutory applications and final hearings is a fundamental one in equity proceedings; and, when the expression "final hearing" is used in reference to an equity suit, it is used in contradistinction to an interlocutory application.

In 2 Daniell, Ch. Pr. c. 35, § 1, (4th Amer. Ed. 1587,) it is said:

"An interlocutory application is a request made to the court, or to a judge in chambers, for its interference in a matter arising in the progress of a cause or proceeding; and it may either relate to the process of the court, or to the protection of the property in litigation *pendente lite*, or to any matter upon which the interference of the court or judge is required before or in consequence of a decree or order."

This distinction is recognized in the rules in equity prescribed by the supreme court. Rule 1 is as follows:

"The circuit courts, as courts of equity, shall be deemed always open for the purpose of filing bills, answers, and other pleadings; for issuing and returning mesne and final process and commissions; and for making and directing all interlocutory motions, orders, rules, and other proceedings preparatory to hearing of all causes upon their merits."

This rule went into effect August 1, 1842, and has been in force ever since. So, in rule 29 of the rules in admiralty prescribed by the supreme court, it is provided that a default in answering a libel may be set aside, and an answer allowed, "at any time before the final

hearing and decree." This rule has been in force since September 1, 1845.

In *Dedekam v. Vose*, 3 Blatchf. C. C. 77, in 1853, in this court, where a decree dismissing a libel in admiralty had been affirmed, it was held by Mr. Justice NELSON and Judge BETTS, that the proctor could not have a docket fee of \$20 for each one of two terms at which the cause was on the calendar, but could have one docket fee.

In *Hayford v. Griffith*, Id. 79, in 1853, in this court, where an appeal in admiralty was dismissed by the court on motion, before hearing, for irregularity, it was held by Mr. Justice NELSON that the docket fee was allowable, because the cause was on the calendar for hearing and was finally disposed of.

In *Dedekam v. Vose*, Id. 153, in 1853, in this court, where, after a decree in admiralty had been affirmed, there was an order by default against stipulators, it was held by Judge BETTS that a docket fee could not be charged therefor, as a final hearing, because it was an interlocutory or collateral proceeding by motion.

In *Doughty v. West, Bradley & Cary Manuf'g Co.* 8 Blatchf. C. C. 107, in 1870, in this court, there was a reference to a master growing out of a motion for an injunction before final hearing, and it was held by Judge WOODRUFF that a docket fee for the reference, as a trial or final hearing, was not taxable.

In *Goodyear Dental Vulcanite Co. v. Osgood*, 2 Ban. & A. 529, in 1878, in the circuit court for the district of Massachusetts, there were, in each of two equity cases, a bill, an answer, and a replication, and each case was dismissed by an order of the court, on the plaintiff's motion, there having previously been an interlocutory decree in each suit, which substantially decided the merits of the controversy; and it was held by Judge SHEPLEY that a docket fee of \$20 was taxable in each of the two cases. He said:

"In the taxation of costs, 'final hearing' is to be considered as the submission of a cause in equity for the determination of the court, so that the case may be finally disposed of upon bill and answer, or bill, answer and replication, or upon pleadings and proofs, or otherwise, after the case is at issue."

In *The Bay City*, 3 FED. REP. 47, in 1880, in the trial of a suit in admiralty in the district court for the Eastern district of Michigan, evidence was given on both sides, and leave was granted to the libellant to give further proof, the court having intimated an opinion that he had not made out a case. He then discontinued the suit. Judge BROWN held that the docket fee was taxable, and was not dependent on a judgment or decree, but was taxable on a trial or final hearing.

In *Strafer v. Carr*, 6 FED. REP. 466, in 1881, in the district court for the Southern district of Ohio, there were two disagreements of juries, and then the plaintiff dismissed the case. It was held by Judge SWING that no docket fee of \$20 was taxable, but only a discontinuance fee of \$5.

In *Schmieder v. Barney*, 19 Blatchf. C. C. 143, S. C. 7 FED. REP.

451, in 1881, in this court, there were three trials before a jury; *first*, the plaintiff had a verdict, and the defendant obtained a new trial; *second*, the defendant had a verdict, and the plaintiff obtained a new trial; *third*, the defendant had a verdict. It was held by Judge BLATCHFORD that each of the three trials was a complete trial, and that the defendant was entitled to tax three docket fees of \$20 each.

In *Coy v. Perkins*, 13 FED. REP. 111, in 1882, in the circuit court for the district of Massachusetts, there was a demurrer to a bill in equity, and the plaintiff, without notice to the defendant, or hearing or consideration of the case by the court, entered an order as of course, dismissing the bill. It was held by Mr. Justice GRAY and Judge LOWELL (Judge NELSON concurring) that the docket fee was not taxable. Mr. Justice GRAY says, referring to sections 823 and 824:

"We are of opinion that, upon the face of the statute, the intention of the legislature is manifest, that it is only where some question of law or fact, involved in or leading to the final disposition actually made of the case, has been submitted, or at least presented, to the consideration of the court, that there can be said to have been a final hearing which warrants the taxation of a solicitor's or proctor's fee of \$20; as, for instance, where the court, on motion and argument, dismisses for irregularity an appeal from the district court, as in the case before Mr. Justice NELSON, of *Hayford v. Griffith*, 3 Blatchf. C. C. 79, or where the plaintiff discontinues after the court has substantially decided the merits of the case, either in an opinion expressed at the hearing upon the merits, as in the case of *The Bay City*, before Judge BROWN, (3 FED. REP. 47,) or by a previous interlocutory decree, as in *Goodyear Dental Vulcanite Co. v. Osgood*, decided by Judge SHEPLEY in February, 1878."

In *Yale Lock Manuf'g Co. v. Colvin*, 21 Blatchf. C. C. 168, S. C. 14 FED. REP. 269, in 1882, in this court, where a suit in equity was voluntarily discontinued by the plaintiff, without any hearing or decision by the court, Judge WHEELER held that the docket fee was not taxable.

In *The Alert*, 15 FED. REP. 620, in 1883, in the district court for the Eastern district of New York, a vessel was in custody, in an admiralty suit *in rem*, and the case was entered on the admiralty docket. An order was afterwards made by the court dismissing the case, and discharging the vessel from custody, on payment of costs, founded on a consent of the libelant that the cause be discontinued on payment of the amount claimed, and the libelant's costs. Judge BENEDICT held that, as an order of court was necessary to obtain the release of the vessel and to cancel the libelant's stipulations, the hearing on the motion to that effect was a final hearing, and the docket fee was taxable.

In *Huntress v. Town of Epsom*, 15 FED. REP. 732, in 1883, in the circuit court for the district of New Hampshire, there was a disagreement of one jury, and afterwards a verdict by another jury. Judge CLARK held that only one docket fee of \$20 could be allowed.

In *Goodyear v. Sawyer*, 17 FED. REP. 2, in 1883, in the circuit court for the Western district of Tennessee, in six suits in equity, Judge

HANMOND held that the docket fee was taxable where, after a cause was set on the hearing docket, it was dismissed by an order of the court, either generally or without prejudice, on motion of the plaintiff; and also where, after a decree against the defendant for an injunction and an account, and for costs, the cause was dismissed by the court on motion of the plaintiff. There were answers in all the cases, and replications in two, but no replications in the others.

In *Andrews v. Cole*, 20 FED. REP. 410, in 1884, in this court, in a suit in equity, there was an order *pro confesso*, followed by a final decree. It was held by Judge WALLACE that there had been a final hearing, and that a docket fee was taxable, because a final decree after an order *pro confesso* was not a matter of course.

The conclusion from the considerations above stated, supported as they appear to be by all the cases cited, except, perhaps, that of *Goodyear v. Sawyer*, is that to constitute "a final hearing in equity or admiralty," within the meaning of section 824, there must be a hearing of the cause on its merits; that is, a submission of it to the court in such shape as the parties choose to give it, with a view to a determination whether the plaintiff or libellant has made out the case stated by him in his bill or libel as the ground for the permanent relief which his pleading seeks, on such proofs as the parties place before the court, be the case one of *pro confesso*, or bill or libel and answer, or pleadings alone, or pleadings and proofs. Nor does it detract from the force of this conclusion, that what is called an interlocutory decree, as distinguished from a final decree, is often entered as the result of a decision on a final hearing. In 2 Daniell, Ch. Pr. c. 26, § 1, (4th Amer. Ed.) 986, it is said:

"A decree is a sentence or order of the court, pronounced on hearing and understanding all the points in issue, and determining the right of all the parties to the suit, according to equity and good conscience. It is either interlocutory or final. An interlocutory decree is when the consideration of the particular question to be determined, or the further consideration of the cause generally, is reserved till a future hearing."

The docket fee is given by section 824 as a fee to the solicitor or proctor "on" the final hearing. If there is such a final hearing as is above defined, the fee is taxable, as between party and party, in behalf of the party to whom the costs of the cause are awarded. Nor is there anything in the statute which forbids the allowance of a docket fee on or for each trial before a jury where there is a verdict, or on or for each final hearing in equity or admiralty, if there are two or more final hearings, such as are above defined, in the same cause. A new trial granted after verdict is as complete a trial, if there is a verdict in it, as was the first trial; and a rehearing or second hearing, such as was had in suits Nos. 1, 9, and 10, after a decision was rendered in them, is as complete a final hearing as was the first one.

I am, therefore, of opinion that the second \$20 docket fee, in each of the three cases so reheard, must be allowed.

2. *Depositions admitted in evidence by stipulation.* There were, in each one of suits Nos. 2, 3, 4, 5, 6, 7, and 8, depositions admitted in evidence, by stipulation or order, which were not taken in the case in which they were so admitted. They number in all 150 depositions, and the fees for them, at \$2.50 each, are \$375. Those fees were disallowed on taxation. In suits Nos. 2, 3, 5, and 6 there was a stipulation that the depositions of two persons, taken in suits Nos. 1, 9, and 10, might be put in evidence by the defendants, in suits Nos. 2, 3, 5, and 6, "with the same force and effect as if" those two persons "were personally examined herein and testified as they have testified in said depositions;" and that the depositions of two other persons, theretofore taken in suits Nos. 1, 9, and 10, might "be read upon the final hearing," in suits Nos. 2, 3, 5, and 6, "with the same force and effect as if duly taken," in suits Nos. 2, 3, 5, and 6, "on the part of complainant." In suits Nos. 4 and 5 there was a stipulation that all the evidence taken in suit No. 3 "be admitted as evidence" in suits Nos. 4 and 5, "subject to all objections entered in the record" in suit No. 3, "with the same force and effect as if said evidence had been adduced" in suits Nos. 4 and 5; and that the evidence of two persons, theretofore taken in suit No. 10, "be admitted as evidence" in suit No. 5. In suit No. 6 there was a stipulation that the deposition of one person, taken in suit No. 3, be considered as taken in suit No. 6, "for the purposes thereof." In suit No. 7 an order was made, on consent of both parties, that all of the evidence theretofore taken on behalf of either party, in suits Nos. 2, 3, and 4, "be treated as evidence" in suit No. 7, on behalf of the party "who introduced and took the same" in suits Nos. 2, 3, and 4, "with the same effect (except on question of costs) as if duly taken" in suit No. 7. In suit No. 8 an order was made, on consent of both parties, that the proofs theretofore taken in suits Nos. 2, 3, 4, and 7 "be admitted as evidence for final hearing," in suit No. 8.

The defendants contend that, by these stipulations in the suits other than No. 7, it was agreed that the depositions should be treated in all respects as if taken in the respective suits into which they were admitted; that, independently of such agreement, the fee was taxable in all the cases in which the depositions were admitted in evidence; and that there is nothing in the stipulation in suit No. 7 which varies that rule.

In *Dedekam v. Vose*, 3 Blatchf. C. C. 77, in 1853, in this court, it was held by Mr. Justice NELSON and Judge BETTS, in an appeal in admiralty, that the fee of \$2.50 could not be taxed for a deposition taken in the district court and read in evidence in this court, at the hearing, from the apostles.

In *Stimpson v. Brooks*, Id. 456, in 1856, in this court, it was held by Judge BETTS that the fee was not taxable for a deposition taken and admitted as evidence on the hearing of a motion for a preliminary injunction.

In *Troy Iron & Nail Factory v. Corning*, 7 Blatchf. C. C. 16, in 1869, in the circuit court for the Northern district of New York, it was held by Mr. Justice NELSON that the word "deposition," in the act of 1853, did not include oral testimony taken in court or before a master, and applied only to a deposition given in evidence on the trial of a case at common law, and to one read at the hearing of a suit in equity.

In *Jerman v. Stewart*, 12 FED. REP. 271, in 1882, in the circuit court for the Western district of Tennessee, it was stipulated between the parties that depositions theretofore taken in a suit in a court of the state might "be read and used in evidence on the trial" of the suit in the circuit court. Judge HAMMOND held that the fee of two dollars and fifty cents for each of them was taxable, on the ground that, under section 824, it was not necessary that the depositions should be formally taken, but it was sufficient if they were taken in any way and admitted in evidence; that the depositions stood, in all respects, as if taken in the usual way, except that the cost of retaking was saved; that the fee of two dollars and fifty cents was not a part of the cost of taking the deposition, but, like the docket fee, was an allowance to the attorney, as taxable costs, for his professional services in the case; and that, unless the agreement of the parties waived it, it was as much taxable as any other costs.

In *Green v. French*, 5 N. J. Law J. 228, in 1882, in the circuit court for the district of New Jersey, there was a stipulation that the testimony taken in the case should be used in 13 other cases. Under the stipulation, 95 depositions taken and admitted in evidence in the first case were used in the 13 other cases. Judge NIXON held that the fee of two dollars and fifty cents was taxable for each deposition in each one of the 14 cases.

The contention of the plaintiff here is, that the fee for a deposition cannot be taxed in any other suit than that in which it was taken; that it is not enough that the deposition is "admitted in evidence in a case," but it must be taken in the same cause; that the object of the stipulations and orders was to save the labor and expense of taking the depositions more than once; and that, therefore, they cannot be charged for as actually taken when they were not actually taken.

The question has been before this court. In *Simon v. Neumann*, the depositions of 38 witnesses, taken in another suit in this court, heard at a different time, were admitted in evidence, by virtue of a stipulation that "all the evidence taken for the final hearing," on both sides, in the other suit, "may be read on the final hearing herein, with the same force and effect as if taken herein." On taxation, the clerk disallowed the charge of \$2.50 for each of the 38 depositions, and Judge WALLACE, in July, 1884, after hearing counsel for both parties, affirmed the taxation. No distinction favorable to the allowance of the fee can be taken between the case of *Simon v. Neumann* and the present cases, and it is proper that the ruling in that case should be followed as the law of this circuit, as the taxations in the

present cases, in October, 1884, were, as to this point, based on the ruling of this court in *Simon v. Neumann*.

3. *Copies of papers.* The following items in suit No. 1, for copies of papers, were disallowed:

1. Copy deposition in <i>Magic Ruffler Case</i> ,	- - - -	\$ 1 25
2. Copy deposition Wooster, (from Gutman,)	- - - -	5 70
3. Copy testimony Asa Wilnot,	- - - -	14 60
4. Certificate of loss of deposition and copy deposition, (Gutman,)	- - - -	3 60
5. Copy opinion,	- - - -	8 00
6. Stenographer's minutes of argument and copy,	- - - -	103 50
7. Copy testimony in interference, <i>Robjohn v. Pipo</i> ,	- - - -	47 50

The following items in suit No. 2, for copies of papers, were disallowed:

8. Copy <i>prima facie</i> proofs, (Gutman,)	- - - -	\$10 20
9. Copy of Carey's deposition, (Gutman,)	- - - -	7 50
10. Copy of Kellogg's deposition,	- - - -	5 75
11. Copy of Pipo's deposition,	- - - -	5 00
12. Copy of part of testimony taken,	- - - -	30 00

The following items in suit No. 9, for copies of papers, were disallowed:

13. Copy deposition Wooster, from Gutman,	- - - -	\$ 5 34
14. Copy of part of evidence before master,	- - - -	4 80

Item 1 was obtained to be used in opposing a motion for a preliminary injunction. Items 2, 8, 9, 10, 11, 12, 13, and 14 were for copies of testimony taken on behalf of the plaintiff, either in chief or before the master, the copies being procured by the defendant so as to be informed of the contents and to be prepared to meet the evidence. Item 3 was for a copy of a deposition of a person, obtained for use on a motion made in suit No. 1, by the defendant, to open the proofs therein and allow the deposition of that person to be taken as a witness in suit No. 1, the object of procuring the copy being to show the relevancy of the evidence. Item 4 was a certificate from the examiner as to the loss of the deposition of a witness taken in suit No. 1, and a copy of a second deposition of the same witness taken in suit No. 1, the certificate and copy being obtained for use on a motion in reference to the lost deposition. Item 5 was for a copy of the opinion of the court given on the decision in favor of the plaintiff on the first hearing in suit No. 1, the copy being obtained for use by the defendant in settling the decree on that decision. Item 6: At the first hearing in suit No. 1, the defendant had no brief prepared, and the hearing proceeded, with leave to the defendant to send in afterwards a printed argument. To enable him to do this, he employed a stenographer to take down the oral argument for the defendant. Item 7 was for a copy from the files of the patent-office of the testimony in an interference case. Accompanying the motion for a rehearing in suit No. 1, there was a motion by

the defendant for leave to put in evidence the interference testimony, and such copy was part of the moving papers, on that motion. The motion was not granted.

The provision of section 983 is, that "lawful fees for exemplifications and copies of papers necessarily obtained for use on trials, in cases where by law costs are recoverable in favor of the prevailing party, shall be taxed" and "be included in" the "judgment or decree against the losing party." The papers must be not only for use "on trials," or, as the act of 1853 says, "on trial,"—that is, such trials and final hearings as are elsewhere spoken of, (for this provision came from the act of 1853, and must be interpreted in the light of the other provisions of that act,)—but the language implies that the copies must have been actually used on or in the trial or final hearing, (or, at least, obtained for such use under a rule or an order or a stipulation,) and the fact of such use, or the existence of such rule or order or stipulation, is evidence that the copy was "necessarily obtained for use." As section 983 relates to exemplifications and copies of papers, it covers that subject, and excludes all of that class which are not there provided for. It excludes papers used on interlocutory or preliminary or incidental motions or hearings. Copies of papers in the suit, obtained from the clerk, and otherwise properly taxable, are included in the provision, in section 983, for taxing "the bill of fees of the clerk." In these cases, the plaintiff did not object to certified copies from the clerk, of orders in the suits, required by the rules to be served.

In *Hathaway v. Roach*, 2 Woodb. & M. 63, 74, in 1846, in the circuit court for the district of Massachusetts, even before the act of 1853, Mr. Justice WOODBURY disallowed a charge by the defendant for a copy of the plaintiff's patent, on the ground that it was not needed in order to be used as evidence by the defendant, but was wanted for preparation and argument.

In *Hussey v. Bradley*, 5 Blatchf. C. C. 210, in 1864, in the circuit court for the Northern district of New York, the expense of reporting for the court the argument on the final hearing was disallowed by Judge HALL (Mr. Justice NELSON concurring) because there was no agreement of the parties that the expense should be taxed.

Under the foregoing views, all of the above 14 items were properly disallowed.

4. *Traveling expenses of messengers and attorneys, and expense of box.* The following item in suit No. 1 was disallowed:

15. Expenses of messenger from patent-office with original models, - \$25 00

The following items in suit No. 2 were disallowed:

16. Expenses B. F. Lee, Syracuse, - - - - -	\$37 86
17. Expenses B. F. Lee, Wilkesbarre, - - - - -	20 50
18. Expenses B. F. Lee, at Boston, - - - - -	70 83
19. Box for preserving exhibits in clerk's office, - - - - -	5 80
20. Expenses W. H. L. Lee, at Navesink, - - - - -	2 00
21. Paid messenger from clerk's office, with exhibits, - - - - -	13 00

Item 15 was for the expense of a messenger in bringing from the patent-office, for use in opposition to a motion for a preliminary injunction in suits Nos. 1, 9, and 10, certain original filed models, with a view of showing that the original patents were invalid. Items 16, 17, 18, and 20 were for traveling expenses of the solicitor in attending to take testimony. Item 19 was for the cost of a box to preserve the exhibits in the clerk's office. Item 21 was for bringing from the clerk's office to the office of counsel, for use in taking testimony in suit No. 2, the exhibits and filed papers in suits Nos. 1, 9, and 10.

In *Hussey v. Bradley*, 5 Blatchf. C. C. 210, in 1864, in the circuit court for the Northern district of New York, Judge HALL (Mr. Justice NELSON concurring) disallowed the traveling expenses of counsel in attending court; and the expense of models and old machines used in evidence as exhibits, (which did not appear to be copies of models in the patent-office;) and the expenses of their transportation, and of taking charge of the same.

Item 15, being for use on a motion, cannot be classed as amounting to the use, as evidence in chief, of a copy of a model in the patent-office.

It is sought to maintain the propriety of allowing items 16, 17, 18, 19, 20, and 21, on the view that they were actual disbursements necessarily incurred in the exercise of the right of examining witnesses; and the cases of *Hussey v. Bradley*, 5 Blatchf. C. C. 212; *Dennis v. Eddy*, 12 Blatchf. C. C. 195; and *Gunther v. Liverpool, etc., Ins. Co.* 20 Blatchf. 390, S. C. 10 FED. REP. 820, are cited. In the first case, money paid for telegraphic dispatches, properly and necessarily expended in the progress of the suit, was allowed, on the same principle on which necessary and proper postages were allowed. In the second case, the cost of printing papers which a rule of court required to be printed was allowed, as a necessary disbursement, made by order of the court; and it was held that the act of 1853 did not prohibit the allowance of indemnity for such disbursements as were made necessary by an order of the court. In the third case, it was held that a disbursement of one dollar, paid for serving the summons by which a suit at law was commenced, was taxable as a necessary disbursement actually made, and taxable by virtue of the rules of the court, it having been so taxable prior to the act of 1853; and that section 983, relating to copies of papers, did not forbid the taxation of disbursements other than fees for such copies of papers. In this connection it may be noted, that section 5 of the act of 1853 provided as follows: "All laws and regulations heretofore made, which are incompatible with the provisions of this act, are hereby repealed and abrogated." But rules and regulations not so incompatible remained in force.

Items 16, 17, 18, 19, 20, and 21 were never taxable before or since the act of 1853.

5. *Machine exhibits.* The following items in suit No. 1 were disallowed:

22. Exhibit Carey Machine, - - - - -	\$ 23 00
23. Exhibit Wilnot First Ruffer; Exhibit No. 13, (Barney;) Exhibit Crosby & Kellogg Spring Blade Machine, - - - - -	170 00
24. Ruffers Exhibit, (hinged, etc.,) - - - - -	10 00

The following items in suit No. 2 were disallowed:

25. Ruffer Exhibits, - - - - -	\$ 5 00
26. Fanning machine, - - - - -	66 25

These machine exhibits represented structures regarding which proof was given that they anticipated the plaintiff's patent, and the models enabled the oral evidence to be understood. But they were none of them models from the patent-office of the patented invention in suit. Items for exhibits of that character were taxed. Nor were any of the items disallowed procured under order or rule of court, nor was there any stipulation that they should be taxed. Such machine exhibits were not taxable before the act of 1853. *Hathaway v. Roach*, 2 Wood. & M. 63.

The cases of *Parker v. Bigler*, 1 Fisher, 285, in 1857, and *Woodruff v. Barney*, 2 Fisher, 244, in 1862, are to the effect that the items here in question cannot be allowed.

In *Hussey v. Bradley*, 5 Blatchf. C. C. 110, in 1864, in the circuit court for the Northern district of New York, Judge HALL held (Mr. Justice NELSON concurring) that the expense of copies of models in the patent-office, properly procured for use as a part of the evidence in the suit, might be allowed for, but that the expense of other models and machines was not allowable.

6. *Photolithographing exhibits.* The following item in suit No. 2 was disallowed:

27. Photolithographing exhibits, - - - - -	\$17 75
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These were not drawings from the patent-office, but were sketches introduced by witnesses in giving their evidence. They fall under the rule as to machine exhibits, as they were substantially of that character.

7. *Witness fees not paid.* The following items for witness fees were disallowed:

In suit No. 2, 3 witnesses, 1 day each, - - - - -	\$ 4 50
" No. 3, 7 " 1 " - - - - -	10 50
" No. 4, 6 " 1 " - - - - -	9 00
" No. 5, 7 " 1 " - - - - -	10 50
" No. 6, 7 " 1 " - - - - -	10 50

These witnesses had not been paid their fees in these several cases, but had been paid their fees as witnesses in one or more of others of these cases.

The statute (section 983) allows the amount "paid" to witnesses to be taxed. In *Cummings v. Akron Cement, etc., Co.* 6 Blatchf. C. C. 509, and *Dennis v. Eddy*, 12 Blatchf. C. C. 195, as is clearly to be inferred, the witnesses had been paid, and the question was whether their

fees were taxable, inasmuch as it was not shown that they had attended on service of a subpoena.

If a party does not pay a witness either before or after he has testified, the presumption is that the debt is forgiven, unless the failure to pay is explained in such wise that the fee can be considered as if "paid," because both parties intend it shall be paid. Nothing of that kind here appears. Witnesses are generally paid in advance, or at the time, or soon afterwards, and where, as here, they are paid in one or more cases, and not in others, the evidence is strong that they are never to be paid, especially where the lapse of time is so great, as here, between the rendering of the service and the taxation.

The objections taken by the plaintiff to the allowance of items which were allowed will next be considered.

8. *Depositions of witnesses sworn in more cases than one.* In suits Nos. 1, 9, and 10 there was but one record of proofs, and each witness on both sides was sworn in each of the three suits; and his deposition was written down only once, and was entitled in the three suits. The same is true as to suits Nos. 2, 3, 5, and 6, except that a few depositions taken in other cases were admitted by stipulation. The record in suit No. 4 was the same as that in suits Nos. 2, 3, 5, and 6, a part of it being admitted by stipulation from other cases, and, as to the rest, each witness being sworn in this case, and in each one of suits Nos. 2, 3, 5, and 6, and his deposition written down only once, and entitled in the five cases. In the bills of costs as taxed, the clerk allowed a deposition fee to the solicitor of two dollars and a half for each witness in each case in which his deposition was entitled, although in suits Nos. 1, 9, and 10, as a group of titles, the testimony of the witness was written down but once, on one direct and one cross-examination for all three cases, and in suits Nos. 2, 3, 4, 5, and 6, as a group of titles, the testimony of the witness was written down but once, on one direct and one cross-examination, for all five cases. The plaintiff contends that there should be but one deposition fee of two dollars and a half for each witness, for each writing down of his testimony. His objection covers the following number of depositions taxed: Suit No. 1, 18; suit No. 3, 42; suit No. 4, 14; suit No. 5, 39; suit No. 6, 40; and suit No. 9, 19; in all, 172, at \$2.50 each, \$430.

The language of section 824 is, "for each deposition taken and admitted in evidence in a cause, two dollars and fifty cents." The act of 1853 said, "in the cause." Each of the depositions allowed for was taken and admitted in evidence in each suit in which it was entitled. It was for the parties to agree that the fee should be taxed but once for the group of cases, if that was to be the rule. Otherwise, the fee was taxable, because the deposition was taken in each case, and admitted in evidence in each case, although the writing was not repeated for each case. Where several cases are heard at the same time, on one argument, a docket fee is always taxed in each case.

9. *Fees paid the same witness in more than one case.* In the cases

mentioned in clause 8, above, where the witness was sworn in several cases at once, but his deposition was taken in all of them at the same time, by being written down once, as given, under the titles of all of the several cases, the defendants paid the witness his lawful witness fees in each one of the several cases in which his deposition was entitled, to the same extent they would have done if his deposition had been written down separately for each of the cases. The clerk taxed the fees so paid. The plaintiff objects to the taxation. The amounts objected to are, in the several suits, as follows: No. 3, \$75; No. 4, \$18; No. 5, \$73.50; No. 6, \$75; No. 9, \$42; No. 10, \$42.

By section 848, a witness is allowed one dollar and fifty cents for each day's attendance in court, or before an officer pursuant to law. This necessarily means that he is entitled to that in each suit in which he attends. The same section makes special provision for the case where a witness is subpoenaed "in more than one cause between the same parties, at the same court;" thus leaving the case where he attends in more than one cause between different parties, or where only one of the parties is the same, to be regulated by the general provision, in the absence of any rule of court, or special order, or stipulation of parties. This view was held in *Parker v. Bigler*, 1 Fisher, 285, in 1857, in the circuit court for the Western district of Pennsylvania, by Mr. Justice GRIMMER.

10. *Certified copies of papers put in evidence.* The clerk allowed, on taxation, the disbursements paid for various copies of papers put in evidence by the defendants, and forming part of the record for final hearing. They comprised documentary exhibits not from the patent-office; documentary exhibits from the patent-office, (other than patents,) but which were not part of the file wrapper and contents of the patent sued on, and not assignments affecting the plaintiff's title to that patent; and certified copies of patents other than the one sued on, which did not affect the plaintiff's title to that patent, and were not mentioned in the bill of complaint. One of the above items was for drawings from the patent-office, to bind with the printed record, being drawings of patents and drawings in file wrappers. They pertained to the text in the record, and fairly come under the head of the printing required by the rule. All of the above items were taxable. They were, under section 983, "copies of papers necessarily obtained for use," being put in evidence, and there being no order rejecting them as evidence.

11. *Incompetent and immaterial testimony.* Under the provision in rule 67 in equity, that "the court shall have power to deal with the costs of incompetent, immaterial, or irrelevant depositions, or parts of them, as may be just," the plaintiff, now, for the first time, on an appeal from the taxation of costs, applies to the court to declare certain depositions to be incompetent and immaterial. This is done on an affidavit made by the counsel for the plaintiff, more than a month after the costs were taxed, setting forth that, in his opinion, certain

depositions, evidence, and exhibits introduced by the defendants are incompetent or immaterial, and the cost of introducing and printing them should not be charged against the plaintiff. He specifies 18 different items. The counsel for the defendants makes an affidavit expressing a contrary opinion. Under this state of facts, it is a sufficient ground for denying the application, that the plaintiff did not, at or before the final hearing in June, 1884, or before the taxation of costs, move to strike out the evidence in question. Whatever objections may have been taken to any of the testimony at the time it was introduced, (and only such objections could be considered, in any event,) they were waived by the laches. It results that the taxations are all of them affirmed, except that, in each of the suits Nos. 1, 9, and 10 a docket fee of \$20 is to be added.

FOSTER, who sues, etc., v. SEYMOUR and Others.

(*Circuit Court, S. P. New York. February 6, 1885.*)

CORPORATION—ISSUE AND EXCHANGE OF STOCK FOR OTHER PROPERTY BY TRUSTEES—FRAUD—ACCOUNT.

Where the statute under which a company is incorporated authorizes the trustees to issue stock and exchange it for property, and declares that when exchanged such stock shall be taken to be full-paid stock and not liable to further calls; and the trustees, being the only members of the corporation, exchange the whole capital stock in payment for the purchase of mining property owned by themselves, and, after division and distribution of the stock among themselves, sell it as full-paid stock to innocent purchasers,—such purchasers cannot maintain a suit to compel the trustees to account to the corporation for a fraudulent disposition of its capital stock.

In Equity.

W. F. Scott, for plaintiff.

H. M. Ruggles and *T. W. Osborn*, for defendants.

WALLACE, J. The bill of complaint is filed by the complainant as the holder of certain shares of stock in the Central Arizona Mining Company against that corporation and its trustees personally to require the trustees to account to the corporation for a fraudulent disposition of its capital stock. The bill alleges, in substance, that the whole capital stock of the corporation, which was fixed and limited by the certificate of incorporation of the company at 100,000 shares of \$100 each, was exchanged by the trustees of the corporation in payment for the purchase of mining property owned by the trustees personally, or some of them, the value of which did not exceed \$100,000, as the trustees knew. The bill further alleges that the trustees, after such exchange of the capital stock, divided and distributed it among themselves, and sold it as full-paid stock to innocent purchasers including the complainant; and the trustees realized large sums

of money thereby which they applied to their own use. The bill also contains allegations for the purpose of showing that the trustees exert entire control over the corporation, and that the corporation refuses to bring an action against them for relief in the premises. It is not alleged in the bill that when the stock of the corporation was exchanged for the mining property any part of the capital stock had been subscribed for, or that any part of it had ever been paid into the company, or that it represented any corporate property; but the bill alleges that the trustees issued it, and delivered it as full-paid stock to themselves in exchange for the mining property.

The statute under which the company was incorporated authorizes the trustees to issue stock and exchange it for property, and declares that when exchanged such stock shall be taken to be full-paid stock, and not liable to further calls. Laws N. Y. 1853, c. 333, § 2. The statute, however, permits the trustees to exchange stock to the amount only of the value of the property for which it is exchanged. Upon these facts the corporation has no right of action against the trustees.

The corporation lost nothing by the transaction disclosed by the bill, except the paper which was created and called capital stock. None of its capital was diverted. The scrip was not capital stock. The capital stock of a corporation is the money or property which is put into a corporate fund by those who subscribe for stock, and thereby agree to become members of the corporate body. Unless it represents capital contributed, or agreed to be paid in, it has no value. *Burrall v. Bushwick R. Co.* 75 N. Y. 216; *Sturges v. Stetson*, 1 Biss. 246. The property it received in exchange for the scrip had some value; certainly as much as the scrip had. There was no fraud upon the corporation. At the time the scrip was exchanged for the mining property, the trustees were all there was of the corporation. There were no stockholders unless they were stockholders. What was done was done by the corporation. By the exchange the corporation got the mining property, and gave it back again to those from whom it got it, divided into 100,000 shares of the nominal value of \$100 each. *The Ambrose Lake Tin & Copper Min. Co.* (*Ex parte Taylor*), L. R. 14 Ch. Div. 390; *Re Seamless Box Co.* L. R. 17 Ch. Div. 46.

The transaction as alleged was a fraud upon the public. It was equivalent to an overissue of stock by a corporation to its stockholders. It was calculated to lead parties, dealing with the corporation in ignorance of the facts, to believe that it had a paid-up capital stock of \$10,000,000, and representing a corporate fund of that amount invested in mining property. By putting out the scrip, the trustees represented to the public, who have no means of knowing of the private contracts made between a corporation and its stockholders, that the capital stock had been subscribed for and paid in. It was not a fraud upon stockholders, however, because there were none; nor necessarily upon persons subsequently becoming stockholders, because the stock was full-paid stock, and not liable to any further calls in

the hands of those who might purchase it. *Scovill v. Thayer*, 105 U. S. 143. A purchaser of the stock would not be injured by the transaction unless he paid more for it than it was worth; and every purchaser would stand upon the particular circumstances of his purchase. If the original transaction, in connection with the special facts of a purchase of stock, should operate as a fraud upon a purchaser, the cause of action would be his, and not that of the corporation. The fraudulent character of the transaction was imparted to it by the corporation itself; that is, by those who represented all there was of the corporation. The remedy of the complainant, if he has been deceived into the purchase of stock by false representations as to its value, is against those who have misled him. Even if he could recover against the corporation or against the trustees, (see *Fosdick v. Sturges*, 1 Biss. 255,) the corporation has no cause of action against the trustees.

Upon the argument of the demurrer, the opinion was expressed that the bill was defective in not alleging the necessary efforts of the complainant to set the corporation in motion to seek such redress as it ought to seek, within the rule declared in *Hawes v. Oakland*, 104 U. S. 460, and subsequent cases in the supreme court. It has been deemed proper, however, to meet the main question in the case in disposing of the demurrer.

The demurrer is sustained.

GREEN v. COOS BAY WAGON ROAD CO.

(Circuit Court, D. Oregon. March 2, 1885.)

1. STATUTE OF LIMITATIONS.

An agreement or promise made without a consideration to postpone or extend the time of payment of a debt or demand is void, and does not, therefore, prevent the running of the statute against the right of the creditor to maintain an action thereon.

2. SAME—ACKNOWLEDGMENT.

From an acknowledgment of the existence of a debt under circumstances that indicate a willingness or liability to pay the same, the law will imply a promise to pay, upon which an action may be maintained during the statutory period of limitation thereafter.

3. NEW PROMISE—HOW PLEADED.

In pleading a new promise, or an acknowledgment or agreement from which such promise will be implied, it need not be alleged that the same was made in writing, but that fact will be presumed until the contrary is shown.

Action to Recover Money.

Thomas N. Strong, for plaintiff.

James F. Watson and Edward B. Watson, for defendant.

DEADY, J. This action is brought by A. T. Green, of California, against the defendant, a corporation duly formed under the laws of

Oregon, to recover the sum of \$3,000, with interest from June 1, 1875, amounting to \$2,825. The action was commenced on November 10, 1884; and it is alleged in the complaint that on April 17, 1875, the defendant was the owner of 96,325 acres of land in Douglas and Coos counties, in this state, for 35,533 acres of which it had a patent from the United States, and was entitled to a patent for the remainder; that the defendant then agreed with the plaintiff that if he would find a purchaser for said lands, it would pay him a commission of \$5,000; that the plaintiff accepted said proposition, and afterwards, on May 31, 1875, the plaintiff found a person who purchased said lands of the defendant at one dollar per acre, and paid for the patented portion thereof at once, and agreed to pay for the remainder as soon as the patent was issued therefor; that on July 26, 1875, the defendant paid the plaintiff on account the sum of \$2,000, and requested him "to wait for the payment" of the remaining \$3,000 until it received the balance of the purchase price, to which he agreed; that the plaintiff at the same time agreed to, and afterwards did, assist the defendant to get the remainder of said purchase price, which was paid to it on January 7, 1884; and that on January 12th, the plaintiff duly demanded of the defendant payment of said \$3,000, with legal interest thereon from June 1, 1875, which it refused. The defendant demurs, for that "it appears on the face of the complaint that said action was not commenced within the time prescribed by law," and "is barred by the statute of limitations."

The Code of Civil Procedure, § 66, provides that the defense of the statute of limitations may be made by demurrer when it appears on the face of the complaint that the action has not been commenced within the period prescribed by law. The contention of the defendant is that it appears from the complaint that whatever was to be paid to the plaintiff for his services in procuring a purchaser of the property was due and payable on May 31, 1875, when the service was performed, or, at the furthest, on July 26th, when the purchaser paid the first installment of the purchase money, and the plaintiff received the two-fifths of the commission claimed by him, and that at the expiration of the six years thereafter, to-wit, July 26, 1881, the claim for the balance of \$3,000 was barred by the lapse of time. The plaintiff's answer to this proposition is that by the agreement of July 26th, the payment of his claim was postponed until the defendant should receive the remainder of the purchase money, which did not occur until January 7, 1884, at which time the statute commenced to run against the claim, and not before; citing *Webber v. Williams College*, 23 Pick. 302; Ang. Lim. p. 111, § 120; *Lichty v. Hugus*, 55 Pa. St. 434; *Irving v. Veitch*, 3 Mees. & W. 90. According to the complaint this \$3,000 was due the plaintiff at the date of this agreement, and had been since June 1st, from which time he seeks to recover interest on that sum. Without doubt, if the arrangement made between the parties on July 26, 1875, constituted a valid agreement, the day of payment

was postponed until January 7, 1884, and the statute did not commence to run until that time.

But it does not appear that there was any consideration for the plaintiff's promise to delay action in the premises. The defendant neither gave nor forebore anything in consideration of or on account of the plaintiff's promise; while, on the other hand, the plaintiff undertook the further service of helping to obtain the remainder of the purchase money without, as appears, any compensation therefor. The promise was then a mere *nudum pactum*, which did not in law prevent the plaintiff from maintaining an action in the mean time to recover whatever was due him from the defendant. And from the time the plaintiff's right to sue commenced, the statute commenced to run against it, and cut it off by June 1, 1881. As was substantially said in *Chace v. Chapin*, 130 Mass. 128, of a similar agreement between the maker and payee of a note to postpone the day of payment thereof, there is no advantage to the defendant nor disadvantage to the plaintiff growing out of the agreement which can constitute a consideration for the plaintiff's promise to postpone the payment of the sum then due him, and therefore it is not binding on him. Notwithstanding the promise, he could, at any time within six years from June 1, 1875, have maintained an action against the defendant to recover the unpaid commission. See, also, *Shapley v. Abbott*, 42 N. Y. 447.

The cases cited by counsel for the plaintiff do not support his contention in this respect. In *Irving v. Veitch*, *supra*, the agreement to postpone the payment of the defendant's notes was made on a valuable consideration. Besides, there were payments made on them within six years before the action was commenced, which circumstance of itself was sufficient evidence of an acknowledgment whereon to raise an implied promise to pay the notes. In *Lichty v. Hugus*, *supra*, it was decided that the statute will not run against the claim of an attorney for compensation for services until the undertaking in which he is engaged is performed, or the relation of attorney and client is terminated. To the same effect is the citation from *Angel*, *supra*. But the relation of attorney and client never existed between these parties. And however analogous the relation between them may have been to that of attorney and client, it came to an end on June 1, 1875, and the only relation that existed between them thereafter was that of debtor and creditor. The plaintiff was not employed for a continuous and indefinite service, but to do a specific thing,—a job; to find a purchaser for the defendant's land at an agreed compensation. This he did on May 31, 1875, and was then entitled to his commission. Afterwards, the plaintiff, on receiving two-fifths of what was due him, agreed to wait for the payment of the remainder until the happening of a certain event.

The case of *Webber v. Williams College*, *supra*, is not in point. The plaintiff held the note of the defendant, which would become due

within the year. The defendant wrote to the plaintiff asking a year's delay, and saying that the right of the latter to sue should not be prejudiced by the delay. The creditor answered, denying the request, but did in fact delay bringing an action on the note for a year, and until the statute had run. The defendant pleaded the statute, and the court held with the plaintiff. The matter is very summarily and somewhat obscurely disposed of, the court saying that the defendant's offer was "a good waiver of the statute of limitations." The expression "waiver of the statute" is misleading, and not applicable to the case. A party may be said to *waive* the statute by not pleading it when he might, but not otherwise; and the better opinion seems to be that the bar of the statute cannot be waived or renounced in advance, as that would put it in the power of individuals to dispense with the law, contrary to the public policy and peace it is intended to promote and preserve. Ang. Lim. § 247, note. But, whatever may be said of the grounds of the decision, there is no doubt of its correctness. It was a clear case of an acknowledgment of the existence of the debt by the debtor, under circumstances that indicated a willingness to pay the same, from which the law implied a promise to pay that might be enforced by an action within the statutory period thereafter. And so the case is characterized in *Shapley v. Abbott*, *supra*, 447, and in Ang. Lim. § 247, note. And so the agreement in this case, so far as the defendant is concerned, may be the equivalent of an acknowledgment of the debt. But it does not appear from the complaint to have been reduced to writing and signed by the defendant.

The Code of Civil Procedure, § 24, provides that "no acknowledgment or promise is sufficient evidence of a new or continuing contract," to take a case out of the operation of the statute of limitations, "unless the same is contained in some writing, signed by the party to be charged thereby." But I presume the rule in pleading a contract within the statute of frauds applies in this case. It is sufficient to allege the matter according to its tenor or legal effect, without stating that it was in writing, and if the adverse party wishes to take advantage of the statute he must aver that it was not in writing as a matter of defense or reply, as the case may be. *Lamb v. Starr*, Deady, 358.

Assuming, then, that the agreement of July 26th was in writing, it was in effect a valid acknowledgment of an existing debt that the defendant was willing to pay. And from this the law would imply a promise by the defendant to pay, grounded on the consideration of the antecedent liability, from which point of time the statute of limitations commenced to run against the claim anew. *Bell v. Morrison*, 1 Pet. 351; Ang. Lim. c. 22. The acknowledgment, however, does not take the case out of the operation of the statute prospectively, but only as to the past. It commences to run again simultaneous with the new promise, and in six years thereafter bars the remedy thereon.

Now, the acknowledgment in this case being made on July 26, 1875, the statute had run against the action of the new promise on the same day in 1881. It is admitted that this action is barred by lapse of time unless the transaction of July 26th has the effect to save it. But, as we have seen, it is void as an agreement to postpone the day of payment for want of a consideration; and, though good as an acknowledgment from which the law would imply a new promise to pay, an action thereon has since been barred by lapse of time.

The demurrer must be sustained; and it is so ordered.

CONROY v. OREGON CONSTRUCTION Co.

(Circuit Court, D. Oregon. March 6, 1885.)

1. CONTRIBUTORY NEGLIGENCE.

What is known as "contributory negligence" is a defense; and therefore, in an action by a servant against his master, to recover damages for an injury to the person, sustained while in the employment of the latter, the plaintiff need not allege that his own negligence did not contribute to the result.

2. "ON OR ABOUT" A CERTAIN DAY.

In an action for an injury to the person, arising from the negligence of the defendant, it was alleged in the complaint that the injury occurred "on or about" a certain day. *Held*, that this was not a statement of any distinct day or time, and therefore it did not appear from the complaint that the action was barred by lapse of time; and such defense, if made at all, must be made by answer.

3. TIME IN PLEADING.

When time is not an essential element of the cause of action, under the Code, a demurrer will not lie to a complaint for want of a date to a material fact alleged therein, but the remedy for such omission is a motion to make more definite and certain in this respect; and if it appears on the face of such amended complaint that the action is barred by lapse of time, the defense may be made by demurrer.

Action for Damages for Injury to the Person.

C. E. S. Wood, for plaintiff.

George H. Williams and George H. Durham, for defendant.

DEADY, J. This action is brought by the plaintiff, a citizen of California, against the defendant, a corporation formed under the laws of Oregon, to recover \$50,000 damages, for injuries to his person sustained while in the employ of the defendant. The action was commenced on November 12, 1884. The complaint alleges that "on or about" November 13, 1882, the plaintiff, while in the employ of the defendant as foreman of a gang of Chinese laborers, engaged in the construction of the railway known as the "Oregon Short Line," near Meacham's station, in this state, was ordered by George Gray, a person in the immediate charge of the business for the defendant, "to fire certain blasts;" that in so doing he "exercised all possible skill and precaution," but, nevertheless, the said blast exploded pre-

- maturely, and caused great injury to the plaintiff, including the loss of his sight; and that the cause of said explosion "was the defective and faulty fuse supplied to the plaintiff by the defendant," of which the latter had notice. The defendant demurs, for that (1) it appears the action is barred by lapse of time; and (2) the complaint does not state facts sufficient to constitute a cause of action.

On the argument, the only point made in support of the second cause of demurrer was that it did not appear from the complaint that the plaintiff was aware of the defect in the fuse; and therefore it does not appear but that his own negligence contributed to his injury. But the allegation in the complaint, that the plaintiff used "all possible skill and precaution" in firing the blast in question, is equivalent to an allegation that he was not guilty of any negligence in the premises. And if knowledge of the faulty condition of the fuse would, under the circumstances, make his conduct negligent, an averment that he acted prudently, or not negligently, is equivalent to a denial of such knowledge. But I do not think it necessary for the complaint to contain any allegation on the subject. The law does not presume that any one is negligent; especially when such negligence may or will result in his own personal injury. True, if it appears on the trial, whether from the evidence of the plaintiff or defendant, or both, that the former was guilty of "contributory negligence," as it is called, he cannot recover. But he is neither bound to allege nor prove that he was not guilty of such negligence, in order to make out a case against the defendant. It is matter of defense; and if the defendant would avail himself of it, he must allege and prove it.

So much upon principle; but on authority the rule is unsettled in the state courts. In *Thomp. Neg.* 1176, it is stated that 18 of the states of this Union are nearly evenly divided on the question whether "contributory negligence" is a part of the plaintiff's case or a matter of defense; while in New York and other states the decisions are irreconcilable. But the learned author, speaking for himself, says (1175) that such negligence is properly a matter of defense. Since the publication of this work the supreme court of this state appears to have decided that it is a part of the plaintiff's case; at least, there is a *dictum* to that effect in *Walsh v. Oregon Ry. & Nav. Co.* 10 Or. 253. But the decisions of the national courts, including the supreme one, are otherwise, and that is sufficient to control the action of this court.

In *Knaresborough v. Belcher S. Min. Co.* 3 Sawy. 446, it was held that a complaint which only alleged that the plaintiff sustained an injury from a defective platform negligently provided by the defendant was sufficient, and that knowledge of such defect on the part of the plaintiff, as evidencing contributory negligence, must be shown by the defendant. In *Holmes v. Oregon & C. Ry. Co.* 6 Sawy. 289, S. C. 5 Fed. Rep. 523, this court held that contributory negligence is a defense, the burden of proof to establish which is on the defendant; at the same time saying: "Any other rule than this violates all the anal-

ogies of the law, and is practically illogical and unjust." In *Railroad Co. v. Gladmon*, 15 Wall. 401, the supreme court decided that want of care on the part of the plaintiff, or what is termed "contributory negligence," is a defense.

The first ground of demurrer is based on subdivision 7 of section 66 of the Code of Civil Procedure, which permits a demurrer to the complaint when it appears therefrom that the action has not been commenced within the time limited by law. According to the complaint, the injury was sustained by the plaintiff, and the right of action therefor accrued, "on or about" November 13, 1882; and the action was commenced on November 12, 1884. The action was barred (Code Civil Proc. § 8) within two years from the time the right to sue accrued; and if the allegation that the injury was received "on or about" the 13th, is equivalent to an averment that it did occur on the 13th, the action was commenced in time. But an averment that a fact occurred "on or about" a certain day, is not an averment that it occurred on any distinct day or time. The actual day or time may be either before or after the one stated with an "on or about." In short, the averment amounts to nothing, so far as time is concerned. *U. S. v. Winslow*, 3 Sawy. 342. This being so, it does not appear on the face of the complaint when the right of action accrued, and therefore it cannot be said that the action was not commenced in time, and a demurrer for that cause will not lie.

At common law the rule was that every material fact in the declaration should be stated with a distinct averment of time and place. 1 Chit. Pl. 287, 288. And there is no reason why this rule should not be applied to the statement of a fact in a complaint under the Code of Civil Procedure. The latter (section 66, sub. 2) requires the facts constituting the cause of action to be concisely and intelligibly stated. But the time and place when and where each of such facts occurred, though proper and convenient to be alleged, as a matter of form, are not absolutely necessary to a sufficient statement of a cause of action, unless where time is a material element thereof, or the action is local.

The time when the plaintiff received this injury is not a matter of substance necessary to a sufficient statement of the cause of action, of which such injury or fact is a part, but rather an incident or qualification of the same. The statement of the fact of the injury, without the day it occurred, is so far a sufficient statement of a cause of action, and the complaint would support a verdict and judgment thereon. At common law, the omission to state the day in such a case could only be taken advantage of, as a matter of form, by a special demurrer; at least, after the statute of 27 Elizabeth. Gould, Pl. 468. And for this remedy the Code of Civil Proc. § 84, has substituted the motion to make more definite and certain. See *People v. Ryder*, 12 N. Y. 433, 439.

It follows that, if the defendant wants to make the defense of the

statute of limitations in this case, he must plead it in his answer; and this is the better way; or he may move to make the complaint more definite and certain in respect to the date when the injury occurred, and if it then appears that the action is barred by the lapse of time, he may make the defense by demurrer to the amended complaint.

UNITED STATES *v.* MATHEWS.¹

(*Circuit Court, S. D. Ohio, W. D. February 26, 1885.*)

1. EXCESSIVE COMPENSATION IN PENSION CASES—REPEAL OF ACT OF MARCH 3, 1881—EFFECT OF, ON PENDING PROSECUTIONS.

A pending prosecution for receiving excessive compensation for prosecuting pension claims in violation of the act of June 20, 1878, is not affected by the repeal of the clause of the general appropriation act of March 3, 1881, relating to act of June 20, 1878, by the act of July 4, 1884, although the repealing act contains no saving clause as to pending prosecutions. Section 13, Rev. St., operates to save prosecutions, generally, upon repeal of statutes upon which they are founded, unless the contrary is expressly provided in the repealing act. *U. S. v. Van Vliet*, 22 FED. REP. 641; *U. S. v. Hague*, 22 FED. REP. 706, not followed.

2. REPEALS—SAVING PENDING PROSECUTIONS—SECTION 13, REV. ST.

Section 13, Rev. St., which provides that "the repeal of any statute shall not have the effect to release or extinguish any *penalty, forfeiture, or liability* incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such *penalty, forfeiture, or liability*," held to cover a prosecution under a statute which authorizes imprisonment as well as fine. *U. S. v. Ulrici*, 3 Dill. 532, followed.

Motion in Arrest of Judgment.

Channing Richards, U. S. Atty., and *Henry Hooper*, Asst. U. S. Atty., for United States.

Alfred Yapple, for defendant.

SAGE, J. The defendant was indicted March 8, 1884, under section 5485, Rev. St., for receiving for his services in prosecuting a pension claim a greater compensation than the \$10 allowed by the act of July 20, 1878; the provisions of section 5485 having been, by a clause of the general appropriation act of March 3, 1881, made applicable to any person who should violate the provisions of said act of July 20, 1878. The defendant was tried and convicted before the repeal, July 4, 1884, of the clause of the act of March 3, 1881, above referred to. The repeal of the act of 1881 is without any saving clause as to offenses already committed, or prosecutions already begun. That upon the repeal of a penal statute without such saving clause, judgment will be arrested even after conviction, is so well settled as not to require verification. But section 13 of the Revised Statutes of the United States provides that "the repeal of any statute

¹Reported by Harper & Blakemore, Esqs., of the Cincinnati bar.

shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide; and such statute shall be treated as remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability." This general provision, in the chapter of the Revised Statutes relating to the form of statutes and effect of repeals, made the insertion of a saving clause in the repealing enactment of July 4, 1884, unnecessary.

It is urged that, inasmuch as the punishment for violation of section 5485 is a fine or imprisonment at hard labor, or both, section 13 is not broad enough to cover this case; that here is neither "forfeiture" nor "liability," and that "penalty" cannot be properly construed to include imprisonment, even if it could be held to include a fine, which counsel for defendant denies. Penalty is the punishment inflicted by law for its violation. The term is mostly applied to a pecuniary punishment, (2 Bouv. Law Dict. 399,) but it is not exclusively so. The case of *U. S. v. Ulrici*, 3 Dill. 532, is in point upon all the propositions urged on behalf of the defendant. In that case Mr. Justice MILLER, sitting as circuit justice with TREAT, J., held that the thirteenth section of the Revised Statutes contains a general provision changing the rule of the common law invoked in favor of the defendant in this case; and he says that the section was intended to repeal the rule. It is only necessary, in passing upon the motion, to quote the language of Justice MILLER from page 534:

"Now, the counsel for the defendant argues that neither the word 'penalty,' 'forfeiture,' nor 'liability,' is equivalent to the word 'punishment;' and therefore that the section under which these indictments are drawn is repealed, unless the penal sanction is comprehended by the term 'penalty,' and this, he insists, means only that which can be enforced by a civil action; or by the term 'forfeiture,' which relates merely to property; or by the term 'liability,' which he says means merely subject to a civil proceeding. But, without attempting to go into a precise technical definition of each of these words, it is my opinion that they were used by congress to include all forms of punishment for crime; and as strong evidence of this view I found, during the progress of the argument, and called the attention of the counsel to, a section which prescribed fine and imprisonment for two years, wherein congress used the words 'shall be liable to a penalty of not less than one thousand dollars, * * * and to imprisonment not more than two years.' Moreover, any man using common language might say, and very properly, that congress had subjected a party to a liability; and, if asked what liability, might reply, a liability to be imprisoned. This is a very general use of language, and surely it would not be understood as denoting a civil proceeding. I think, therefore, that this word 'liability' is intended to cover every form of punishment to which a man subjects himself by violating the common laws of the country. Besides, as my brother TREAT reminds me, the word 'prosecution' is used in this section, and that usually denotes a criminal proceeding."

I am referred to the cases of *U. S. v. Van Vliet*, 22 FED. REP. 641: and *U. S. v. Hague*, 22 FED. REP. 706. In neither case does the re-

port show that section 13 was referred to or considered, and I think that I am bound to recognize *U. S. v. Ulrici* as the better authority. The motion is overruled.

See *U. S. v. Van Vliet*, ante, 35, reversing *U. S. v. Van Vliet*, 22 FED. REP. 641.

MCKAY, Trustee, v. MACE and others.¹

(Circuit Court, E. D. Pennsylvania. October 20, 1884.)

LICENSE OF PATENT—CONSTRUCTION OF TERMS—IMPLIED MEANING—JURISDICTION OF CIRCUIT COURT—BILL FOR DISCOVERY AND ACCOUNT—CITIZENSHIP.

A license granted the use of a certain shoe-sewing machine, embodying a patent which was specified by its number, date, and the name of the patentee; "said machinery also embodying other patents which the said party of the first part now has, or may hereafter obtain, applicable to the said machine, or either of them." The license then gave the use of the above-mentioned patent, and also other patents granted to Lyman R. Blake, August 14, 1860, "for the term of the existence of the said patents, or any of them, and of all renewals or extensions of the same, * * * and also all patents which the said party of the first part now has, or may hereafter obtain, whether as original patentee or by assignment or license, applicable to said machine, and all extensions and renewals of the same." The license also provided "that this lease and license shall continue (provided the lessee comply with the terms thereof) until the expiration of all the letters patent which the lessees are hereby licensed to use, or any extensions or renewals of the same." The Blake patents of 1860 expired August 14, 1881, but the machine, at the execution of the license, embodied other patents not specifically designated in it, which did not expire until September 6, 1887. *Held*, that the license did not expire on August 14, 1881, the date of the expiration of the Blake patents of 1860, but continued in force until September 6, 1887, the date of the expiration of the term of the youngest patent embodied in the leased machine. A bill praying discovery and account for refusal to pay royalties under such a license is sustainable in the circuit court when the parties are citizens of different states.

In Equity. Bill for discovery, and an account brought by plaintiff, Gordon McKay, as owner and licensor of certain patents against the defendants Charles Mace and others, as licensees.

By the license, dated April 29, 1872, the plaintiff leased to the defendants—

"The McKay sewing-machine No. 1278 for uniting the soles of boots and shoes to their vamps or uppers, constructed according to the specifications, and embodying the invention contained and set forth in letters patent of the United States, granted to Lyman R. Blake on the sixth day of July, 1858, channeling machine No. 822, and bobbin winder No. 176; *said machinery also embodying other patents which the said party of the first part now has or may hereafter obtain, applicable to the said machine, or either of them.*

"And the said party of the first part doth also hereby license the said party of the second part to use the said patent above mentioned, granted to Lyman R. Blake on the sixth day of July, 1858, and also the patents granted to the said Lyman R. Blake on the fourteenth day of August, A. D. 1860, on the process of making a boot or shoe, and on the article so made *for the term of the existence of said patents, or any of them, and of all renewals and extensions of*

¹ Reported by Albert B. Gullbert, Esq., of the Philadelphia bar.

the same, said patents having been assigned by said Lyman R. Blake to said Gordon McKay, trustee; and also all patents which the said party of the first part now has or may hereafter obtain, whether as original patentee, or by assignment or license, applicable to said machine, and all extensions and renewals of the same."

It was further provided—

"That this lease and license shall continue (provided the lessees comply with the terms and conditions thereof) until the expiration of all the letters patent which the lessees are hereby licensed to use, or any extension or renewals of the same; and upon the expiration thereof, the lessees shall deliver to the lessor, his successors, legal representatives, or assigns, the machines hereby leased in good order, natural wear and tear alone excepted; and the said lessees shall thereupon, if they have kept all the conditions of this lease and license, have the right to purchase said machines for the sum of one dollar."

The licensees agreed to pay as rent for the machines, and for the license to use the patents, the sum of 10 cents for every pair of shoes made on the machines, or instead thereof, to purchase and apply to every pair of shoes thus made a license stamp, according to the schedule annexed to the license. They also covenanted to keep a daily account of all boots and shoes sewed on the machines, and to send a copy of the account to the licensor on the first of every month. The defendants accepted this license, and continuously from its date enjoyed the use of the licensed machines; but after August 14, 1881, they refused to render any account or to pay license fees. They claimed that as August 14, 1881, was the date of the expiration of the Blake patents of 1860, which were specifically designated in the license, it followed that the license expired on that date. On the other hand, it was contended by the plaintiff that the machinery embodied other patents, not designated by name in the license, but included under the general language of the licensing clause, the terms of which had not yet expired, and that the license remained in force until the expiration of the youngest of these. The patents not mentioned in the license, but claimed to be included under the licensing clause, were the McKay and Mathies patent of August 12, 1862, the McKay and Blake improvement of December 13, 1864, and the Blake patent of September 6, 1870. The name of each of these patents was conspicuously stamped on the machine used by the defendants. The defendants also set up the defense that in this case there could be no equitable jurisdiction.

Elias Merwin, (Francis Rawle and Walter George Smith with him,) for plaintiff.

Francis T. Chambers and Furman Sheppard, (George Harding with them,) for defendants.

Before McKENNAN and BUTLER, JJ.

McKENNAN, J. The right of the complainant to the relief which he prays depends upon the ascertainment of the date at which a license granted by him to the respondent expires. The construction of this license is not unattended with difficulty, growing out of the inaccuracy

of some of its phraseology, and the collocation of the phrase defining its duration, but with the assistance of an argument of uncommon vigor and clearness on both sides, we have reached a conclusion which, in our judgment, effectuates the intention of the parties, and a just solution of the controversy. The license is dated April 29, 1872. By its first clause the complainant "leased" to the respondents "the McKay sewing machine No. 1,278, * * * constructed according to the specifications, and embodying the invention contained and set forth in letters patent of the United States, granted to Lyman R. Blake on the sixth day of July, 1858, channeling machine No. 822 and bobbin winder No. 176; said machinery also embodying other patents which the said party of the first part now has or may hereafter obtain applicable to the said machine, or either of them." By the second clause "the said party of the first part doth also hereby license the said party of the second part to use the said patent, above mentioned, granted to Lyman R. Blake on the sixth day of July, 1858, and also the patents granted to the said Lyman R. Blake on the fourteenth day of August, A. D. 1860, on the process of making a boot or shoe, and on the article so made, for the term of the existence of said patents, or any of them, and of all renewals and extensions of the same, said patents having been assigned by said Lyman R. Blake to said Gordon McKay, trustee; and also all patents which the said party of the first part now has or may hereafter obtain, whether as original patentee, or by assignment or license, applicable to said machine, and all extensions and renewals of the same."

At the date of the license other patents than these individuated by specific designation were owned and controlled by the licensor, were actually embodied in the leased machine, and were essential to its profitable use. They were the McKay and Mathies patent of August 12, 1862, the McKay and Blake improvement patent of December 13, 1864, and the Blake patent of September 6, 1870, for 17 years, and expiring September 6, 1887. These patents were within the general description of the licensing clause, and are therefore comprehended by its terms, as fully as if they had been specifically identified. The Blake patents of 1860 were extended until August 14, 1881, when they finally expired. Since that date the respondents have continued the use of the leased machines and the above recited patents without the payment of the royalties agreed upon, or rendering any account of them, according to the requirements of the license, upon the hypothesis that it was then terminated by its own limitation. Considering the clauses of the license above quoted by themselves, this contention is not without at least plausible warrant. The right to use all the patents referred to is conferred by the license, without restriction, but the duration of such use is apparently referred to "the term of the existence" of the Blake patents, or any of them. The phrase which limits the term of the license is connected with the description of the Blake patents, and is expressly applicable to them, and it is not, therefore,

unreasonable to hold that the entire license is terminable by the expiration of these patents.

On the other hand, the consideration is not without great weight that the licensor could not have intended to concede to the licensees the uncompensated use of patents, which imparted to the leased machines their chief value, and had many years to run after the lapse of two years, when the Blake patents expired, or even after the possible extension of them for seven years, for the meager consideration of a moderate royalty, payable only during these periods. However this may be, the parties have, in a subsequent part of the license, declared their own understanding of its terms, and that is decisive of its meaning. In subdivision 8, under the eighth head in the license, it is agreed "that this lease and license shall continue (provided the lessees comply with the terms thereof) until the expiration of all the letters patent which the lessees are hereby licensed to use, or any extensions as renewals of the same." This language is unambiguous, and applies to all the patents, whether specifically or generally described, the right to use which is authorized by the license. In this category are several patents, as before stated, which were embodied in, or ingrafted upon, the leased machine. The youngest of them, the Blake patent of September 6, 1870, continues in force until September 6, 1887, and must therefore be taken as the measure of the duration of the license. Of the remaining ground of defense it is sufficient to say that it is unsustained. Nor is a more extended discussion of the pleas to the jurisdiction of the court required. The parties are citizens of different states; and the bill prays for a discovery and account. These are recognized heads of equity jurisdiction, and are cognizable in this court, although the groundwork of the relief sought is a contract touching the use of letters patent, because adequate relief cannot be obtained in a court of law.

There must therefore be a decree in favor of the complainants for discovery and an account, as prayed for; and counsel will accordingly prepare one.

UNION TUBING Co. and others v. PATTERSON Co. and others.

(Circuit Court, S. D. New York. February 9, 1885.)

1. PATENTS—REISSUE.

Reissued letters patent granted to Enoch Osgood, assignor, etc., July 30, 1872, for an improvement in process for rendering leather, etc., soft, flexible, and impervious to gas, are for the same invention described in the original, granted April 16, 1878, and valid.

2. SAME—INFRINGEMENT.

Such reissued patent is not infringed by the compound of glycerine, soap, borax, and sulphate of iron, as used by defendants in manufacturing their gas

tubing; the function of the glue in such compound being to make the tube gas-proof, of the glycerine to make it flexible, and of the other ingredients to cure the glue and glycerine so that they will not melt when subjected to heat.

In Equity.

Wetmore, Jenner & Thompson, for complainants.

Benjamin F. Thurston and Wilmarth H. Thurston, for defendant.

WALLACE, J. The reissued letters patent granted to Enoch Osgood, assignor, etc., July 30, 1872, for an improvement in processes for rendering leather, etc., soft, flexible, and impervious to gas, and which are alleged to be infringed by the defendants, are for the same invention described in the original, and the defense so far as it rests upon the invalidity of the reissue is not tenable. The specification of the original patent to Osgood, granted April 16, 1878, describes his invention as "a new and improved process of rendering leather, fibrous and porous materials, impervious to gas, preventing all gases from penetrating or escaping from such materials when made into bags, tubes, or other forms." The specification proceeds: "My invention relates to the use of glycerine for this purpose, and I carry out my invention as follows: The substances to be rendered impervious are first wrought into the desired form. When the articles are dry they are saturated with glycerine by immersion therein, or any process suitable therefor. This treatment renders them impervious to gas, preventing either its escape therefrom or penetration thereinto." The claim is: "The herein described process of rendering leather, fibrous and porous substances, impervious to gas, preventing the penetration into or the escape of gas therefrom by the application thereto of glycerine, substantially as set forth."

In the specification of the reissue, the invention is described to consist "in treating or saturating the leather, skin, cloth, or other article to be rendered pliable and gas-tight, with glycerine. The article to be prepared by my process is saturated by immersion in glycerine, with or without the aid of heat, or the glycerine may be rubbed in, or be applied by thorough brushing, or otherwise. The substances to be rendered soft and pliable, and impervious, may or may not be first wrought into the desired form before being treated with glycerine."

The claims of the reissue are as follows: (1) As a new article of manufacture, leather or skin, or their equivalent, saturated with glycerine, whereby said article is rendered impervious to gas, and soft and flexible, substantially as described. (2) The herein described process of rendering diaphragms, tubes, and vessels of leather, skin, or other fibrous and porous material, impervious to gas, soft and flexible, by saturating or treating the same with glycerine, substantially as set forth.

The real discovery of Osgood was a new treatment of leather, etc., with glycerine. He was not the inventor of glycerine. He could not patent any undiscovered property of glycerine or a result merely.

Glycerine was discovered by Scheele in 1779. Upon the proofs, it seems that glycerine had never been applied by saturation to leather, etc., until Osgood applied it. If his new application of the article produced a new and useful result he was entitled to a patent for his process, or for the new product of his process, or for both the process and the product. What that process was is very clear. It was a treatment of leather, etc., by saturation with glycerine. The degree of saturation, if there are any degrees, is not pointed out unless by describing the result. The saturation may be effected by immersion or by any other process that will saturate the material. When the material is impervious to gas the treatment is complete. Osgood saw fit in his original patent to claim the process only. After the lapse of four years his right to claim the product has been abandoned and lost by laches. If there was any mistake or inadvertence it was apparent on first inspection of the claim.

The second claim in the reissue is no broader than the claim of the original, and is for the same invention. In the original the claim properly construed, as has been shown, was one for the process of treating leather, etc., by saturation with glycerine until it becomes impervious to gas. Unless the material is sufficiently saturated either by immersion or in some other way to be impervious to gas, the process described and claimed is not employed. All reference to the results of the process in the specification and the claims is superfluous and meaningless, except so far as the statement of the results produced enter into the description of the process, and serve to point out what extent of saturation is a necessary part of the process. According to the new claim the material must be saturated sufficiently, not only to render it soft and pliable, but also impervious to gas. If there is any difference between this and the claim of the original patent it is one which tends to narrow the claim.

The defendants are manufacturers of gas tubing, and make that article under several patents which they control. In making their tubing they use a wire spiral or core, which they cover with cotton braid oiled with boiled linseed oil. After it has become dry, the tube thus formed is immersed in a vessel containing a compound of glue, glycerine, soap, borax, and sulphate of iron. In this compound the function of the glue is to make the tube gas-proof, of the glycerine to make it flexible, and of the other ingredients to cure the glue and glycerine so that they will not melt when subjected to heat. The compound thus composed is not an infringement of the complainant's patent. It is not saturated with glycerine to the degree required by the patented process. It is not sufficiently saturated to render it impervious to gas, but is composed of an ingredient impervious to gas, which is treated with glycerine in order to make it pliable. Certainly, the cotton braid is not saturated with the glycerine so as to be impervious to gas; the treatment first applied to it of saturating it in boiled oil is calculated to prevent it from becoming saturated by the com-

v.23f,no.2—6

pound with which it is next treated. That no amount of saturation of such material with glycerine would render it gas-tight is clearly shown by the proofs.

The bill is dismissed.

COLGATE v. COMPAGNIE FRANCAISE DU TELEGRAPHE DE PARIS A NEW YORK.

(*Circuit Court, S. D. New York.* January 30, 1885.)

PATENTS—BILL OF DISCOVERY—ACTION AT LAW FOR INFRINGEMENT—CORPORATION DEFENDANT.

A bill in equity may be maintained in the United States circuit court against a corporation to compel a discovery in aid of an action at law brought against it to recover damages for the infringement of a patent.

In Equity.

Betts, Atterbury & Betts, for complainants.

Blatchford, Seward, Griswold & Dacosta, for defendant. *C. A. Seward and Chas. M. Dacosta*, of counsel.

WALLACE, J. The complainant has filed a bill of discovery in aid of a pending action at law in this court, wherein he is the plaintiff, brought against the defendant to recover damages for the infringement of letters patent for an invention. The subject of the patent is an improvement in electrical conductors for submarine telegraphic purposes. The bill avers that the defendant operates a cable telegraph under water, extending from the coast of France to some point on or near Cape Cod, Massachusetts, and also operates lines of telegraph wire, including a number of river and water crossings in the United States, and employs the plaintiff's invention in such lines of cable telegraph; that in the suit at law the defendant, in its answer, has pleaded non-infringement of said letters patent; that the complainant is unable to prosecute his action at law without a full discovery of the method of insulation of the said lines of cable telegraph, for the reason that such lines are under water and under the control of the defendant, and in localities unknown to the defendant, and are not open to his inspection; and that he cannot prove with accuracy and completeness the damages that he has suffered by reason of the infringement without the discovery by the defendant of the locality and length of said lines, the number of the conducting wires composing said lines, and without the inspection of certain contracts in defendant's possession which disclose the mode and materials of the construction of its cables; all of which matters and things are solely within the knowledge of the defendant, and unknown to the complainant. The defendant has demurred to the bill, and the main points made by the demurrer are—*First*, that the defendant, as a corpora-

tion, cannot be compelled to make a discovery; and, *second*, that the court should refuse to entertain the bill, because, under sections 724, 858, Rev. St., and the existing practice at law, discovery is no longer necessary, but the plaintiff can obtain in the suit at law all necessary evidence by an examination of the officers of the defendant and by compelling a production of all books or writings containing pertinent evidence.

Undoubtedly, a corporation cannot be compelled to answer under oath to a bill in equity. It answers only under the seal of the corporation. It is for this reason the practice has obtained of making the officers of the corporation parties to the bill and requiring them to answer the interrogatories. This, however, does not excuse a corporation from answering, and the complainant is entitled to an answer from a corporation as well as from an individual, although the value of the answer as evidence may not be worth the expense of the experiment. Although no officer or agent is made a party to the bill, it is still the duty of the corporation to cause diligent examination to be made, and give in its answer all the information derived from such examination; and if it alleges ignorance without excuse, a disposition on its part to defeat and obstruct the course of justice may be inferred which will justify the court in charging it with the costs of the suit. *Attorney General v. Burgesses of East Retford*, 2 Mylne & K. 35. There is nothing, therefore, in the fact that the defendant is a corporation to defeat the complainant's right to maintain a bill of discovery.

Under the existing practice in courts of law in this state, a plaintiff can obtain the evidence of a defendant upon the trial by examining him as a witness, and can obtain a production of books and papers both before and upon the trial. He can also compel a sworn answer to his complaint, and thus require the defendant to admit or deny under oath all the material allegations of fact in his complaint. The practice which thus prevails is the practice of the federal courts also, by force of sections 724, 858, 914, Rev. St. He cannot obtain the testimony of the defendant before the trial in an action pending in this court, although he can do so in the state courts, because section 861 of the Revised Statutes, as construed in *Beardsley v. Littell*, 14 Blatchf. 102, requires such testimony, unless taken *de bene esse* or by commission, to be taken in the presence of the court and jury at the trial. See, also, *Easton v. Hodges*, 7 Biss. 324.

The jurisdiction in equity for discovery originated in the absence of power in courts of law to compel a discovery by their own process, either by means of the oath of a party or by the production of deeds, books, and writings in his possession or control. But it does not follow, because courts of law now have power to extend such relief, that a court of equity should forego the exercise of an ancient and well-settled jurisdiction. No principle is more vigorously asserted by courts of equity than that they will not yield a jurisdiction once

legitimately exercised because an enlargement of the ordinary powers of courts of law has rendered a resort to equity no longer necessary. There can be no ebb and flow of jurisdiction dependent upon external changes. Being once legitimately vested in the court, it must remain there until the legislature shall abolish or limit it; for without some positive act the just inference is that the legislative pleasure is that the jurisdiction shall remain upon its old foundations. Story, Eq. § 64. Accordingly, it has been frequently held that a court of equity should not refuse to entertain a bill for discovery, although, by the enlargement of the jurisdiction and remedies exercised by courts of law, similar relief could be obtained by the complainant in his action at law. *Lovell v. Galloway*, 17 Beav. 1; *British Empire Shipping Co. v. Somerset*, 3 Kay & J. 433; *Shotwell's Adm'r v. Smith*, 20 N. J. Ch. 79; *Cannon v. McNab*, 48 Ala. 99; *Millsaps v. Pfeiffer*, 44 Miss. 805.

It is obviously desirable to ascertain the merits of a case at its outset, so far as may be practicable, when this can be done with the formalities and safeguards of regular procedure, rather than to await the result of an elaborate trial. The saving of time and expense which may thus be effected is beneficial, not only to the immediate litigants, but to the public also. There are, therefore, persuasive considerations why a party should be permitted to resort to a bill of discovery when the facts alleged in the bill reasonably indicate that such a remedy will conduce to the safe and convenient prosecution of his action or defense at law. It is the rule of the English courts that a party may maintain a bill of discovery in equity, not only when he is destitute of other evidence than the oath of the adverse party to establish his case, but also to aid such evidence or to render it unnecessary. *Montague v. Dudman*, 2 Ves. Sr. 398; *Finch v. Finch*, Id. 491; *Brereton v. Gamul*, 2 Atk. 241. In *Earl of Glengall v. Fraser*, 2 Hare, 99, it was said by Vice-Chancellor WYGRAM: "The plaintiff is, in this court, entitled to an answer from the defendant, not only in respect to facts which he cannot otherwise prove, but also as to facts, the admission of which will relieve him from the necessity of adducing proof from other sources." There are many American authorities to the same effect, among which may be cited *Marsh v. Davison*, 9 Paige, 580; *Peck v. Ashley*, 12 Metc. 481; *Stacy v. Pierson*, 3 Rich. Eq. 152; *Williams v. Wann*, 8 Blackf. 477.

Other authorities hold that in order to maintain such a bill it must appear affirmatively that the case of the party at law cannot be established by the testimony of other witnesses, or without the aid of the discovery he seeks. Such is the rule declared in *Brown v. Swann*, 10 Pet. 497, where it is held that the complainant must show by his bill that he is unable to prove the facts sought to be discovered by other testimony than that of the defendant. That was a case, however, in which the complainant sought general relief as well as discovery, thus seeking to withdraw the whole jurisdiction from the court

of law of a cause of action properly triable there and transfer it to a court of equity; and the decision is not applicable where the bill is for discovery merely. Story, Eq. Pl. § 324. The same observation applies to the case of *Drexel v. Berney*, 14 Fed. Rep. 268, decided in this court.

A consideration peculiar to a bill of discovery like the present, in which the complainant seeks a discovery concerning the infringement of a patent, should be adverted to. Courts of equity in patent causes sometimes exercise the power of granting to a complainant an inspection of alleged infringing devices as incidental to ordinary discovery. *Vidi v. Smith*, 3 El. & Bl. 969; *Morgan v. Seward*, 1 Webst. Pat. Cas. 169; *Russel v. Cowley*, Id. 468; *Shaw v. Bank of England*, 22 Law J. Exch. 26. Courts of law have no such authority, but power to do so was conferred in England upon common-law courts by 15 & 16 Vict. c. 83, § 42. Manifestly, cases may occur where the exercise of this power is necessary in order to prevent a defendant from profiting by his own artifice. The case made by the present bill is one where, if the defendant has appropriated the complainant's invention, it would be obviously difficult, if not impossible, to prove the fact unless an inspection were granted.

In reaching the conclusion that the demurrer should be overruled, the statutory provision (section 723, Rev. St.) which prohibits the federal courts from sustaining suits in equity where a plain, adequate, and complete remedy may be had at law, has not been overlooked. It has been decided in some of the states, where equity jurisdiction is restricted by a similar statutory regulation, that a bill of discovery will not be sustained when the common-law courts are competent to compel the disclosure sought. *Hall v. Joiner*, 1 S. C. 186; *McGough v. Insurance Bank*, 2 Ga. 151; *Riopelle v. Doellner*, 26 Mich. 102.

Section 723 was originally section 16 of the judiciary act of 1789, and was considered as declaratory merely as early as the case of *Boyce v. Grundy*, 3 Pet. 210. It may well be insisted that a discovery by a bill in equity affords a more adequate and complete remedy than a discovery upon the trial of the action at law by the testimony of an adverse party. This is certainly so if a bill may be resorted to in order to enable a party to dispense with the necessity of proof from other sources upon the trial of the suit at law. Power is conferred upon the supreme court to prescribe rules regulating the practice of the circuit courts in equity, and it is more properly the province of that court than of the circuit court to determine what, if any, innovations shall be made in the existing practice in consequence of the more enlarged powers now enjoyed by courts of law. Until some action by that court, this court should be slow to declare that a jurisdiction so ancient and so convenient as that of discovery, should be surrendered, or should depend upon the accidents of legislation respecting the practice of common-law courts.

HAPGOOD and others v. ROSENSTOCK and others.

(Circuit Court, S. D. New York. February 7, 1885.)

1. PATENTS—AGREEMENT AND LICENSE—ASSIGNMENT OF PATENT—INJUNCTION.

A party who purchases a patent and takes an assignment thereof, with knowledge of an existing agreement and license granted to another, will be bound thereby, and may be restrained from violating the terms of the agreement.

2. SAME—SPECIFIC PERFORMANCE.

Equity does not generally decree specific performance of contracts relating to personal property, but will do so when the subject is the exclusive right to manufacture and sell a patented article, and in such a case will also enjoin the breach of a negative covenant.

In Equity.

J. C. Hueston, for complainants.

Dickerson & Dickerson, for defendants.

WALLACE, J. The complainants' motion for a preliminary injunction is founded on a bill which shows that in August, 1884, one Alice D. Hadlock, who was then the owner of a patent for an improvement in bustles, entered into an agreement with the complainants which is set out. By the terms of that agreement Hadlock, in consideration of certain royalties to be paid from time to time by the complainants, conveyed to them "the sole and exclusive right and privilege to manufacture and sell" the patented bustle anywhere in the United States, with the exception that they were not to sell the bustles in Chicago, and reserving to Hadlock herself the privilege to manufacture and sell the bustles in any part of the United States. By the second clause of that agreement Hadlock covenanted "not to form any stock company or copartnership for the purpose of manufacturing the bustle." By the third clause she agreed that complainants might prosecute infringers, and that any moneys which might be the outcome of any suits for infringement brought by complainants should belong to them. The bill further alleges that defendant Rosenstock asserts that October 4, 1884, he obtained an assignment of the patent from Hadlock, and is now the sole and exclusive owner thereof; that although complainants have fully performed their agreement with Hadlock the defendants assert that his rights under said agreement have been forfeited and terminated; and that the defendant Rosenstock is now manufacturing and selling the patented bustles in the city of New York. It is also alleged that Rosenstock had full knowledge of all the rights and equities of the complainants at the time he acquired the assignment of the patent. The prayer of the bill is for an injunction restraining Rosenstock from interfering with the complainants' rights and privileges under their agreement with Hadlock, and from making, selling, and using the patented bustles. The defendants claim that Rosenstock is now the owner of the patent, and admit that he purchased it from Hadlock with knowledge of the terms of the agreement between her and the complainants.

As the requisite diversity of citizenship exists between the parties, and is alleged in the bill to confer jurisdiction upon this court, the jurisdiction does not depend upon the patent laws, but upon general principles of equity. Assuming that the complainants did not acquire by their agreement with Hadlock the legal title to the patent, and therefore could not maintain an action for infringement except in the name of the owner or with the owner joined as a party, it is nevertheless true that they acquired an extensive beneficial interest in the patent. The second clause of the agreement shows that the right reserved to Hadlock was intended to be a personal privilege merely. The complainants, therefore, acquired the whole monopoly of the patent except in Chicago, and subject to the right of Hadlock to sell the bustles when she manufactured them herself or bought them from the complainants or their vendees. If Hadlock were now selling the patented articles in New York, not manufactured by herself or by the complainants, no doubt is entertained that she could be enjoined at the suit of the complainants. The complainants would not be restricted to a remedy at law for damages for breach of covenant. Equity will enjoin the breach of negative covenants whenever it would decree a specific performance of the agreement between the parties. Such a remedy is said by a commentator of authority to furnish the complement to the relief by specific performance. Bisp. Eq. § 461.

Although equity does not, as a general rule, decree specific performance of contracts relating to personal property this is because, ordinarily, adequate compensation in case of a breach may be obtained by way of damages at law. It is apparent that such a consideration cannot apply to an agreement like the present, because from the nature of the subject-matter it would be impossible in many cases to ascertain the damages which licensees might sustain by reason of being deprived of their rights to use an invention. Agreements for the assignment of a patent, and for delivery of chattels which can be supplied by the vendors alone, and for renewals of leases, are among those which will be specifically enforced, (*Binney v. Annan*, 107 Mass. 94; *Fry, Spec. Perf.* § 33; *Furnival v. Crew*, 3 Atk. 83-87; *Burke v. Smythe*, 3 Jones & L. 193; *Willis v. Astor*, 4 Edw. Ch. 594,) and are sufficiently analogous in their character to the present agreement to bring this case within the authorities. As Rosenstock had full knowledge of the complainants' equities these equities are impressed upon the title he acquired, and restrict his rights to the same extent as though the title remained in Hadlock. He can be compelled to do and not to do those things which Hadlock ought or ought not to do. He knew, or was bound to know, that if Hadlock intended by a sale of her patent to put it out of her power to perform her agreement with complainants the transaction was intended as a fraud upon them. He was either a party to this fraudulent design, or he intended to recognize complainants' rights. In either case he stands

towards the complainants in the place she would occupy if she now owned the patent, and must abide by the agreement.

An injunction is granted.

THE SIDNEY.¹

THE WILLIAM WORDEN.¹

PROVIDENCE WASHINGTON INS. CO. *v.* THE SIDNEY, and her Consort,
THE WILLIAM WORDEN.¹

(District Court, S. D. New York. January 30, 1885.)

1. INSURANCE—SUBROGATION—NEGLIGENCE—PAROL EVIDENCE.

A cargo of wheat, from the west to New York, was laden at Buffalo, through M. & Co., forwarders, on the canal-boat W., and insured by them as part of the price of freight agreed upon. At the beginning of the season, M. & Co. had taken out an "open policy" with the libelants "for whom it may concern," which required that each transaction under it should be entered in an accompanying policy book, or indorsed on the policy, stating the persons on whose account it was effected. A certificate payable to order was issued on this transaction to M. & Co., in their names, without the words "on account of whom it may concern," or equivalent words, and their names only were entered in the policy book. M. & Co. delivered the certificate, indorsed by them, along with the bill of lading signed by the captain of the W., which they also signed, to the agents of the owners, paying some \$200 prior charges, and also making further advances to the captain for the trip. They took from the master a separate bill of lading in which they were described as shippers, and in which the boat and cargo were consigned to their own New York agents, for their own protection. While the Worden was coming down the Hudson, in charge of the Sidney, both vessels belonging to the same owner, a steam-flue on the Sidney burst; the vessels drifted and stranded upon an island and the W.'s cargo was lost. The owners abandoned to the insurers, who paid them as for a total loss, and, claiming to be subrogated to the rights of the owners against the carriers, filed a libel against the S. and W. to recover for the loss. *Held*, that the consignees, the carrier, and M. & Co. had each an insurable interest in the cargo to its whole value: that a policy "for whom it may concern" assures all persons, having an insurable interest, that are intended to be covered by it, whether known to the insurers or not; that the conditions of the policy and the certificate in this case limited the general words of the policy, and that only M. & Co., the persons named, were "the assured" under the policy; and that the persons and interests assured could not be enlarged by parol evidence, and that the libelants, on paying the owners, as indorsees of the certificate, were subrogated to the rights of M. & Co. only.

2. SAME—CARRIERS—AGENCY—BENEFIT OF INSURANCE.

M. & Co., in procuring freight and making advances on account of the carrier, acted as his agents. The insurance effected by M. & Co. was intended for the benefit of the shipper, the carrier, and for themselves, and was effected upon the request and authority of both, there being no express reference to subrogation in the policy. *Held*, that such subrogation is a mere equity, depending on the actual relation of the various parties to one another, and is therefore subordinate to the equitable rights existing between a principal and his agent, who effects the insurance for the benefit of both; that the payment by the insurers in this case to the owners, was, in effect, the same as a payment to M. &

¹Reported by R. D. & Edward Benedict, Esqs., of the New York bar

Co., and by the latter to the owners; that on payment of the insurance to M. & Co., the carrier, as principal, could have compelled a payment by M. & Co., as his agents, to the owners, in discharge of their joint liability under the bill of lading; and therefore that no equitable right of subrogation existed through M. & Co., against the carrier, in favor of the insurers.

3. SAME—VOLUNTARY SETTLEMENT—NEGLIGENCE—BURDEN OF PROOF—PRIVIES.

The policy excepted loss through "want of ordinary care and skill in navigating said boats." *Held*, that if the case were one of doubt whether the loss happened by negligence or not, and if the carrier were not equitably entitled to the benefit of the policy, the insurers might have paid the owners of the goods with an assignment of all claims for damages to themselves, and then have prosecuted the carriers for indemnity, and recovered on proof that the loss was in fact due to negligence of the carrier; but that as the company has once paid the owner upon a voluntary settlement, as upon a loss under the policy, and the carrier being equitably entitled to the benefit of the policy, he is entitled to the benefit of the settlement made under it; and that such a settlement cannot be set aside except for duress, fraud, or mistake, and that the burden of proof, in an action to recover back the money from the carrier, was upon the libelants to show the fraud or mistake, and also that the loss was within the exception of the policy, and not a valid claim.

4. SAME—LOSS NOT COVERED BY POLICY.

And as the libel charged negligence, and the answer denied it, and averred that the stranding of the boat occurred under such circumstances as negatived the charge of negligence, and no proof being offered by either party on this point, or that there was any fraud or mistake in the settlement, *held*, the libelant could not recover on the claim that the loss was not covered by the policy.

In Admiralty.

E. D. McCarthy, for libelants.

Hyland & Zabriskie, for respondents.

BROWN, J. The libelants, at Buffalo, insured a cargo of wheat on board the canal-boat Worden, in tow of the Sidney, consigned to Armour, Plankinton & Co., of New York. One of the steam-flues of the Sidney having burst while she was coming down the Hudson river, she became unmanageable, and, as the answer states, drifted with the tide upon the rocks of Esopus island, whereby the cargo on board the Worden was lost. The cargo was abandoned to the libelants, who thereupon paid the consignees as for a total loss,—\$9,211.75,—and, claiming to be subrogated to the rights of the consignees against the carrying vessels for the loss of the wheat, filed this libel to recover the sum of \$6,175.89, the amount of the loss, after deducting the sum realized from the damaged cargo. The libel alleged that the stranding occurred through the negligence of the respondents, which the answer denies. On the question of negligence no evidence was given upon the trial. On that point both sides rested upon the pleadings, each claiming that the burden of proof was upon the other. Without reference to the question of negligence, however, inasmuch as the carrier had given a clean bill of lading binding himself to a delivery of the goods without exception or qualification, the libelants claimed that upon payment to the consignees they were subrogated to the benefit of the consignees' right of action for the loss of the goods against the carrier, as the principal debtor, for the non-delivery of the cargo; also that, upon the admissions of the answer, it was incumbent on the carrier to show that the stranding was without any fault on his

part, if that is material. The general principles of law invoked by the libelants are not denied, either as regards an insurer's right to subrogation, upon payment of a total loss, to the rights of the assured against any other persons primarily liable for such loss; or as regards the presumptions of negligence. The only question is as to the applicability of these principles to the facts of the case.

The contract of insurance, in this case, contains no express provision for any subrogation of the insurers to the rights of the assured on payment of the loss. In such cases, the right of subrogation, if any exists, being no part of the contract, does not depend upon the contract, or on the form of it; it is a mere equity to be worked out through the rights of the assured only, in his relation to other parties. If the assured has a legal right to indemnity for the loss against a carrier that has no legal or equitable right to the benefit of the insurance, then the liability of the carrier to the assured is regarded as the primary liability for the loss, and the liability of the insurer as secondary, and similar to that of a surety only. The insurer, on payment, is therefore held, in such cases, to be equitably entitled to stand in the shoes of the insured, and to recover such indemnity as the insured was entitled to recover against other persons having no right to the benefit of the insurance. *Mobile & M. Ry. Co. v. Jurey*, 111 U. S. 584; S. C. 4 Sup. Ct. Rep. 566; *Hall v. Railroad Cos.* 13 Wall. 367; *Garrison v. Memphis Ins. Cos.* 19 How. 312. In the case of *Hall v. Railroad Cos.*, *supra*, the court say:

"In respect to the ownership of the goods, and the risk incident thereto, the owner [the assured] and the insurer are considered but one person, having together the beneficial right to the indemnity due from the carrier for a breach of his contract, or for non-performance of his legal duty. Standing thus as the insurer does, practically, in the position of a surety, stipulating that the goods shall not be lost or injured in consequence of the peril insured against, whenever he has indemnified the owner [the assured] for the loss, he is entitled to all the means of indemnity which the satisfied owner [the assured] held against the party primarily liable. His right rests upon familiar principles of equity. It is the doctrine of subrogation, dependent not at all upon privity of contract, but worked out through the right of the creditor or owner [the assured.] Hence it has often been ruled that an insurer who has paid a loss may use the name of the *assured* in an action to obtain redress from the carrier whose failure of duty caused the loss."

As the right of the libelants to subrogation can only be claimed through the rights of the *assured*, the questions chiefly litigated were—*First*, who were insured under the policy in this case? and, *second*, was the owner of these vessels equitably entitled to the benefit of the insurance, so as to cut off any right of subrogation that the insurers might otherwise have had against him?

The facts are as follows:

The policy was issued in the name of Morse & Co., whose business is variously described as that of forwarders, carriers, transportation brokers, or, familiarly, scalpers. For convenience, I shall call them forwarders. They belong to a class of middle-men, long established in Buffalo, who handle all

the freight business there, as intermediaries between the boatmen and the owners of grain and produce, or their agents, who desire to ship it eastward. The forwarders see the consignors; agree upon the price of freight, which includes insurance; procure boats to take the grain upon the terms fixed; get a certificate of insurance and deliver it to the shipper along with the bill of lading, which they sign as well as the captain; pay prior charges, if any; make any advances necessary to the boatmen for the trip; and receive, for their services, from the boatman, a commission, usually 5 per cent. upon the amount of stipulated freight. The insurance companies that engage in this kind of insurance have provided a particular form of policy specially prepared for it. The shipper designates the company in which the insurance shall be effected. The forwarder, at the beginning of each season, procures from the various companies what is termed an "open policy," which is attached to a "policy book," in which are entered the particulars of each insurance under it. To effect a particular insurance, the policy and the policy book are taken to the office of the companies' agents, who enter in the policy book the particulars of the insurance as applied for, and thereupon issue and deliver to the forwarder a certificate stating that insurance is effected, under the policy, upon cargo on board the vessel, of the value designated, and on account of the persons named; the loss, if any, payable to "the assured, or order, and return of this certificate." The certificate is thereupon indorsed in blank by the forwarder and delivered to the shipper, with the bill of lading, also signed by the forwarder, as above stated.

The transaction in this case was in accordance with the general custom above described. The grain in question was in charge of Mr. Meadows, as agent of the consignees in New York. Morse & Co. applied to him in negotiating for its transportation, and agreed upon the rate of five cents per bushel, including insurance, which the shipper directed to be taken in the libelants' company. Morse & Co. thereupon placed the transportation with Capt. Wager, the owner of the Sidney and the Worden, and the grain was loaded upon the latter. When the cargo was loaded, Morse & Co. obtained the captain's bill of lading, and, having previously procured a certificate of insurance, delivered it, indorsed by them in blank, to Mr. Meadows, along with the bill of lading, which Morse & Co. also signed, paying him at the time \$200 for prior charges. The bill of lading recited Meadows as shipper on board the Worden, and provided for the delivery of the grain to the consignees in New York, without any exception or qualification, on payment of freight and prior charges, which were to be paid to Brooks & Co., the New York agents of Morse & Co.

The form of insurance was as follows: The "open policy" No. 772 states that the libelants, "by this policy, on account of Morse & Co., for whom it may concern, do *insure* the several persons whose names are hereinafter indorsed thereon as *owner, advancer, or common carrier*, on goods on his own boat, or boats belonging to others, from place to place, as indorsed hereon or in a book kept for that purpose, for the amounts, at the rate, and on the goods specified in said indorsement; no risk considered as insured until said *indorsement* is approved and signed." There are various provisions in reference to the lading and unlading, and the time allowed therefor. The risks assumed by the company are those of the seas, canals, rivers, and fire, and all other perils, losses, or misfortunes to the goods during said trip, "excepting perils, etc., from ice, jettison, theft, or from want of ordinary care and skill in lading or navigating said boats." There are numerous other provisions not material in this case. The certificate issued May 17th, on the application of Morse & Co., states that "Morse & Co. is insured under policy No. 772 in the sum of \$9,875, in board, cargo of boat Wm. Worden, on wheat \$9,875, at and from Buffalo to New York; loss, if any, payable to assured or order and return of this certificate."

The name of the consignees is not usually made known to the forwarder, and was not in this case known to him, until the grain was loaded. Upon the delivery of the bill of lading to the shipper, the name and direction of the consignee were written in the margin. When Morse & Co. obtained the certificate of insurance, they did not know who was to be the consignee. The agents of the insurers in Buffalo, who insured the certificate, and made the entry in the policy book, were fully acquainted with the established customs and usages in this business. They knew that Morse & Co. were forwarders, doing business in the manner above stated; they understood that the certificate of insurance applied for was designed to accompany a bill of lading of the goods in question; that Morse & Co. obtained the shipment of this cargo as agents of the captain; that they usually signed the bills of lading along with the captain; that they were accustomed to pay prior charges and to make advances to the captain; that the price of freight included insurance; and that Morse & Co. were paid for their services by the carrier by a commission on the amount of freight.

1. Upon the facts above stated, it is manifest that the consignees and the carrier, as well as Morse & Co., had each of them an insurable interest in the cargo to its whole value. Any person responsible for goods in his custody has an insurable interest in them to the extent of his liability. 3 Kent, *262; Hutch. Carr. § 429; 2 Duer, Ins. 49; Arn. Ins. § 107; *Hooper v. Robinson*, 98 U. S. 528, 538; *Savage v. Corn Exchange, etc.*, 36 N. Y. 655; *Harvey v. Cherry*, 76 N. Y. 436; *Waring v. Insurance Co.* 45 N. Y. 606; per GRAY, J., *Eastern R. Co. v. Relief, etc.*, 98 Mass. 423; *Com. v. Hide & L. Co.* 112 Mass. 136, 141. The consignee had an insurable interest, because he was owner; the carrier, because as carrier he was answerable to the owner for the full value; Morse & Co., because by signing the bill of lading they were equally responsible to the consignee for the safe delivery of the cargo. As respects the consignee, indeed, both Morse & Co. and Capt. Wager, by signing the bill of lading jointly, made themselves jointly liable as carriers; although as between themselves, Morse & Co. were but agents in procuring freight and making advances on account of Capt. Wager as principal. To secure themselves, Morse & Co. took a separate bill of lading from the master, in which they were described as shippers; and the boat and cargo were consigned to Brooks & Co., New York, as agents of Morse & Co. As each of these three parties had an insurable interest to the full amount, it was competent for Morse & Co., in taking out the insurance under an open policy "for whom it might concern," to insure for the direct benefit of all three; and had the *certificate* of insurance, besides the words "Morse & Co.," contained the additional words "on account of whom it may concern," like the original policy, there can be no question that under the proofs in this case the policy would have insured directly to the benefit of all three, and all of them been "the assured;" for the evidence leaves no question that Morse & Co. intended this insurance to operate in some form for the benefit of all. The agents of the insurance company so understood it; Morse & Co., in effecting the insurance, did it by the direct request of the consignee's agent;

and they as clearly acted, and were understood to act, on account of the captain also. The insurance premium, though paid by Morse & Co., was charged as an advance against the captain and the freight, and was allowed as such by the captain before the loss; and the evidence was that they acted for the captain's benefit as well as for their own. It is well settled that a policy "for whom it may concern" in such a case inures to the benefit of all persons having an insurable interest that are intended to be benefited by it, whether known to the insurers or not, and that such persons may sue upon the policy in their own names. A recovery by one against the insurers, in such cases, inures to the benefit of all, and bars any subsequent action by the others. *Hooper v. Robinson*, 98 U. S. 528; *Aldrich v. Equitable Safety Ins. Co.* 1 Woodb. & M. 272; *Henshaw v. Mutual, etc.*, 2 Blatchf. 99; *Fabbri v. Phoenix Ins. Co.* 55 N. Y. 129, 133; *Walsh v. Washington, etc.*, 32 N. Y. 427, 439; 1 Arn. Ins. 169, note; *Waters v. Monarch Assur. Co.* 5 E. & Bl. 870, 871.

The certificate of insurance issued in this case does not contain the words "on account of whom it may concern," or any equivalent words, but the names of Morse & Co. only. The necessary construction of the original policy with its conditions, is that, in order to make any particular transaction available under it, the names of the individuals on whose account any particular insurance under it is effected, must appear by indorsement on the policy, or by an entry made in the policy book. This condition of the policy is a perfectly lawful one, and, being clearly expressed, is controlling. In this case the name of Morse & Co. alone is entered in the policy book, without any additional words, as "for whom it may concern;" nor are they described as agents. The certificate is in accordance with this entry, and is made payable to Morse & Co., or their order. There is no language in it that can be so extended as to include other persons. Upon the written contract, therefore, "the assured," in the language of the policy, are Morse & Co. only. In such a case parol evidence is not receivable to vary the written contract, or to enlarge the interests of the persons directly assured. Arn. Ins. 169, note; *Mead v. Mercantile, etc.*, 67 Barb. 519. The indorsement of the certificate by Morse & Co. to the consignees, who were the owners of the cargo, effectually secured the latter. The consignees, in receiving payment of the loss from the insurers, received it, not as "the assured" under the policy, but as the indorsees of Morse & Co., pursuant to the terms of the contract, which provided for payment "to order." This was the mode agreed on and accepted for the security of all. It was a legal and effectual mode. In paying the consignees, the insurers paid them on account of Morse & Co., who were "the assured," pursuant to the indorsement; and hence the rights, if any, to which the insurers were subrogated upon this payment, were the rights of Morse & Co., and not the rights of the consignees, independently considered, against Capt. Wager and his vessels. In legal effect, the transaction is the

same as respects the insurers' rights of subrogation as if they had paid the whole loss to Morse & Co. as the "assured," and the latter had then paid the owners in discharge of their liability to them.

2. The relation of Morse & Co. and Capt. Wager, as between themselves, was, as I have said, that of agent and principal. Morse & Co., by signing the bill of lading, had indeed made themselves liable as principals to the consignees; but, as between themselves, their liabilities were those of principal and surety. The insurance effected by Morse & Co. was, as I have said, clearly shown by the evidence to have been intended as much for the benefit of Capt. Wager as for themselves. It was effected upon his request and authority, and the premiums paid by Morse & Co. were charged against the captain and freight. Capt. Wager was absolutely liable to Morse & Co. for this advance of premium, whether the freight or insurance money should ever be collected or not. The fact that these premiums, as part of the freight, were a lien upon the cargo and would be repaid to the captain or to Morse & Co. upon the delivery of the cargo to the owners, in case there were no loss of the cargo, is therefore immaterial as respects Capt. Wager's interest in the policy. The insurance company sufficiently understood all this, since it was in the usual course of business as fully understood by them. But the insurance did not cover any negligence of the carrier, because such negligence was expressly excepted by the terms of the policy.

Under such circumstances there can be no question that Morse & Co., on recovering from the insurance company the whole amount of the loss, would hold the money for the discharge of the joint obligation of themselves and Capt. Wager to the consignee, and to that extent they would be regarded as trustees of Capt. Wager, as the principal obligor; and Capt. Wager, as principal, would have the right to compel that application of the insurance moneys. This would not in any way conflict with any of the terms of the policy, or of the certificate; and the relation of the parties, and the circumstances that gave Capt. Wager this right, could, therefore, be legally established by parol. The situation is, in substance, analogous to the situation of mortgagor and mortgagee, where the latter, at the request of the mortgagor, insures the mortgaged premises in his own name, and at the expense of the mortgagee, and the insurance is intended for the benefit of both. In such cases, it has been repeatedly held that the mortgagor is entitled to the benefit of the insurance, and to have the amount paid to the mortgagee by the insurers applied in reduction of the mortgage debt; and that the insurers, consequently, have no right of subrogation thereto. *Stony, J., in Carpenter v. Providence Ins. Co.* 16 Pet. 502-507; *Holbrook v. American Ins. Co.* 1 Curt. 193, 200; *Kernochan v. New York Bowery, etc.*, 17 N. Y. 428; *Waring v. Loder*, 53 N. Y. 581, 585; *Cromwell v. Brooklyn Fire Ins. Co.* 44 N. Y. 42, 47. But if the mortgagee insure his own interest, without any privity with the mortgagor, or if the insurance policy itself, in terms, provides for sub-

rogation to the mortgagee's rights upon payment of the loss, then the terms of the policy will prevail, and the mortgagor cannot have the benefit of the insurance, or compel the application of the payment to the reduction of his debt, and the insurers will be entitled to be subrogated to the mortgagee's rights against him. *Springfield, etc., v. Allen*, 43 N. Y. 389; *Excelsior, etc., v. Royal Ins. Co.* 55 N. Y. 343, 359; *Foster v. Van Reed*, 70 N. Y. 19; *Bank of S. C. v. Bicknell*, 1 Clif. 85, 91-93.

In this case there is no provision for subrogation in the insurance contract; hence any right of subrogation here, as previously stated, is a mere equitable right depending upon the actual relation of the other parties to each other. It is, therefore, subordinate to the equitable rights existing between a principal and his agent who effects the insurance for the benefit of both, and upon the account, and at the primary charge, of the principal.

It has been held that where the carrier expressly stipulates in the bill of lading that he shall have the benefit of any insurance effected upon the goods by the shipper, no subrogation against the carrier would arise in favor of the insurers upon their payment of a loss. *Carstairs v. Mechanics' & Traders' Ins. Co.* 18 FED. REP. 478; *Rintoul v. New York Cent. & H. R. R. Co.* 21 Blatchf. 439; S. C. 17 FED. REP. 905. If such a stipulation is upheld when inserted in the bill of lading, it must be equally valid when clearly proved to exist by extrinsic evidence.

This insurance having been obtained, in fact, for the benefit of Capt. Wager, as the principal carrier, and at his primary charge and request, as well as for the benefit of the agent, and also for the benefit of the consignees, through an indorsement of the certificate to them, and the insurers, in effect, knowing all the facts, Capt. Wager, as principal, has a superior equity to the application of the insurance moneys in discharge of his liability as carrier; and as this equity is incompatible with any subrogation to the rights of Morse & Co., as "the assured," against Capt. Wager or his vessel, no such subrogation can be allowed. The insurers' right being a mere equity to stand in place of Morse & Co., their right is subject to the same equities that affect Morse & Co. See *Kernochan v. Bowery*, 17 N. Y. 428; *Benjamin v. Saratoga Mut., etc.*, 17 N. Y. 415, 420; *Cromwell v. Brooklyn Fire Ins. Co.* 44 N. Y. 42, 47. As Capt. Wager, moreover, had the right to have the moneys paid by the insurers, whether it was paid to Morse & Co. or to their indorsees, applied in discharge of his, Capt. Wager's, obligation as carrier, the payment by the insurers operated in law as an extinguishment of Capt. Wager's liability; and hence no obligation of Capt. Wager to either Morse & Co., or to the owners, remained to which there could be any subrogation.

3. In what has been said above, reference has been had to a loss through causes covered by the policy. The policy, however, expressly excepts "want of ordinary care and skill in lading or navigat-

ing said boats." If the loss in this case happened through the negligence of Capt. Wager or the carrying vessels, or from the want of ordinary care, then the loss was not covered by the policy, and no one was entitled to recover upon it against the insurers. For the loss by such negligence the consignees could have held both Morse & Co. and Capt. Wager, under the bill of lading which both had signed; and Morse & Co., on paying the consignees, could have resorted to Capt. Wager and the carrying vessels for his indemnity, though he would have no valid claim upon the insurance company. If the case were one of doubt whether the loss happened by negligence or not, and the carrier were a stranger to the policy, having no equitable interest in the application of the insurance moneys, the insurers, instead of litigating their liability with the assured or their indorsees, might pay the owners of the cargo, as they did in this case, and take, as they did here, an abandonment of the goods, with an assignment of all claims for damages to themselves, and then prosecute the carriers for indemnity. *Excelsior, etc., v. Royal Ins. Co.* 55 N. Y. 343, 352. It is not material to the carrier, according to the authorities, with whom he litigates the question of negligence; and the insurers, in settling and paying such doubtful claims, are not mere volunteers. *The Monticello*, 17 How. 152, 155; *Insurance Co. v. The C. D., Jr.*, 1 Woods, 72; *Sun Mutual Ins. Co. v. Mississippi Val. Transp. Co.* 17 FED. REP. 919.

But here the carrier, as I find upon the facts, is not a mere stranger to the insurance. He is equitably entitled to the benefits of the policy; and hence entitled by an equity paramount to that of the insurers, and as against Morse & Co., or their indorsees, to have any moneys paid on account of the loss to either of them applied in discharge of his own obligation. Any voluntary settlement made by the insurers with either, inures to his benefit as much as to theirs.

A voluntary settlement and payment are in general binding, and cannot be ripped up and set aside except upon some of the special and recognized legal grounds therefor; such as duress, fraud, or mistake of fact. 2 Greenl. Ev. §§ 85, 120-123; *Elliott v. Swartwout*, 10 Pet. 137, 154; *Nichols v. U. S.* 7 Wall, 128. This rule applies not only to the immediate parties to the settlement, but in favor of others also that are in privity with them. The carrier here, being equitably entitled to the benefits of the policy, is clearly in privity with Morse & Co., the assured, and their indorsees. A settlement by the insurers with either inures directly to the benefit of all. It is as binding as respects all, as respects either; and it cannot be set aside, as against either, except upon some of the special grounds above referred to. Upon either of these grounds it might be set aside, doubtless, in an action against the carrier; but then only upon appropriate averments in the libel, and upon appropriate proof. And in such a case the whole burden of proof is upon the libelants. "It is incumbent upon them," say the court in the analogous case of

Hooper v. Robinson, (98 U. S. 540,) "to establish everything necessary to entitle them to recover, and they have no right to throw upon the defendant any part of the burden that belonged to themselves." See, also, *Transportation Co. v. Downer*, 11 Wall. 129, 134.

If the proofs had shown, therefore, that this loss occurred by such negligence as rendered the insurers not liable upon their policy, and that the insurers had settled with and paid the owners upon a clear mistake of the facts in regard to their liability, I should hold that the libelants would be entitled to maintain an action against the carrier, under an appropriate libel for that purpose. But this is not a libel of that character. No mistake or misapprehension of any of the facts at the time of settlement and payment is alleged in the libel, or suggested in the proofs; and as to the alleged negligence, no evidence has been given by either party. The libel charges negligence; the answer denies it, and states that the stranding occurred under such circumstances as negative the charge. These averments of the answer must be taken as a whole. The libelants having once paid the loss, as a loss covered by the policy, if they sought to recover back the amount paid in an action against a carrier equitably entitled to the benefit of the policy, on the ground that the loss was within one of the exceptions of the policy, and was paid under a mistake of fact, must sustain the entire burden of proof, and affirmatively show both their ignorance and mistake as to the facts, and that the loss was actually within the exceptions of the policy.

The libelants are not in the situation of mere naked assignees of a cause of action for damages held by the consignees against the carrier; nor do they sue in that character. It has been said that insurance companies have no power to purchase and sue on such claims independent of any question of their own liability. *Excelsior v. Royal Ins. Co.* 55 N. Y. 343, 357. Here they sue as insurers, who have paid the loss as a loss covered by the policy; and they now claim subrogation, in consequence of such payment, to a claim against the carrier. If, for the reasons above stated, they might be allowed to reopen the settlement made upon a mistake of fact, and prove that the loss was one not really obligatory on them to pay, because caused by negligence, the action must be one appropriate to that purpose, and the burden of proof in all respects be sustained by them. Neither the form of action nor the proofs meet these requirements; and the libel must, in every point of view, therefore, be dismissed, with costs.

v.28f,no.2—7

THE REGULUS.

(*Obit Court, S. D. New York. January 6, 1885.*)

1. CARRIERS BY WATER — SEAWORTHINESS — CHARTER-PARTY — OVERLOADING
FRUIT CARGO—VENTILATION—PROXIMATE CAUSE OF INJURY.

Where a vessel was chartered to take a specified cargo of fruit, after loading with other cargo, and the contract contained a clause that the hatches should be taken off, "whenever practicable, as usual, for the ventilation of green fruit," and the master overloaded the ship, in consequence of which the hatches could not be removed, as usual, on the voyage, *held*: (1) that the charter-party obligated the ship to furnish the usual ventilation for a cargo of fruit, to the extent of which her ordinary facilities would permit, in view of the perils of the voyage; (2) that there was a breach of this obligation by overloading the ship so that it was not practicable to open the hatches as usual; (3) that the charterer was entitled to rely upon the contract, and was not precluded from recovering, because he had reason to apprehend when he delivered his cargo that the ship would be overloaded.

2. SAME—DECREE AFFIRMED.

Upon examination of the evidence, the decree of the district court (18 FED. REP. 380) in favor of libellant is affirmed, with costs.

In Admiralty.

Goodrich, Deady & Platt, for claimant and appellant.

Wm. A. Walker, for libellant and appellee. *Geo. A. Black*, of counsel.

WALLACE, J. The libel is filed to recover damages for the loss upon a cargo of oranges received by the steam-ship at Valencia, Spain, in January, 1881, to be transported to the city of New York. The *Regulus* sailed from Valencia, January 7th, and arrived in New York, February 9th, with the oranges rotten. The libel, after setting out the conditions of a charter-party executed between the libellant and the owners, avers that the steam-ship at the time she received the oranges was so stiff and deep in the water in consequence of cargo previously taken on that she was unseaworthy, unfit to encounter the weather of that season of the year, and rendered incapable of properly ventilating and caring for the cargo of fruit, and that the master and those navigating her failed to properly ventilate the same. The answer denies any lack of proper ventilation "so far as the circumstances of the voyage would permit;" alleges that the libellant well knew the quantity of cargo on board before the loading of his cargo; denies that the steam-ship was overloaded; denies all negligence; alleges that the damage to the fruit, if any, was occasioned solely by unusually stormy weather and heavy seas, whereby the voyage was protracted, and the usual ventilation became impracticable; and insists that the loss was within an exception in the bill of lading exempting the steam-ship from liability. An issue is made by the pleadings respecting the proper stowage of the libellant's cargo; but the ship was stowed by the libellant's stevedores, was properly stowed, and upon

the concessions of counsel at the hearing this issue is to be deemed eliminated from the case.

The proofs establish the following facts:

November 30, 1880, the *Regulus* then being in the Tyne, bound for Genoa, her owners entered into a charter-party at London with the libellant, conditioned that, "after loading her mineral at Elba for owner's benefit," she should proceed to Valencia, and load 4,400 cases of oranges for the libellant, "not above what she could reasonably stow and carry, above her tackle, apparel, provisions, and furniture," and being so loaded should proceed to New York. It was also conditioned in the charter-party that the hatches should be taken off "whenever practicable, as usual for ventilation of green fruit." After leaving Genoa the ship proceeded to Elba and took on 1,243 tons of mineral ore, the master giving notice by telegram to the libellant, December 23d, that she would sail that night for Valencia. She arrived there, January 1st. In the mean time the libellant had directed his oranges to be packed, boxed, and brought in from the country ready for shipment. January 5th, a bill of lading was executed between the libellant and the master containing a clause exempting the owners from liability from loss from all accidents of navigation and from negligence or default of master, mariners, or others. When she arrived at Valencia the steam-ship had on board 60 tons of coal, besides the 1,243 tons of ore taken on at Elba. Her carrying capacity was 2,000 tons. The libellant, who had been a ship captain and was familiar with the contingencies of the voyage and the conditions of safety for his fruit, objected to the master that the ship was too deeply loaded, and suggested that with bad weather the hatches would have to be battened down, and the fruit could not be properly ventilated. The master dissented from this view, and the libellant delivered the oranges, 4,326 cases, weighing about 300 tons. After the cargo had been delivered the libellant was informed that the ship would coal at Gibraltar. This had not been understood by him before; it was not contemplated by the terms of the bill of lading, and there was no uniform custom on the part of vessels coming from England to do so, although fruiterers generally on a voyage from the Mediterranean to New York were accustomed to coal there. The steam-ship left Valencia, January 7th, and proceeded to Gibraltar where on the 10th she took on 300 tons of coal. On January 11th she left there for New York. When she left Gibraltar her draught of water aft was 19 feet 6 inches, and forward was 17 feet 4 inches, a mean draught of 18 feet 5 inches. She carried a Plimsoll mark, according to the provisions of English acts of parliament, which is a disk one foot in diameter with a line drawn horizontally through the center, painted on the outside of the vessel amid-ship. The center line fixes the point beyond which according to the judgment of the owner the vessel is not to be loaded deeper. When she left Gibraltar her water or load line was about 10 inches below the center line of the Plimsoll mark, and she had 4 feet 4 inches of free-board.

According to Lloyd's rules, however, the utmost mean draught of water which she could have, consistently with safety to herself and any cargo, was 18 feet 5½ inches, and a free-board amid-ship of not less than 4 feet 5½ inches. Vessels carrying fruit customarily allow a free-board of a couple of feet more than the free-board for ordinary cargo in order that the hatches can be opened without danger from water to secure the necessary ventilation of the fruit and prevent it from heating. The coal taken on at Gibraltar increased her draught something over a foot, but when she left Valencia it is safe to assume she drew at least a foot more water than was customary, in view of the cargo she was to carry and the reasonable contingencies of the voyage. The steam-ship was provided with the ordinary facilities for ventilation, and in addition with booby hatches such as are usually provided for the ventilation

of fruit cargoes, and which were constructed under the supervision of libellant at Valencia. These booby hatches were built at the after-part of the holds, Nos. 2 and 5, in which the oranges were stowed. After leaving Gibraltar the steam-ship met with unusually tempestuous weather and heavy seas, which lasted with occasional intermissions of a day or two at a time until she arrived at New York, February 9th. On January 12th one of the booby hatches was carried away by the seas, and on the 13th the other was carried away. After that the hatches were covered with tarpaulins, and were opened for ventilation from time to time, and wind-sails were used for that purpose; but owing to the heavy seas constantly shipped by the steamer the hatches were not kept open sufficiently for the proper ventilation of the oranges. The voyage of the ship was protracted 10 or 12 days beyond the usual time required by reason of the heavy gales and seas she encountered, and because in consequence of being so deeply laden she was obliged materially to decrease her speed.

When the oranges were delivered on board they were in good condition for shipment, and with proper ventilation would have arrived in good condition notwithstanding the length of the voyage. When the ship left Gibraltar she was too deeply laden by two or three feet to carry her cargo of oranges with a due regard to necessary ventilation in case of encountering heavy seas. Her trim was gradually lightened as she consumed her coal, but when she arrived at New York her draught of water aft was 18 feet 10 inches. If she had had two more feet of free-board she would not have shipped such heavy seas, and it would have been practicable to open her hatches oftener and ventilate her fruit more efficiently than was done. Two other steam-ships, the Navigation and the Rossend Castle, left Gibraltar about the same time she did; the Navigation bound for Boston, and the Rossend Castle for New York. They encountered the same weather, substantially, as did the Regulus, but were able efficiently to ventilate their cargoes of oranges and deliver them in good order. The Navigation sailed from Gibraltar, January 10th, and arrived at Boston, February 1st. Her voyage was protracted about three days by the very exceptional weather she met with. Her booby hatches were carried away by the heavy seas. She carried a clear side of seven feet, and shipped a great deal of water during the passage; but, although a large part of the time she was unable to take off her hatches, she managed to keep the lee corners open for ventilation. Owing to the want of sufficient ventilation the libellant's oranges became heated upon the voyage and rotted, whereby he sustained a loss in the sum of \$10,144.99, which sum represents the difference between the amount realized by the sale of the oranges at public auction in New York, January 10, 1881, and the amount he would have realized over the current prices at that time if the oranges had arrived in good condition.

In considering the proofs, the question which has presented the most difficulty is the one of fact, whether, in view of the severe weather encountered by the steam-ship, it would have been practicable, if she had not been overloaded, to keep the hatches open sufficiently for the ventilation of the fruit. No doubt is entertained that, with the usual free-board, the steam-ship would not have shipped such heavy seas, and that the hatches could have been opened more frequently than was practicable when she was loaded down almost to the limit of her draught. But the weather was extraordinary, and the doubt is whether, with two feet more of free-board, she would not still have been under the necessity of keeping her hatches closed so much of the time as to preclude the necessary ventilation. It is incumbent upon the libel-

ant to show affirmatively that the loss arose solely from the breach of the obligation of the charter-party; and he cannot prevail by raising a doubt upon this point. It does not help him that in such a case the evidence is almost wholly in the control of those in charge of the ship, and affords him a frail reliance in establishing fault on their part; but it is not unreasonable to hold that where it is shown that the ship disregarded the practice which experience had established, and which is therefore to be deemed essential to a discharge of her whole duty, that circumstance is *prima facie* sufficient to account for the result, and to shift upon the ship the burden of a satisfactory exculpation. Certainly the proofs are not convincing that the hatches could not have been opened efficiently for ventilation if the ship had been in light trim and carried the usual free-board. The result that followed was just what experience indicated as likely to follow in case of heavy seas. The log of the first officer is well calculated to convey the impression that the vessel had to contend with tremendous seas throughout nearly the entire voyage; but an analysis of the testimony of the master and of the first officer, and a comparison between this log and the engineer's log materially modifies this impression. For instance, the log (January 11th) has this entry: "Ship rolling heavily, and shipping quantities of water over all;" while the master, with the official log in his hand, says the first bad weather was on the 13th. The first officer also testifies that there was nothing extraordinary in the character of the wind or sea on the 11th. The fact that the Navigation encountered substantially the same perils with safety to her cargo, fortifies the theory that the loss is attributable to the fault of the ship rather than to the perils of the voyage.

The cause of action being founded on the breach of the charter-party the remaining question is whether the hatches were "taken off whenever practicable, as usual for ventilation of green fruit." This covenant obligated the ship to furnish the usual ventilation necessary for such cargoes to the extent which her facilities would permit. The hatches were to be taken off whenever practicable, in view of the facilities of the ship as they existed at the time the charter-party was executed and the vicissitudes of the voyage. It was not contemplated by the charter-party that the ship should be at liberty to carry other cargo of a character to cripple the ordinary ventilating facilities of the ship. The hatches may have been taken off to the extent practicable in view of the overloaded state of the ship on her voyage and the weather she encountered; but they were not taken off "as usual" because the overloaded condition of the ship rendered this impossible. The ship could not perform her contract with the libellant because those in charge had put it out of her power to do so. If there was negligence on the part of those in charge in not removing the hatches as often as they should have been, the ship is not exonerated by the exception in the bill of lading. Conceding that the contract is to be

interpreted and effectuated according to the law of England, (*Moore v. Harris*, L. R. 1 App. Cas. 318-382; *Woodley v. Mitchell*, L. R. 11 Q. B. Div. 51,) and that it was competent by the stipulation of the parties to exempt the ship from liability arising from the negligence of those in charge, yet that stipulation must give way to the expressed contract to take off the hatches whenever practicable. Both cannot stand together, and any doubtful question of construction should be resolved against the carrier. *Hayn v. Culliford*, L. R. 3 C. P. Div. 410; L. R. 4 C. P. Div. 182; *Taylor v. Liverpool*, L. R. 9 Q. B. 549.

It is insisted for the appellant that the libellant cannot recover because he knew the ship was overloaded when he delivered his cargo to her. If his cause of action was one for negligence it would be pertinent to inquire whether there was negligence on his part which contributed to the loss, and if so, whether the loss should fall upon him or be apportioned. There is no principle, however, which precludes one party from a recovery for the breach of an express contract because he had reason to suppose at the time the contract was made, or during the time it remains executory, that the other party could not perform. He has a right to rely upon the contract and to substitute the promise of the other party for his own fallibility of judgment.

In reaching the conclusion that the decree of the district court was right, the theory that the delay in the voyage which was attributable in part to the overloading of the ship contributed to the spoiling of the fruit has not been adopted. Possibly with a shorter voyage the lack of proper ventilation might not have been so injurious to the fruit; but this would seem to be conjectural merely; and when the oranges were shipped they were unripe and ought to have kept 40 or 50 days with ordinary care. The testimony introduced for the first time upon this appeal has not materially changed the case as made in the district court; and that which has been adduced to show that the oranges when shipped were unduly ripe is rejected as utterly unworthy of credit.

A decree is ordered for the libellant for \$10,144.99, with interest from January 10, 1881, with the costs of the district court, and of this appeal.

THE PILOT BOY.

(District Court, D. Maryland. February 9, 1885.)

1. EXCURSION BOATS—CARRIERS OF PASSENGERS—DUTY TO PASSENGERS.

The owners of excursion boats used for night excursions are bound to use proper precautions to guard against the natural mistakes of passengers while on board.

2. SAME—NEGLECT TO SUFFICIENTLY LIGHT A STAIR-WAY.

Where there was an open door-way from which steep stairs descended to the hold, which was in such a location that it was likely to be mistaken by a passenger for the stairs which ascended to the upper deck, *held*, that the owners of the boat were guilty of negligence in not having it so effectually lighted as to warn a passenger making such a mistake as soon as he faced, and was about to step into the opening.

In Admiralty.

A. Stirling Pennington, for libelant.

H. V. D. Johns, for respondent.

MORRIS, J. This is a libel *in rem* instituted by a passenger who received injuries from falling down a stair-way on the steam-boat Pilot Boy while on an evening excursion from Baltimore to Keller's Pavilion, in June, 1884. There is some conflict of testimony with regard to whether or not the libelant was under the influence of drink at the time of the accident. I take it that even on such an excursion as this, and with a bar on board, the presumption still remains that the excursionist was sober, and, aided by that presumption, I think the weight of evidence is decidedly with the libelant. The account given by the libelant and his companion of what they had done during the afternoon and while on board is quite inconsistent with his having had enough drink to affect his conduct or his care for his own safety. I find the fact to be that the libelant was sober.

On the Pilot Boy there is on the forward part of the main-deck a structure, in the center of the ship, containing on one side a door-way and stairs leading up to the upper deck, and on the opposite side containing a door-way and stairs leading down to the hold. There is across the whole deck, and extending from each side of this structure to the port and starboard edges of the boat, a partition or bulk-head, with an entrance door on each side. Directly by the entrance door on the port side there is the door-way and stairs ascending to the upper deck, and similarly placed, directly by the entrance door on the starboard side, there is the door-way and stairs descending into the hold. The account of the accident, given by the libelant, is that he was coming from the stern of the boat along the starboard alley-way, intending to go up again onto the upper deck, where he had before been sitting, and thinking that the stairs on both sides lead to the upper deck, he stepped into the starboard door-way, which was open, and the place being entirely dark, and not finding the ascending steps, he fell down to the bottom of the steep descending stairs,

and was injured. It is admitted that the door was fastened open, and, unquestionably, if the opening was not sufficiently lighted, it was in that location a dangerous opening; so that I think the case turns, in great measure, on the question whether the lighting was sufficient for such a place on an excursion boat. There was a bright light with a reflector, fastened against the after-most side of the structure and in the center of the boat. But this was not against the side of the structure in which this door-way was, but at right angles with it and around the corner from it. Obviously, this light did not serve to illuminate the door-way in question. There were lights in the bar, some distance aft, and on the opposite side of the alley-way, which ran fore and aft, and there was a light of some sort on the opposite side of the alley-way, say eight to ten feet distant from the door-way, but not placed directly opposite to it.

There is a conflict of testimony as to whether there was a light in the hold at the foot of the stairs. The libelant says there was no light at all in the hold. The witnesses of the steam-boat say that there was usually placed on a bench near the foot of the stairs a small light for the use of the firemen who were obliged to use this stair-way, and who were the only persons entitled to use it. If this light was there, it was such a light as would very dimly illuminate the stair-way, and as there was no fixed place for it, it may have been placed well towards the after-end of the bench. Since the hearing I have visited the steam-boat, and feel quite sure that I now understand the location of the doorway and its surroundings. It is plain that from its position an ordinary passenger might in the night-time readily suppose that this door-way was an opening leading to the upper deck, and the question to be determined is, was the lighting sufficient to warn a person of ordinary prudence, who was acting under that reasonable impression, what its real character was in time to prevent his stepping into it? Undoubtedly it was lighted sufficiently for men accustomed to the boat, for they know its real character, and would need but very little light; but I take the law to be that owners of excursion boats carrying pleasure-seekers on a night excursion are bound to guard against the natural mistakes of such passengers. The law is that carriers of passengers are not liable, if injuries happen from sheer accident or misfortune, where there is no negligence or fault, or where no reasonable caution, foresight, or judgment would have prevented the injury; but the carrier is liable for the smallest negligence of himself or his servants. I think it was a natural mistake for any landsman to make, to suppose that this opening led to the upper deck, and I think that when it was left open the lighting should have been sufficient to give instant warning to such a person of his mistake. For a boat carrying a crowd of excursionists at night, I do not think the lights on the main deck were sufficient to give such warning, and I do not think the dim light placed on the bench in the hold near the foot of the stairs made them sufficient. There should have been a

good light inside the opening, placed high enough to catch the eye of the passenger as soon as he faced the opening. It may be said that in a narrow opening with steps leading directly down, and with the ascending steps from the opposite side close overhead, and inclining towards the opening, such lighting would be difficult. This may be so. I can appreciate the difficulty, and no doubt the safer and better plan would be to have some obstruction across the door-way to check any one attempting to enter.

The boat's officers state that the door must be kept fastened open to give ventilation to the firemen in the hold, and this being so, the surest precaution against the dangerous mistakes of excursionists at night would seem to be to put some physical obstruction across it, and this would be more effectual than any amount of lighting. I have heard and considered with attention the testimony of the experienced steam-boat men who were called as experts, and who testified that in their judgment the precautions used were sufficient, and in holding that they were not, I do not, of course, mean to assume that the court, by any sort of judicial legislation, may declare that steam-boats must be constructed and furnished according to plans which the court may think most judicious, but I do consider that the testimony of nautical men as to what is sufficient to prevent such accidents must be received with some allowance, for this reason, that it is difficult for seafaring men to comprehend how stupid an ordinary landsman or excursionist is with regard to the construction of a boat, and how liable he is to become confused with regard to the location of the stair-ways leading from one deck to another.

Now, with respect to a boat used for night excursions, and particularly one which has a bar on board, and is intended for more or less merry-making, the rules of law governing carriers of passengers should not be relaxed, and they should be required to guard against the natural and general ignorance and mistakes of those they invite on board as passengers. In this case, as the neglect for which I pronounce the steam-boat in fault is not one of gross or willful negligence, the recovery should be strictly confined to a reasonable compensation. The libellant proved no actual loss of earnings or expenditures for medical attendance. He was laid up in the city hospital nine weeks, and was on crutches two months,—say eighteen weeks in all.

A decree may be drawn for \$300 and costs.

**BROUGHTY v. FIVE THOUSAND TWO HUNDRED AND FIFTY-SIX BUNDLES
OF STAVES, etc.**

(Circuit Court, N. D. New York. January 30, 1885.)

CARRIERS OF GOODS—LOSS OF GOODS—EVIDENCE.

Decree of district court, 21 FED. REP. 590, affirmed.

In Admiralty.

Marshall, Clinton & Wilson, for appellant.

Cook & Fitzgerald, for appellee.

WALLACE, J. Under the allegations in the libel, the libelant cannot be permitted to deny that he received on board his schooner all the cargo described in the bill of lading. But the claimant, the consignee, accepted the cargo without insisting upon a tally by the carrier, and without making one himself, to ascertain whether all was delivered that was shipped. Part of the cargo after its delivery to the consignee was permitted to remain exposed on the dock over night. After the cargo was transferred from the dock to the cars the cars were sealed, and the cargo remained in them for about six weeks when a tally was made, and it was discovered that part of the cargo described in the bill of lading was missing. The acceptance of the cargo by the claimant without objection was an acknowledgment that the carrier had performed his contract, and implied a promise to pay the freight, which the consignee was instructed to pay by the bill of lading upon delivery. The testimony for the libelant tends to show that all the cargo received was delivered as strongly as the testimony for the claimant tends to show the contrary. The affirmative of the issue is with the claimant, he having accepted delivery of the cargo. His proofs are as unsatisfactory as those of the libelant. It is as reasonable to infer that the missing part of the cargo was stolen upon the dock after it had been delivered to the consignee as that it was lost or misappropriated on the voyage. The decree of the district court is affirmed, with costs.

RAWSON and others v. LYON and others.¹

(District Court, S. D. New York. January 28, 1885.)

1. REPRESENTATIONS—FRAUD—MUTUAL MISTAKE.

The owners of the brig *D.* filed a libel against the charterer to recover a balance of charter money. The charterer answered that "at the time of the execution of the charter-party it was represented, warranted, and agreed by the master and agents of the brig that she was of 247 tons register, and would carry 2,700 barrels, or from 290 to 300 tons of logwood, on the faith of which the charter was accepted, but which agreement was by mistake inadvertently omitted from the charter;" and that the vessel brought home only about 225 tons of logwood. The written charter contained a clause that the vessel was of 247 tons register, which was true; and it was proved that she carried on her outward voyage 2,900 barrels, and on the homeward voyage brought only 225 tons of logwood, because so bulky that more weight could not be got under deck.

2. SAME—EVIDENCE.

Evidence in support of the allegation of the answer as to the representations was taken under objection to its admissibility, and contrary evidence was offered in behalf of the brig.

Held, that if the answer had charged fraud, the evidence would have been admissible under recent authorities, (*contra*, *Baker v. Ward*, 3 Ben. 499,) and so if a mutual mistake of fact were charged; that on the evidence there was no mutual mistake of fact, or any such representations as were meant or understood as a warranty that the brig would carry 290 or 300 tons of logwood.

3. SAME—EVIDENCE MUST BE SATISFACTORY.

If the rule which makes the writing the highest evidence of the contract, and excludes evidence of prior conversations to vary it, or to attach to it new conditions or obligations, is to be relaxed in cases of fraud, actual or constructive, or of mutual mistake, the evidence showing such fraud or mistake must be entirely clear and satisfactory, and in cases of doubt the writing must prevail.

In Admiralty.

Benedict, Taft & Benedict, for libelants.

Scudder & Carter and *Geo. A. Black*, for respondents.

BROWN, J. This libel *in personam* was filed to recover the sum of \$515.83, a part of the sum of \$2,150, agreed to be paid by the respondents for the charter from the libelants to the respondents of the brig *Dauntless*, for a voyage from New York to Port au Prince and back in November, 1882. The answer alleges that "at the time of the execution of the said charter it was represented, warranted, and agreed by the master and agents of the brig that she was of 247 tons register, and would carry 2,700 barrels, or from 290 to 300 tons, of Jamaica log-wood; on the faith of which the charter was accepted, but which agreement was, by mistake, inadvertently omitted from the charter." Upon the trial it was proved that the brig, upon her outward voyage, took 2,940 barrels; but on her return voyage, though fully loaded, she could take but 225 tons of logwood, instead of 290 or 300 tons. Considerable testimony was also offered to show that in the negotiations leading to the execution of the charter-party, the brig was represented by her captain to be able to take from 290 to 300 tons of

¹ Reported by R. D. & Edward Benedict, Esqs., of the New York bar.

logwood. This testimony was objected to as inadmissible to vary the written charter, which stated the tonnage correctly, but contained no representation as to the number of barrels, or the tons of logwood, that she could take. The difficulty was not in her ability to carry 300 tons weight, but in her capacity to stow so much logwood between-decks.

The answer does not allege any fraud, nor that the representation alleged was fraudulently made, but only that the representation was untrue. The evidence is not even conclusive that the brig could not have carried 290 or 300 tons of logwood, if the wood were of sufficiently large sticks, or if it had been sawed so as to be stowed compactly. Had the answer charged false and fraudulent representations, as the means whereby the respondents were induced to enter into this charter-party, I should have regarded the testimony offered as admissible according to weighty authorities. *Cooper v. Schlesinger*, 111 U. S. 148, 152, 155; S. C. 4 Sup. Ct. Rep. 360; *Johnson v. Miln*, 14 Wend. 195; *Brown v. Tuttle*, 66 Barb. 169; *Thomas v. Beebe*, 25 N. Y. 247; *Bennett v. Judson*, 21 N. Y. 238; *French v. Newgass*, L. R. 3 C. P. Div. 163; 1 Story, Eq. § 193. So if there were any mutual mistake of fact which was the foundation of the contract. *Funch v. Abenheim*, 20 Hun. 1. In the case of *Baker v. Ward*, 3 Ben. 499, however, evidence similar to that offered in this case was excluded, even where the answer expressly alleged false and fraudulent representations.

I do not deem it necessary to consider this question anew in this court in the light of subsequent authorities, inasmuch as upon the evidence, which was provisionally received concerning the conversations between the parties prior to the execution of the charter-party, I must hold that no mutual mistake of fact is established, nor any such representations as were either meant or understood to be a warranty that the brig would carry 290 or 300 tons of logwood. *Hawkins v. Pemberton*, 51 N. Y. 198; *Durham v. Fire & Marine Ins. Co.* 22 FED. REP. 468.

On the part of the libelants the evidence is that the captain said that the brig had never carried any logwood, though he had once been to Jamaica for logwood with another vessel; but that the Dauntless would carry 300 tons of logwood "if they could get it aboard." The broker testified in behalf of the respondents that the master said that the Dauntless *had* brought 300 tons of logwood from Hayti. It seems to me more probable that there was error in the recollection of the broker as to the precise language of the master, than that the master stated the downright falsehood of which the broker's testimony, if true, would convict him. The witnesses on this point are evenly balanced, and the circumstances favor the respondent's version of the conversation. The omission from the charter-party, of a positive stipulation for the carriage of 290 or 300 tons, well agrees with the libelants' testimony concerning the condition attached to the statement,

viz., that she would carry 300 tons "if it could be got aboard;" while, if made in the positive form alleged by the broker, there is no reason why the charter-party, drawn up by himself, should not have contained it. Moreover, within a week after the execution of the charter-party, in a conversation between the broker and the master, the broker desired the master to saw the logwood in order to have it packed more compactly, and thus be able to bring as large an amount as possible; and he offered to contribute something for that purpose. But the master declined to do anything about sawing, as not incumbent on him. Such a conversation seems to me less likely to have occurred had it been understood that the brig was at all events to bring from 290 to 300 tons of logwood, than if the amount she would bring was understood to be dependent upon her capacity for stowage. If the rule of law which makes the writing the highest evidence of the actual contract between the parties, and which excludes evidence of prior conversations to vary it, or to attach to it new conditions or obligations, is to be relaxed in cases of fraud, actual or constructive, or in case of mutual mistake, the evidence showing such fraud or mistake must be entirely clear and satisfactory to the court; and in case of doubt, at least, the writing, as it stands, must prevail.

The libelants are, therefore, entitled to the balance due according to the terms of the charter-party, with interest and costs.

THE S. B. BAKER, etc.¹

(District Court, S. D. New York. January 31, 1885.)

SALVAGE—FIRE IN COTTON—TOWAGE.

A fire broke out during a westerly gale among the cotton bales which composed the cargo of the lighter Baker, lying along-side the *Servia*. The slip was filled with boats, which were imperiled by the fire, and the fire could not be extinguished there. Upon signal from the superintendent of the wharf, the tug *L.* towed her out from the slip into the river, and played upon the fire with a small hose until the arrival of two city fire department tugs. The *L.* then towed the three vessels to a place convenient for taking out the burning cotton. The value of the cotton saved and sold was \$29,000, the value of the lighter about \$3,000, and the tug *L.* was worth about \$14,000. There were no special circumstances of danger to the salvors or their tug, and the service was completed in about two hours. *Held*, that \$750 was a proper salvage award.

In Admiralty.

Alexander & Ash, for libelants.

Butler, Stillman & Hubbard and *Wilhelmus Mynderse*, for claimants.

BROWN, J. At about 1 P. M. on the twenty-fifth of September, 1883, a fire was discovered among bales of cotton on the lighter *S. B. Baker*,

¹Reported by R. D. & Edward Benedict, Esqs., of the New York bar.

lying in the slip on the southerly side of pier 40, North river. The wind was westerly, blowing nearly a gale. The lighter lay near the end of the slip, inside of the steam-ship *Servia*. The fire had burst out ablaze around the wood-work of the mainmast, and the blaze ran up along the canvas, which hung upon the mast. The pier was well supplied with means for putting out fires, and a hose was very speedily run from the pier, across the *Servia*, to play upon the fire. Another hose was also got out from the *Servia*. The slip was full of vessels, and the superintendent, fearing danger from an increase of the fire in a high wind, called for aid to move the lighter away. The libelants' tug *Lyndhurst* answered the call; came along-side the lighter about five minutes after the fire broke out; attached his lines to her; pulled her out of the slip; and then took her along-side further into the river, playing upon her with a one-inch hose, which was aboard. Very soon the steam fire-engine boat *Zophar Mills*, belonging to the city fire department, came along-side of the *Lyndhurst*, threw her hose across her, and poured several heavy streams upon the burning cotton. As fire among cotton bales cannot be thoroughly extinguished without either submerging them or unloading, it became necessary to take the lighter to some vacant wharf, where the bales could be rolled off, and the fire among them completely put out. The *Lyndhurst* was therefore directed to go ahead, and take the boat in tow up-river till a suitable place could be found. The *Lyndhurst* then left the side of the boat, proceeded ahead, and took the lighter upon a hawser, the *Mills* being along-side of her. About the same time, another fire-boat belonging to the city fire department (the *Havemeyer*) came up, and went along the other side of the lighter; and the three boats were towed by the *Lyndhurst* to Fifty-seventh street, where the bales were rolled off, broken open so far as necessary, and the fire extinguished. The value of the cotton saved was \$29,000; the value of the *Baker*, about \$3,000; and the *Lyndhurst* was worth about \$14,000.

The claimants contend that a very small sum only, if anything, should be allowed for the salvage services of the *Lyndhurst*, on the ground that the lighter originally lay in a good place for being drenched with water to put out the fire; and that her removal was directed, not for her own safety, but for the safety of other vessels. There were no proper means, however, for extinguishing the fire where the lighter lay in the crowded slip. Though the fire might be subdued, it could not be put out there. There were no means there of unloading the bales; and in the high wind then prevailing, the fire might break out anew at any moment, and in remaining there she would be a source of constant danger to other vessels. As it was, one other lighter caught fire. The removal of the barge was, therefore, a matter of necessity; both to put out her own fire and prevent its spreading.

The services of the *Lyndhurst* were clearly salvage services. They were rendered promptly and efficiently. Her crew were active and energetic in removing the lighter; in playing upon her with their

own hose till the Mills came up; and then in assisting the Mills; and, finally, in towing all three boats to Fifty-seventh street. The Lyndhurst, though scorched and blistered, can hardly be said to have been in actual danger. The whole time occupied was about two hours. Considering all the circumstances, I think \$750 will be a proper sum to award as salvage; one-half to the boat, and the rest to be divided among the captain and crew in proportion to their wages.

THE TALISMAN.

(District Court, E. D. Pennsylvania. February 16, 1885.)

PILOTAGE—REFUSAL TO ACCEPT—ACTION BY PILOT TO RECOVER.

To justify recovery of a claim for pilotage by a pilot whom a vessel has refused to receive, the court must be fully satisfied that the respondent refused or neglected to take such pilot, as provided by the statute.

In Admiralty.

On April 12, 1883, in the night-time, the bark *Talisman*, bound for Philadelphia, while off the Whistling Buoy, Delaware bay, signaled for a pilot, and such signal was answered by the *Henry Cope*, which followed her up the bay, and overtook her as she was about to anchor. The pilot tendered his services, and being told by the master that he intended to wait till daylight and see if there were any tug-boats about, went off and did not return. Subsequently he sued for pilotage fees.

Curtis Tilton and *Henry Flanders*, for libelant.

H. G. Ward, *M. P. Henry*, *J. Rodman Paul*, and *C. M. Hough*, for respondent.

PER CURIAM. To justify recovery of the claim the court must be fully satisfied that the respondent *refused*, or *neglected*, to take a pilot, as provided by the statute. While it is true that the liability imposed by the statute for such refusal or neglect is not, technically, a penalty,—as the courts have decided,—its operation and effect, when applied, is so far in the nature of a penalty that it should not be applied except in cases of willful refusal or neglect. Did the respondent willfully—that is to say, purposely or intentionally—refuse or neglect in this instance? If he did not absolutely refuse the services tendered, he certainly neglected to avail himself of them; and I do not see, therefore, how he can escape liability. It seems quite plain that he intended, from the start, to avoid taking a pilot if he could find a tug. He appears to have been laboring under the misapprehension that no obligation to take a pilot rested on him after reaching the point where he anchored. What he said to the pilot is consistent with this view, and seems to be inconsistent with any other. A decree must be entered for the libelant, with costs.

THE AMSTERDAM.¹*(District Court, S. D. New York. February 13, 1885.)*

1. LIMITATION OF LIABILITY—INJUNCTION.

In proceedings to limit the liability of a vessel, an injunction may issue to restrain the prosecution of suits in a state court.

2. SAME—PERSONAL INJURY.

Claims for damages for personal injuries arising out of the stranding of a vessel are within the provisions of the statute limiting liability.

In Admiralty.

Curzman & Yeaman, for the motion.

J. Joachimsen, for the Amsterdam.

BROWN, J. The steamer Amsterdam having been lost by stranding, and proceedings being thereupon taken in this court by her owners to limit their liability upon payment into court of the appraised value of the vessel and her pending freight, an injunction was issued in accordance with the provisions of rule 54, restraining the prosecution of suits in the state courts. Several suitors, claiming damages for personal injuries arising more or less directly out of the stranding, have asked that the injunction be dissolved on the grounds that there is no statutory authority for the injunction itself; and, *secondly*, because claims for such personal damages are not within the statute. Rule 54 expressly declares that the owners, on complying with the statute, shall be entitled to an injunction order. It is not for this court to overrule the interpretation of the statute put upon it by the supreme court, or the practice they have sanctioned. This rule will not cut off sufficient opportunity to present every legal demand. The causes of action are purely maritime. This court, as a court of admiralty, is at least as appropriate as any other for the hearing of all questions arising in such cases; and every point that can be litigated anywhere can be presented and determined here.

The other question, as to whether personal injuries are within the provisions of the statute limiting liability, was carefully considered by BENEDICT, J., in the case of *The Epsilon*, 6 Ben. 381, and afterwards by CHOATE, J., in this court, in the case of the *Seawahnaka*, (*In re Long Island, etc., Transp. Co.* 5 FED. REP. 599, 624;) and in both cases it was held, upon full consideration, that such actions are within the provisions of the act. The reasons for the conclusions there given commend themselves to my judgment, and this application must, therefore, be denied.

¹ Reported by R. D. & Edward Benedict, Esqs., of the New York bar.

PARSONS v. MARYE and others.¹

(Circuit Court, E. D. Virginia. February 11, 1885.)

1. FEDERAL JURISDICTION—SUITS AGAINST STATE OFFICERS—MANDATORY INJUNCTIONS.

Although a state, without its consent, cannot be sued as an individual, yet where a plain official duty, requiring no exercise of discretion, is to be performed by a state officer, and the performance is refused, any person who will sustain a personal injury by such refusal may have a *mandamus* to compel performance; or, where *mandamus* is not available, may have a mandatory injunction for that purpose; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it.

2. SAME.—A federal court has jurisdiction over a state officer, in questions arising under the constitution, laws, etc., of the United States, where the law has imposed upon him a well-defined duty in regard to a specific matter not affecting the general powers or functions of government, but in the performance of which one or more individuals have a distinct interest, capable of enforcement by judicial process; and when it shall be necessary to enforce the rights of the individual, a court of chancery may, by a mandatory decree, or by injunction, compel the performance of the appropriate duty, or enjoin the officer from doing what is inconsistent with that duty and with the plaintiff's rights in the premises.

3. SAME.—VIRGINIA COUPONS—CASE AT BAR.—A non-resident holder of Virginia coupon bonds makes arrangements with sundry tax-payers to purchase and use in payment of license taxes due the state the coupons cut by him from his bonds, by which arrangement he would receive payment in large part for his coupons; the tax-collecting officers, as required by state laws, have in various ways published that coupons would not be received in payment of such taxes; the state law allowing tax-payer to sue for purpose of verifying coupons had been repealed as to license taxes, and the writ of *mandamus* had been taken away from tax-payer in all coupon cases. The bondholder brought his bill in equity in the United States circuit court against the state auditor and the collecting officers of Richmond city to enjoin them from refusing to receive his coupons, and to have a specific performance of the state's contract to receive them, as evidenced on their face; the genuineness of the coupons was not denied in the answer, nor put in issue. *Held*: (1) The court has jurisdiction of the case and the parties, and may grant the relief prayed for. (2) A court of equity has power to award mandatory injunctions as part of its general jurisdiction. (3) A tender of the coupons was not necessary to entitle the complainant to bring his bill, the state having in numerous ways published that they would not be received. (4) Section 114 of the Virginia assessment act of March 15, 1884, by repealing section 3 of the act of January 14, 1882, took away the right to verify coupons when offered in payment of license taxes, which had been pronounced an adequate remedy in *Antoni v. Greenhow*, 7 Va. Law J. 218; S. C. 2 Sup. Ct. Rep. 91, and left the tax-payer without power to use coupons in paying license taxes, and without remedy against the state. (5) The genuineness of the coupons not being put in issue, must be taken as admitted by the defendant. (6) In making the contract of the tax-receivable coupon, the state virtually waived the benefit of plenary proceedings in suits against her officers to enforce it, in cases wherein the genuineness of the coupons is not put in issue; and it would seem that the state, in agreeing to receive the coupons, has waived the right to a plenary defense in all suits for specific performance of the contract in which she does not deny the genuineness of the coupon.

Motion for a Preliminary Injunction.

R. L. Maury and D. H. Chamberlayne, for complainant.

The Attorney General, for defendants.

¹From the Virginia Law Journal.

v.23f,no.8—8

HUGHES, J. This bill is brought by Edward Parsons, a resident of New York, and a holder of the bonds of Virginia issued under the funding act of March 30, 1871. The defendants are Morton Marye, auditor of Virginia; Samuel C. Greenhow, treasurer; and R. B. Munford, revenue commissioner of Virginia in Richmond.

The bill sets out the history and provisions of the funding act of 1871, reciting that the bonds it authorized were issued, with coupons attached, receivable at and after maturity for all taxes, demands, and dues to the state, and that this receivability of the coupons for taxes constituted the chief value of the bonds. It alleges that a large number of creditors were induced to surrender their old bonds on the faith of the new, because of this receivability of the coupons in taxes, and that thereby a contract was made between the state and the holders of the new bonds; that the latter should have the right not only to tender the coupons directly in payment of taxes, but should also have the right to transfer them to any tax-payer of the state, with their quality of receivability for taxes annexed. The complainant sets forth that he is the owner of \$4,986 of said coupons past due and unpaid, cut by himself from genuine bonds issued under the funding act of 1871, and that they are genuine and receivable for taxes by their express tenor. He alleges that other coupons cut by himself from the same bonds have been pronounced genuine by a jury in the mode prescribed by the laws of Virginia, and have also been ascertained to be genuine by this court. He insists, therefore, that the coupons now in question are by every test genuine, valid, and legal, and entitled to be received, according to their tenor, in payment of all taxes due the state. These averments imply that this complainant has held as an investment of his own, for a series of years, the bonds from which the coupons in question were cut; that they have not been bought in market in speculation; and that he is now seeking to render these securities available by transferring them to tax-payers, to be used in payment of their dues to the state of Virginia. He alleges that this right to transfer them would make them worth to him 95 cents on the dollar.

The complainant alleges that Virginia has for a long time refused, and still refuses, to pay the coupons in money; and that she has, moreover, enacted certain laws intended to destroy their receivability in payment of dues to herself, to his own great damage and injury, and in violation of her contract with him in that respect. He particularly complains that the state has passed an act forbidding the receipt of his coupons for license taxes, and providing that the auditor and commissioners of revenue shall not grant licenses until the applicant exhibits evidence that he has deposited the amount of the license taxes in gold, silver, and treasury and national bank-notes; and he avers that he has the right to have his coupons received in payment of license taxes whenever they may be tendered by any person owing such taxes; and claims the right to such process as may

be necessary to require the officers charged with such duties to receive his coupons in payment of license taxes, and thereupon to issue licenses precisely as if payment had been made in money itself. He sets forth that, relying upon his right to transfer his coupons to those who are tax-payers of the state, he has made arrangements with sundry tax-payers to use the coupons in question in payment of their taxes and license taxes now due, and that by such arrangement he would receive payment in large part for his coupons; but that the tax collectors of the state refuse and the defendants refuse to accept the said coupons according to the terms of the contract. He files with his bill a list of the coupons, amounting to \$4,986, upon which it is founded, which identifies them by their numbers, letters, and dates. He prays for an injunction against the defendants to restrain them from refusing to receive the particular coupons thus identified. He also prays for a specific performance on defendants' part of the state's contract with himself, evidenced by these particular coupons, and for general relief.

The defendants file an answer, among other things setting up the acts of the general assembly of Virginia, which require coupons to be verified by a jury, and denying that these particular coupons have ever been so verified. The answer does not deny that the coupons are genuine, and does not comply in that respect with the statute law of Virginia, page 1094 of the Code of 1873, c. 167, § 89, which puts the burden of affirming the spuriousness of a signature on the defendant. Defendants also demur to the bill for multifariousness, and on other grounds, which are proper to be considered at the final hearing of this cause. Defendants also plead in abatement to the jurisdiction of the court. Upon the complainant's bill, duly verified, this court, on the second February instant, granted a temporary restraining order in substantial accordance with its prayers, and set down for hearing on the tenth of February the complainant's motion for a preliminary injunction. It is upon this motion for an injunction, which shall stand until the final hearing of the cause, that we are to pass.

After so many hearings of coupon cases in this court, it is useless to go into the equities of the one at bar. The contract of the state with the holders of coupons like those under consideration cannot be denied. The genuineness of the particular coupons, \$4,986 in nominal amount, as to which an injunction is asked for, is not denied, and must be assumed to be conceded. It is the misfortune of the defendants in all this class of suits that they cannot deny on oath the genuineness of the coupons sued upon; and that the court, upon all the rules of pleading, and by reason of section 39 of the 167th chapter of the Virginia Code, must take their genuineness as confessed. The supreme court of the United States declared in *Antoni v. Greenhow*, 7 Va. Law J. 218, S. C. 2 Sup. Ct. Rep. 91, that the legislation of Virginia relating to the verification of coupons in no manner shifts the burden of proof.

Nor is it worth while to advert to the provision of the national constitution which forbids a state from passing any laws violating or impairing the obligation of her contracts, or to show that such laws are unconstitutional, null, and void. Nor is it necessary to show particularly the unconstitutionality of legislative acts of Virginia which in their practical effect operate to destroy or impair the contract specifically set out in this bill. Nor need it be shown that the coupons now sued upon do evidence a contract between the state of Virginia and the complainant. That this is a valid, subsisting contract has, in reference to similar coupons, been declared by the supreme court of the United States in *Hartman v. Greenhow*, 102 U. S. 672, and by the supreme court of appeals of Virginia in *Antoni v. Wright*, 22 Grat. 833, and by both courts in other cases, which need not be cited. For the purposes of this case, all these propositions may be assumed to be finally and irrevocably settled; and I shall confine myself to questions which are in some degree peculiar to the present suit, and which may be thought open still to discussion. These are, *first*, whether the court has, as a federal court, jurisdiction of the suit itself; and, if so, *second*, whether, as a court of equity, it has jurisdiction of the remedy sought to be employed.

The first is only another form of the question whether we have jurisdiction as to the parties to the record. The complainant being a resident of New York, and the defendants residents of Virginia, we have jurisdiction as to the parties, unless the objection be valid that the parties defendant here are sued as officers of the state, and that the real defendant is the commonwealth of Virginia. If so, then we have no jurisdiction; for, although Virginia in the national constitution granted the right to be sued in the federal courts in certain cases by the subjects of foreign countries or citizens of sister states, yet by the eleventh amendment she revoked that grant. The question therefore is whether suits against the officers of a state, in respect to the discharge of their public duties, are, in all cases, suits against the states themselves; and, if not in all, then in what cases. When the suit of the *Baltimore & O. R. Co. v. Allen*, 17 Fed. Rep. 171, S. C. 7 Va. Law J. 409, was before the judges of this court, severally, in the spring of 1883, this very question was the pivotal one on which the case turned. On application by the company to me for a preliminary injunction to restrain the revenue officers of Virginia from distraining for taxes after tender of coupons, I refused the injunction, principally on the ground that the suit was, in fact, against the commonwealth, and only in form against her officers personally. The circuit judge, (Judge Bond,) a day or two afterwards, on application to him, granted the injunction, taking the opposite view, and holding that that was not a suit against the state. Not only was this, but other important questions connected with the obligations of the state and her officers to receive tax-receivable coupons involved. An appeal was taken, and we have been continually anxious that the supreme court should

decide that case, and give us the guidance of its rulings on the questions presented in it. But it has been allowed to await its turn on the overburdened docket of that court. The appellee (the railroad company) cannot move to advance it; and although section 949 of the United States Revised Statutes, in all cases "when a state is a party, or the execution of the revenue laws of a state is enjoined or stayed," authorizes the state herself to move to advance, and the state has been all the time entitled to a speedy hearing of this and other causes on the docket of the supreme court if she but demanded it, this important case was not advanced until lately, when it, with others in which she is a party, was set down for hearing on the sixteenth of March proximo. We have postponed our own action in many coupon cases now before us, awaiting decisions in those now in the supreme court. Our policy has been to refrain from all action which, with any color of propriety, can be postponed for that purpose.

I do not, however, think that the question of jurisdiction as to parties in the case at bar is any longer undecided in the supreme court. At the last term it decided the case of *Cunningham v. Macon & B. R. Co.*, reported in 109 U. S. 446, S. C. 3 Sup. Ct. Rep. 292, in which it elaborately discussed the question which confronts this court in the case at bar. The supreme court said, (3 Sup. Ct. Rep. 295-300:)

"The failure of several of the states of the Union to pay the debts which they have contracted, and to discharge other obligations of a contract character, when taken in connection with the acknowledged principle that no state can be sued in the ordinary courts as a defendant except by her own consent, has led, in recent times, to numerous efforts to compel the performance of their obligations by judicial proceedings to which the state is not a party. These suits have generally been instituted in the circuit courts of the United States, or have been removed into them from the state courts. In such suits the effort has been made, while acknowledging the incapacity of those courts to assume jurisdiction of a state as a party, to proceed in such a manner against the officers or agents of the state government, or against the property of the state in their hands, that relief can be had without making the state a party.

"It may not be amiss to try to deduce some general principles sufficient to decide the case before us. It may be conceded as a point of departure unquestioned that neither a state nor the United States can be sued as defendant in any court in this country without their consent, except in limited cases, etc. This principle is conceded in all the cases, and whenever it can be clearly seen that the state is an indispensable party to enable a court, according to the rules which govern its procedure, to grant the relief sought, it will refuse to take jurisdiction. But in the desire to do that justice which in many cases the courts can see will be defeated by an unwarranted extension of this principle, they have in some instances gone a long way in holding the state not to be a necessary party, though some interest of hers may be more or less affected by the decision. A reference to a few cases may enlighten us in regard to that now under consideration.

"(1) It has been held in a class of cases where property of the state, or property in which the state has an interest, comes before the court and under its control, in the regular course of judicial administration, without being forcibly taken from the possession of the government, the court will proceed to discharge its duty in regard to the property. * * *

"(2) Another class of cases is where an individual is sued in tort for some act injurious to another, in regard to person or property, to which his defense is that he has acted under the orders of the government. In these cases he is not sued as, or because he is, the officer of the government, but as an individual, and the court is not ousted of jurisdiction because he asserts authority as such officer. * * * To this class belongs the recent case of *U. S. v. Lee*, 106 U. S. 196; S. C. 1 Sup. Ct. Rep. 240 (the *Arlington Case*); for the action of ejectment in that case is, in its essential character, an action of trespass, with the power in the court to restore the possession to the plaintiff as part of the judgment. And the defendants, Strong and Kaufman, being sued individually as trespassers, set up their authority as officers of the United States, which this court held to be unlawful, and therefore insufficient as a defense. * * *

"(3) A third class, which has given rise to more controversy, is where the law has imposed upon an officer of the government a well-defined duty in regard to a specific matter not affecting the general powers or functions of government, but in the performance of which one or more individuals have a distinct interest, capable of enforcement by judicial process. * * * In all such cases, from the nature of the remedy by *mandamus*, the duty to be performed must be merely ministerial, and must involve no element of discretion to be exercised by the officer. It has, however, been much insisted on that in this class of cases, where it shall be found necessary to enforce the rights of the individual, a court of chancery may, by a mandatory decree, or by injunction, compel the performance of the appropriate duty or enjoin the officer from doing that which is inconsistent with that duty, and with the plaintiff's rights in the premises. Perhaps the strongest assertion of this doctrine is found in the case of *Davis v. Gray*, 16 Wall. 203. In that case, the state of Texas having made a grant of the alternate sections of land along which a railroad should be located, and the railroad company, having surveyed the land at its own expense, and located its road through it, the commissioner of the state land-office and the governor of the state were, in violation of the rights of the company, selling and delivering patents for the sections to which the company had an undoubted vested right. The circuit court enjoined them from so doing, which was affirmed in this court. * * * It is clear that, in enjoining the governor of the state in the performance of one of his executive functions, the case goes to the verge of sound doctrine, if not beyond it; and that the principle should be extended no further. Nor was there in that case any affirmative relief granted by ordering the governor and land commissioner to perform any act towards perfecting the title of the company.

"The case of *Board of Liquidation v. McComb*, 92 U. S. 531, is to the same effect. The board of liquidation was charged by the statute of Louisiana with certain duties in regard to issuing new bonds of the state, in place of old ones, which might be surrendered for exchange by the holders of the latter. The amount of the new bonds was limited by a constitutional provision. McComb, the owner of some of the new bonds already issued, filed his bill to restrain the board from issuing that class of bonds in exchange for a class of indebtedness not included within the purview of the statute, on the ground that his own bonds would thereby be rendered less valuable. This court affirmed the decree of the circuit court, enjoining the board from exceeding its power in taking up by the new issue a class of state indebtedness not within the provisions of the law on the subject. In the opinion in that case the language of Mr. Justice BRADLEY tersely thus expresses the rule and its limitations: 'The objections to proceeding against state officers by *mandamus* or injunction are—*First*, that it is in effect proceeding against the state itself; and, *second*, that it interferes with the official discretion vested in the officers. It is conceded that neither of these can be done. A state,

without its consent, cannot be sued as an individual; and a court cannot substitute its own discretion for that of executive officers in matters belonging to the proper jurisdiction of the latter. But it has been settled that where a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain a personal injury by such refusal may have a *mandamus* to compel performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it.' It is believed that this is as far as this court has gone in granting relief to this class of cases. * * *

"On the other hand, in the cases of *Louisiana v. Jumel* and *Elliott v. Wiltz*, 107 U. S. 711, S. C. 2 Sup. Ct. Rep. 128, very ably argued and very fully considered, the court declined to go any further. * * * The short statement of the reason for its judgment in those cases is that, as the state could not be sued or made a party to such proceeding, there was no jurisdiction in the circuit court either by *mandamus* at law, or by a decree in chancery, to take charge of the treasury of the state, and, seizing the hands of the auditor and treasurer, to make distribution of the funds found in the treasury in the manner which the court might think just. * * * We think the foregoing cases mark with reasonable precision the limit of the powers of the courts in cases affecting the rights of the state or federal governments in suits to which they are not voluntary parties.

"In actions at law of which *mandamus* is one, where an individual is sued * * * in regard to a duty which he is personally bound to perform, the government does not stand behind him to defend him. If he has the authority of law to sustain him in what he has done, like any other defendant, he must show it to the court and abide the result. In either case the state is not bound by the judgment of the court; and generally its rights remain unaffected. It is no answer for the defendant to say, 'I am an officer of the government and acted under its authority,' unless he shows the sufficiency of that authority. Courts of equity proceed upon different principles in regard to parties," etc.

After this careful review of the decisions, the court said that in the case before it Georgia was an indispensable party, and that as the object of the suit was to dispossess her of a railroad, of which she had both title and actual possession, the suit was not one of which it could retain jurisdiction.

The reasoning of the supreme court in this case of *Cunningham v. Railroad Co.*, really *Cunningham v. Georgia*, (for the state herself was the railroad company,) settles in advance the case pending before it from Virginia of *Allen v. Baltimore & O. R. Co.*, and makes it reasonably certain that, at least on the question of jurisdiction as to parties, it will affirm the ruling of Judge Bond and reverse my own. It settles also the case at bar; for the granting of a preliminary injunction here is by no means as extreme an exercise of jurisdictional power as there was in the *Texas Case*, where a federal court arrested the hand of a governor and land commissioner while engaged in violating a legislative contract; or as there was in the *Louisiana* and *McComb Cases*, where another federal court, in order to prevent an indirect and contingent depreciation of complainant's bonds, forbade the state's financial board from issuing bonds which they deemed, but which the court denied, that they had a right to issue; or as there

was in the *Arlington Case*, where this court, in which I now sit, gave judgment against officers of the army of the United States holding for the United States,—one of them in charge of a cemetery for Union soldiers,—ordering them off the patrimony of the Lees, and requiring possession to be given to a general of the confederacy. Compared with those cases, the one at bar, involving as it does less than \$5,000 in nominal value of dishonored coupons, is not of superior importance. I think from what itself has said that there can be no reasonable doubt entertained as to what the supreme court's views are on the subject of suits against officers of states. That congress is of opinion that the revenue officers of the states may be "enjoined and stayed" in their collections, is shown by the terms of section 949 of the United States Revised Statutes, from which I have quoted. I shall, therefore, leave that branch of the subject.

The question stated, in syllabus form, is this: A public creditor who does not ask that money may be taken out of the treasury, or property out of the possession of the state, has a right under a public statute to the performance in his behalf of an act by a public officer. That officer sets up another public statute which forbids the performance of that act, but which the public creditor insists is unconstitutional, null, and void. This question is brought before a court for decision by the public creditor, who makes the officer alone a party defendant to his suit. The question is whether the officer must obey the statute which commands or the statute which forbids the act sought by the creditor. It is a question for judicial decision; and as the act sought is merely ministerial, the weight of judicial authority is that the state is not a party necessary to the suit. Such is the case at bar. By setting out on the face of the coupons a contract to receive them in discharge of taxes it would seem to have been the intention of the Virginia legislature of 1871, in the event that this contract should be impaired by subsequent legislation, to give the federal courts jurisdiction to enforce it. And by making the coupons self-collecting in taxes it would seem to have been the object of the same legislature to make the reception of the coupons for taxes a mere ministerial duty of the revenue officers of Virginia, the performance of which might be enforced by the courts in proceedings against the officers, to which the state would not be a necessary party. If the coupons evidenced simply an obligation of the state to pay money, then it would be out of the power of the courts, in proceedings against revenue officers alone, to take money out of the public treasury for the purpose of paying the coupons. This difference between a coupon calling for money and a coupon receivable in the payment of taxes affords a good illustration of the difference between a suit against a public officer, in which the state is a necessary party defendant, and a suit in which the officer only needs to be sued. The case at bar is one of the latter class.

I come now to the question whether this court, having jurisdiction

as to parties, has, as a court of equity, jurisdiction of the remedy, and may grant the injunction prayed for by the complainant. Assuming, from the condition of the pleadings, that the coupons described in the bill are genuine, and that complainant has transferred them to tax-payers with the quality of receivability guaranteed, the remaining question is simply one of the jurisdiction of equity as to the remedy applied for; and let it be premised that an actual tender of the coupons described in the bill to the revenue officers of the state, and their refusal to receive them, were not necessary conditions precedent to entitle complainant to bring this bill,—it having been publicly made known by the authorities of the state, in numerous ways, that the coupons would not be received in payment of taxes according to their tenor, these public notifications made a tender useless, the law not requiring any one to do a vain thing. *Tacey v. Irwin*, 18 Wall. 549.

If the writ of *mandamus* is, on general principles, the proper one in this case, it must be observed that it is taken away from the complainant by the act of assembly of January 26, 1882, and by the acts of 1884 relating to licenses. *Mandamus* being a remedy at law, and the 914th section of the United States Revised Statutes having conformed the practice in the courts of the United States in common-law cases to that employed in the courts of the states in which they are respectively held, the statutes of Virginia, which take away *mandamus* in the state courts in cases where coupons are sought to be used in the payment of taxes, take it away in the courts of the United States. *Harvey v. Virginia*, 8 Va. Law J. 400; S. C. 20 Fed. Rep. 411. In that case I also held that the right of a tax-payer to sue for the purpose of verifying coupons offered in payment of taxes, which was given by section 3 of the act of January 14, 1882, (Coupon Killer No. 1,) was taken away as to license taxes by section 114 of the act assessing licenses and providing a mode of applying for licenses, approved March 15, 1884, which repealed that section. And therefore complainant, having no remedy at law, and being otherwise remediless, resorts to equity, and applies here for what is known in English and American jurisprudence as a *mandatory* injunction, which is the counterpart in equity of a *mandamus* at law.

Must we go into the elementary books to find warrant for such a process? Jeremy, in his *Equity Jurisdiction*, says: "An injunction is a writ framed according to the circumstances of the case, commanding an act which the court regards as essential to justice, or *restraining* an act which it considers contrary to equity and good conscience."

The mandatory injunction may be in the direct form of command, or in the direct form of prohibiting the refusal to do an act to which another has a right. It may be used against public officers. High says, in section 1308: "The preventive jurisdiction of equity extends to the acts of public officers, and will be exercised in behalf of private citizens who sustain such injury at the hands of those claiming to

act for the public as is not susceptible of reparation in the ordinary course of proceeding at law." Indeed, section 949 of the United States Revised Statutes shows that the federal courts may enjoin and stay the revenue officers of the states. Such was the express ruling of the supreme court, as already quoted, in the case of *Board of Liquidation v. McComb*.

It were useless to cumber this opinion with as profuse a citation of authorities as might be made in support of injunctions, mandatory in character, forbidding public officers or other defendants to refuse the performance of duties which citizens may rightfully demand at their hands. Very many authorities for such process are cited in the brief of counsel for complainant, embracing cases from the English courts, from the courts of the states of this Union, and from our federal courts, and I need not repeat the citations here. The printed brief does not contain the case of *Brooke v. Barton*, 6 Munf. 306, in which the Virginia court of appeals enjoined the defendant to permit the complainant to have the benefit of a covenant entered into by the defendant. I will add a few citations from decisions of the federal courts. In the case of *Coe v. Louisville & N. R. Co.* 3 FED. REP. 775, Judge BAXTER, United States circuit judge, issued an order enjoining defendant from refusing to comply with an obligation arising upon a contract. In the case of *Denver & N. O. R. Co. v. Atchison, T. & S. F. R. Co.* 15 FED. REP. 650, Judge HALLETT, (Circuit Judge McCrary concurring,) after elaborate argument and an extended citation of precedents, made a decree of the same character. In the case of *Baltimore & O. R. Co. v. Adams Exp. Co.* 22 FED. REP. 404, a like injunction forbidding the refusal of a duty enjoined by contract was granted, Judges BOND and MORRIS sitting. These and other like orders of federal courts in other cases had been pointedly sanctioned by what the supreme court had said in the case of *Board of Liquidation v. McComb*.

In the light of all the authorities on the subject, we do not think there is any doubt of the power of a court of equity, as a part of its general jurisdiction, to grant injunctions mandatory in character.

The real objection to the remedy in the present suit, though not made in the defense nor argued at bar, as we should have desired, is that in this case the preliminary injunction is equivalent to a final decree, and that the defendants are therefore deprived of the benefit of plenary proceedings, which, in general, is a matter of right. But this results from the character and subject of the contract, the benefit of which is sought by this suit. In making the contract of the tax-receivable coupon, the state virtually waived the benefit of plenary proceedings in suits against her officers to enforce it in cases wherein the genuineness of the coupons is not put in issue. This contract would be worthless to the tax-payer, if he could not use the coupon at the time the tax was due; and if the right to use it is denied him just when the collector applies for the tax under the laws of the

state, its value for that purpose is destroyed, or, by the use of it being postponed, is seriously impaired. In agreeing that it shall be so used, it seems to us that the state has waived her right to a plenary defense in all suits for a specific performance of the contract in which she does not deny the genuineness of the coupon. I repeat that we should have liked to hear argument on the subject. It was, in point of fact, the real question in the case. In the absence of argument, we thought that the objection under consideration did not hold good in this suit.

The decree now entered will apply of course only to the coupons which are the subject of this bill, \$4,986 in nominal amount. I believe that Judge BOND has given a restraining order in the similar suit of George Parsons. The aggregate amount of coupons involved in both is less than \$10,000 in nominal value, and these two suits do not, therefore, embody in themselves amounts of any grave importance. But we are well aware of the sweeping importance to the state of the principle on which the case at bar proceeds, and earnestly desire that the question shall be carried to the supreme court, to be dealt with there. We have no right to suppose that the complainant here made the amount on which he brought his suit less than \$5,000 by design. *Non constat* but that these coupons are all that he owned. But we are not disposed to encourage suits brought on amounts just within \$5,000, working as they do a practical fraud upon the right of defendants to the judgment of the appellate court, and shall be averse to granting injunctions in future cases having that effect until a suit involving more than \$5,000 shall have been brought.

Injunction awarded.

BOND, J., concurs.

.See note to *Baltimore & O. R. Co. v. Allen*, 17 FED. REP. 188.—[ED.]

FRANK and others v. DENVER & R. G. RY. Co. and others.

(Circuit Court, D. Colorado. February 12, 1885.)

1. RAILROAD MORTGAGE—LEASE—ROLLING STOCK.

A contract, whereby cars and locomotives are leased to a railroad company, that agrees to pay for every car and locomotive so delivered an annual rent, equivalent to one-sixth of the original cost thereof, for the period of ten years, at the end of which the cars and locomotives are to become the property of the railroad company, with a proviso that upon default in payment of the annual rent, or failure to observe any of the covenants of the lease, the rights of the railroad company shall be determined, and the property reclaimed by the lessors, is a mortgage, and not a lease.

2. SAME—FAILURE TO COMPLY WITH STATE LAW—GEN. LAWS COLO. 1877, P. 124—LIEN—RIGHTS OF CREDITORS.

Where such an instrument is not acknowledged and recorded as required by the law of the state where the rolling stock is situated, it will not establish a

lien on such property in favor of the mortgagee as against creditors of the railroad company proceeding by attachment and execution, or purchasers from the railway company in good faith.

3. SAME—LIENS—INTEREST ACQUIRED BY MORTGAGEE.

Mortgagees of property to be acquired by the mortgagor, take only the interest of the mortgagor therein, and if the property is already subject to mortgages or other liens, the general mortgage does not displace them, though they may be junior to it in point of time.

4. SAME—SELLER RETAINING LIEN.

This rule applies to the seller of property who retains a lien on the property sold, or the title thereto, as security for the purchase money.

5. SAME—RECEIVER—PAYMENT OF CLAIMS—ORDER MODIFIED.

Order directing receiver to pay principal and interest falling due under the contract, under which rolling stock was furnished to the railroad company, modified so as to postpone payment of principal until other claims are paid.

Upon Motion to Vacate or Modify the Order directing the receiver to pay car trusts.

L. S. Dixon, for plaintiffs.

Hugh Butler, L. K. Bass, and C. J. Hughes, for defendants.

E. O. Wolcott, for receiver.

HALLETT, J. June 6, 1878, the Philadelphia Trust, Safe Deposit & Insurance Company entered into contract with the Denver & Rio Grande Railway Company "to lease to and place upon the railroad" of the latter company certain cars and locomotives which should be delivered to the first-named company for that purpose by the Philadelphia & Colorado Equipment Trust. Defendant company was to pay "for every car and locomotive an annual rent equivalent to the one-sixth of the original cost thereof," and the lease to continue for 10 years, when the cars and locomotives would become the property of the railway company. By this method of computation, it is said that upon completing the contract the railway company would pay the cost of the rolling stock, and 8 per cent. interest on deferred payments. Under this agreement cars and locomotives of the value of \$345,500 were delivered to the railway company, of which \$217,000 has been paid, and interest and cost of trust amounting to \$123,396.20.

Other contracts of similar character, to the number of five, were afterwards made by the railway company with the Rio Grande Extension Company by which the railway company obtained rolling stock of the value of \$4,970,000. These agreements were assigned to the Guarantee Trust & Safe Deposit Company, of Philadelphia, a defendant in the bill and the present holder. In all these instruments it was provided that, upon default in payment of the annual rent, or failure to observe any covenant of the lease, the right of the railway company in the rolling stock would be determined, and the property might be reclaimed by the lessor. The same result would follow "any proceedings of law or in equity, or otherwise, in which the said party of the second part may be a party, whereby any of the rights, duties, and obligations of the party of the second part under this contract shall or may be transferred, abridged, or in any manner whatever al-

tered or impaired, or its control and custody of the leases, cars, and locomotives be in anywise interfered with; and any termination of this lease under this covenant shall have the same effect as if the party of the first part or its assigns had repossessed themselves of the said cars and locomotives, as hereinbefore provided."

These instruments, in the form of leases, and having somewhat of the aspect of conditional sales, were a disguise of the real transaction between the parties. The rolling stock was not, at any time, owned or held by the parties assuming to lease the same, or by any one represented by such parties. Under the first contract of June 6, 1878, the Philadelphia & Colorado Equipment Trust, an association of shareholders, to the amount of \$500 each, furnished money, with which the railway company either bought or constructed cars and locomotives for its own use. In like manner, under the other contracts with the Rio Grande Extension Company, the railway company bought or constructed rolling stock for its own use with money furnished by shareholders through the Guarantee Trust & Safe Deposit Company, to be returned, with interest, from the payments made under the contracts by the railway company. Thus it appears that the payees of these instruments cannot stand in the character assumed by them, of lessors of the rolling stock, and, in so far as they may have any position in the law, they are to be regarded as mortgagees of the property. This assumption of a false character by the payees, with much verbiage of the law in the several contracts, will not, however, affect the result; if the equities of the transaction shall appear to be with them, of which more will be said further on.

In July last, when the original bill was filed, and the receiver was appointed, plaintiffs had not discovered any defect in the contracts, and were disposed to recognize them as valid and binding, and requiring fulfillment on the part of the railway company, in order to retain the interest already acquired through and by means of the large payments previously made under the contracts by the railway company. Accordingly, they asked that the receiver appointed in the cause be directed to pay the sums falling due under the contracts for principal and interest; and this was done. The receiver has since paid, from the current earnings of the road, all such sums; and the plaintiffs, having amended their bill, now move to vacate or modify the order in that respect, on the ground that the rolling stock is subject to the consolidated mortgage which they seek to foreclose, and the said several contracts are invalid as against them. The consolidated mortgage, under which plaintiffs claim, bears date January 1, 1880, and covers "the rolling stock and equipment, of whatever nature and kind, owned, or hereafter to be acquired and owned, and as acquired by the said company, subject to a first mortgage of the company, of date April 13, 1871. The first of the contracts, relating to rolling stock, was prior to the consolidated mortgage, but, as the property thereby acquired is subject to the first mortgage of the road,

and the lien of that mortgage was complete before the consolidated mortgage was executed, it will not be necessary to consider the relation of the latter mortgage to that property. In any view of the question presented, the plaintiffs cannot resort to the rolling stock acquired under the first contract until the first mortgage shall be satisfied, a contingency which does not call for discussion at this time. The other contracts were subsequent in date to the consolidated mortgage, and the property therein mentioned falls within the designation, in that mortgage, of after-acquired property. The provisions of the statute of this state, relating to chattel mortgages, (Gen. Laws 1877, p. 122,) were not observed in form and substance, in the manner of acknowledging or recording these instruments, and therefore they do not establish a lien on the property in favor of the defendants, as against creditors of the railway company proceeding by attachment and execution, or purchasers from the railway company in good faith. *Hervey v. Rhode Island Locomotive Works*, 93 U. S. 664; *George v. Tufts*, 5 Colo. 162.

And this is the pith and substance of plaintiffs' argument: that these rolling-stock contracts, being invalid as to creditors of the railway company, and purchasers from the railway company without notice, are also invalid as to them. But the rule is that mortgages of property to be acquired by the mortgagor take only the interest of the mortgagor therein. As declared in *U. S. v. New Orleans R. R.* 12 Wall. 365, "a mortgage intended to cover after-acquired property can only attach itself to such property in the condition in which it comes into the mortgagor's hands. If that property is already subject to mortgages or other liens, the general mortgage does not displace them, though they may be junior to it in point of time. It only attaches to such interest as the mortgagor acquires; and if he purchase property and give a mortgage for the purchase money, the deed which he receives and the mortgage which he gives are regarded as one transaction, and no general lien impending over him, whether in the shape of a general mortgage or judgment or recognizance, can displace such mortgage for purchase money." *Fosdick v. Schall*, 99 U. S. 235.

This is certainly the rule established by these cases, in favor of the seller of property, who may retain a lien on the property sold, or the title thereto, as security for the purchase money; and the holders of these contracts would seem to be equitably entitled to the benefit of it. Having furnished money with which the railway company purchased rolling stock under an agreement for a lien on the property as security for repayment, they may stand in the place of the seller, and have advantage of all remedies to which he would be entitled in the same situation. In another view, and independently of any special contract establishing a lien on the property sold to the railway company, demands of this kind are debts of the income, to be paid from current revenues of the road in preference to bondholders

and other secured creditors. *Hale v. Frost*, 99 U. S. 389; *Burnham v. Bowen*, 111 U. S. 776; S. C. 4 Sup. Ct. Rep. 675.

If the road had not been supplied with rolling stock when the receiver took possession, it would have been necessary to purchase enough to carry on the business of the road, and the receiver would have paid for it from current earnings available for that purpose. That he now pays for the rolling stock under contracts made by the railway company previous to his appointment, does not present the question in any other light. He is buying rolling stock for the use of the road, and which is said to be necessary to carry on its business, according to the usual course of proceeding in cases of this kind. In order to keep the road in operation, the receiver must have rolling stock, and he ought not to take it in behalf of bondholders or any one, without paying for it. Every payment made under these contracts increases the interest of the railway company in the rolling stock, and adds to the value of plaintiffs' mortgage security. Payments are made in the interest of bondholders as well as the railway company, and I see no grounds for the complaint for them, unless it may be that the price of the cars is too high, or that some of them are not necessary to the business of the road. If anything is to be gained by rescinding any of the contracts and surrendering the cars to the payees, action may be had on proper showing, but the court is not now advised in respect to that matter. In some cases, where rolling stock was held under contracts of purchase, the receiver has paid for the use of it and returned it to the seller at the close of the receivership. *Fosdick v. Schall*, 99 U. S. 285; *Myer v. Car Co.* 102 U. S. 1.

That course was probably regarded as promoting the best interests of all concerned. Whenever considerable payments have been made under the contracts, and the interest of the railway company in the rolling stock acquired by such payments appears to be large, the advantage of continuing the payments under the receivership will be apparent. In that way the use of the property, during the receivership, will be secured, and the interest acquired by prior payments may become available to the company or to purchasers on foreclosure. My conclusion is, therefore, that, until some further showing shall be made in these matters, payments under these contracts ought to be continued by the receiver in the interest of all parties concerned. There is, however, some reason to believe that these rolling-stock creditors have, at present, under the order heretofore entered, an extraordinary preference over other claims of the same class, to which they are not entitled. While as to the bondholders of the railway company, secured by general mortgage of the road and its property, they stand with the labor and supply creditors, and are entitled to payment from the current income of the road, I perceive no reason for saying that they are above all other creditors of the class to which they belong. The circumstance that they exacted of the railway company a stipulation to deliver the property to them in case of non-

payment will hardly accomplish that result. Creditors of an insolvent estate in the hands of a receiver are entitled to payment in the order and precedence established by the merits of their claims, and not by legal remedies, for which they may have contracted, or which may be given them by law. It is disclosed that payments made by the receiver under these contracts have so absorbed the earnings of the road that the orders of the court relating to labor and supply demands remain in large part unexecuted. While, as before stated, these rolling-stock people, in a general way, and with reference to the general mortgages of the road, are classed with the labor and supply creditors, the latter are more immediately and directly creditors of the income. They wrought and gave of their substance under promises of prompt payment from the railway company, and the rolling-stock people are, as to them, general mortgagees of a part of the company's property,—long-time creditors, reaping interest as the others may sow for them.

The labor and supply creditors, who are entitled to payment under existing orders in any just consideration of their position, seem to be on an equal footing if not in advance of the rolling-stock contracts, and they have been postponed for the benefit of the latter for more than seven months. They are now entitled to payment of their demands. The large amount of taxes falling due at this season of the year adds to the financial difficulties of the situation. As the rolling-stock people have hitherto received their dues promptly, while others, equally entitled to payment, have been compelled to wait, it seems reasonable to suspend payment of principal sums falling due under their contracts until other demands on the receiver have been satisfied. With the payment of interest as it matures, which, it is believed, can be made without serious embarrassment, no injustice will be done to these creditors, and the receiver will have funds to relieve other creditors of the company, and to pay taxes. The order directing payment of amounts coming due for rolling stock will be modified, as indicated, so as to postpone the payment of principal sums until other demands, recognized in existing orders, shall be paid.

WILSON v. NEAL and another, County Com'rs, etc.¹*(Circuit Court, S. D. Ohio, W. D. January 19, 1885.)*

1. COUNTY BONDS—COUPONS—DEMAND OF PAYMENT—No FUNDS.

That there were no funds in the county treasury available for their payment, is a sufficient excuse for not presenting and demanding payment of coupons payable "on presentation."

2. SAME—ULTRA VIRES—RATE OF INTEREST—PAYABLE SEMI-ANNUALLY.

County commissioners were authorized to issue bonds "bearing interest at six per centum per annum." *Held*, that bonds bearing that rate, payable semi-annually, are within the authority vested in the commissioners.

3. SAME—CONSTRUCTION OF STATE STATUTES—DECISIONS OF STATE COURTS.

In construing statutes of a state the United States courts follow the decisions of the courts of that state.

4. SAME—OHIO—COUNTY AUDITOR SHOULD ISSUE WARRANTS FOR PAYMENT OF BONDS.

Under the statutes of Ohio it is not necessary that the holders of county bonds should apply to the county auditor to issue his warrant upon the treasurer for the payment of either principal or interest. It is the auditor's duty to issue the proper warrants and deliver them to the treasurer without request of the bondholders.

5. SAME—INTEREST ON INTEREST.

Holders of county bonds, issued under the laws of Ohio, which stipulated for the payment of interest semi-annually, part only of the bonds having coupons therefor attached, and the semi-annual installments of interest not being paid when due, are entitled to recover interest upon all such semi-annual installments from the date they became due.

At Law.

Thomas & Thomas, for plaintiff.

White, McKnight & White, for defendant.

SAGE, J. The plaintiff sues to recover the principal and interest of certain bonds bearing interest at 6 per centum per annum, payable semi-annually, issued in the year 1870 by the county of Brown, to pay the cost of improving a county road. The plaintiff also claims interest upon the unpaid installments of interest from their maturity.

The first defense admits the issuing of the bonds to the contractor who constructed and completed the road, and their transfer to the plaintiff, and that the plaintiff is entitled to recover the amount of the bonds, with interest at the rate of 6 per centum per annum. Defendants say that they have always been ready and willing to pay the plaintiff the amount so admitted to be due, upon presentation of the bonds and coupons, and the delivery of them for cancellation, which the plaintiff has always refused to do without receipt of interest upon the several installments from their maturity. Defendants further answer that they had no power to contract for a greater rate of interest than 6 per cent. per annum.

The second defense sets up the litigation whereby the assessments for the improvements of said road and their payment were enjoined

¹ Reported by Harper & Blakemore, Esqs., of the Cincinnati bar.

until 1877, and the defendants prevented from raising the money to pay said bonds or any part of the interest thereon, or from paying the same or any part thereof. The defendants aver that, as soon as the injunction was dissolved, they proceeded to collect the assessments and apply them to the payment of outstanding bonds and interest, but that the plaintiff never in person, or by agent or attorney, presented his bonds to the auditor of the county for redemption and cancellation, or demanded from the auditor his warrant upon the treasurer for the payment of the same. The defendants also allege that since 1878 there have been at all times funds in the treasury of said county ample for the payment of said bonds, and 6 per cent. per annum interest thereon.

The third and last defense is that said coupons were never presented to the auditor, and warrants obtained from him for their payment by the treasurer. Defendants admit that about the twenty-seventh of May, 1881, said bonds and coupons were presented to the treasurer of Brown county by the plaintiff, and payment demanded, with a demand also for interest on the coupons, which was refused, but the treasurer offered to pay the bonds, with simple interest, on the surrender of the bonds and coupons, which was declined.

The plaintiff replies that it was understood by and between the county commissioners and the parties to whom the bonds were delivered, and at the time of their delivery, that the same should be paid by the treasurer of the county directly, without the warrant of the auditor, in accordance with the uniform custom in said county, and that in accordance with said custom the auditor at all times refused to issue warrants in such cases. He also denies the allegation of the answer that the treasurer, in May, 1881, offered to pay principal and simple interest, and avers that at that time the treasurer informed him that he had no funds wherewith to make payment, and denies that there ever was money in the treasury to pay the plaintiff's demands. These are all the allegations of the reply necessary for the purposes of this decision.

The improvement of the road was ordered, and an assessment made by the county commissioners, in the year 1866, upon a petition under the act of April 5, 1866. 63 Ohio Laws, 114. The act authorizes the commissioners to issue the bonds of the county for the payment of the expense of the improvement, payable in installments, or at intervals, not extending in all beyond the period of five years, and bearing interest at 6 per centum per annum, and directs that the assessment shall be divided in such manner as to meet the payment of principal and interest of the bonds. This act was repealed twenty-ninth March, 1867, (64 Ohio Laws, 80,) and a new act substituted; but it was provided that the repeal should not affect or impair any right acquired or liability incurred under the repealed act. The county commissioners were authorized by the act of 1867 to issue bonds, payable in installments, or at intervals, not exceeding in all five years,

bearing interest at a rate not exceeding 7 per centum per annum, payable semi-annually. On the fifteenth March, 1869, (66 Ohio Laws, 24,) the section of the act of 1867 authorizing the issuing of bonds was amended, but not in any particular material to this case. The saving clause of the act of 1867 prevented that act, and the repeal of the act of 1866, from affecting the proceedings, including the assessment, for the improvement of the road to pay the cost of which the bonds sued upon were issued, and, in the opinion of this court, reserved to the commissioners the right to issue bonds in payment of the expense of said improvement, as provided in the act of 1866. The act of 1867 was not amendatory; it was new legislation relating to the same subject-matter as the act of 1866, which it repealed. The general reservation of all right acquired and liabilities incurred, included the right vested in the county commissioners to issue bonds to pay the expense of the improvement which had been ordered, and the assessment made before the passage of the act of 1867. But if the bonds depend for their validity upon the act of 1867, or the amendment of 1869, the result in this case would not be affected, as we shall presently see. The validity of the bonds must be sustained upon that act and amendment, if not upon the act of 1866; for it cannot be concluded that the legislature intended, notwithstanding the reservation in the act in 1867 in favor of rights accrued and liabilities incurred, to nullify that reservation by taking away from the commissioners the right to issue bonds for any improvement ordered, and for which an assessment had been made under the act of 1866.

The bonds in this case were issued in 1870. No payments of principal or interest have been made. They are payable 48 months after date, with interest at 6 per cent. per annum, payable semi-annually. Some of the bonds have interest coupons, and the interest is made payable "on presentation of proper coupon." Others are without coupons, and provide upon their face for the semi-annual payment of interest.

The validity of the proceedings, of the order for the improvement, and of the assessment under which the bonds sued upon were issued, was contested, and during the litigations, which continued until late in the year 1877, no assessments were collected. The first payment into the county treasury on account of assessments was in February, 1878, and until then there were no funds available for the payment of principal or interest of bonds. Neither bonds nor coupons were in the mean time presented for payment. On the twenty-seventh of May, 1881, the plaintiff, by his attorney, presented his bonds and coupons and demanded payment, with interest upon the coupons from the date of their maturity. At the maturity of the coupons, and of the bonds, there were no funds in the county treasury for their payment. That was sufficient excuse for the failure to present them and demand payment. The stipulation for the payment of the interest on presentation of the proper coupon imported on the part of the commissioners

that the county would have the money in the treasury ready for payment when the interest became due. It is necessary to plead and prove affirmatively that fact to make non-presentment and the failure to demand payment available as a defense. Jones, R. R. Secur. § 334, and cases cited. The defense that there was no presentment or demand of payment is, therefore, not well taken.

It is insisted, however, that the commissioners exceeded their authority in stipulating for the semi-annual payment of interest, for the reason that the law limited their authority to the issue of bonds "bearing interest at 6 per centum per annum." It is urged that the contract to pay interest semi-annually was *ultra vires* and void, and that, therefore, only 6 per centum per annum, payable annually, is recoverable. There is no doubt that the commissioners were limited by the authority conferred by the statute. But the statute fixes only the rate of interest; it is silent as to the times of payment. The bonds bear but 6 per centum per annum interest, and that it is made payable 3 per centum in 6 months and 3 per centum in 12 months does not increase the yearly rate. The proposition that the stipulation to pay the lawful rate in semi-annual installments is usurious, is not sound; for the legal presumption is that parties to a contract intend performance according to its terms, and all that was necessary to avoid the payment of interest upon the coupons was prompt payment upon their maturity. *Monnett v. Sturges*, 25 Ohio St. 384, and *Cook v. Courtright*, 40 Ohio St. 248, are conclusive upon this point. In construing the statutes of a state, the United States courts adopt and follow the decisions of the courts of the state.

There is another consideration which, in view of the reasoning of the court in *Cook v. Courtright*, cited above, sheds light upon this branch of the case. The county commissioners were authorized to issue the bonds of the county, payable in installments, or at intervals, not extending in all beyond the period of five years. They could, if they saw fit, make them payable, some in one month, some in three months, some in six months, and others at any other intervals within five years,—all bearing interest at 6 per centum per annum,—and thus provide for the payment of interest monthly or quarterly or semi-annually, and no objection could be successfully urged to their validity for that reason. How can there be any difference, in principle, between that mode of proceeding, and aggregating the sums of the short bonds in one long bond, and making the interest on that bond payable quarterly or semi-annually, or even monthly? It is true that the bondholder might immediately, on payment, loan the interest paid him at a percentage, but who ever heard that that fact would taint the original transaction with usury?

Was it necessary to present the bonds and coupons to the auditor, and obtain his warrant upon the county treasurer? The law in force when these bonds matured, relating to the redemption and cancellation of the securities for the funded debt of counties in this state, is

the act of February 28, 1859. 56 Ohio Laws, 28. It makes it the duty of the county auditor to draw at the proper time his warrant upon the treasurer for the payment of such installments of principal and interest as may be then due, and to deliver the same to the treasurer, and the duty of the treasurer to thereupon make payment. The law now in force (Rev. St. Ohio, § 1063) contains the same provision in effect. It is nowhere made the duty of the holder of the securities to apply to the auditor for a warrant. That is between the auditor and the treasurer, and the bondholder has nothing whatever to do with it, and is not responsible for the default of the auditor in that behalf. He has no right to demand or to receive the warrant. The auditor has no right to deliver it to any one but the treasurer. Moreover, by section 2 of the act of 1859, it was provided that if "from any cause" (and that includes the failure of the auditor to make out and deliver to the treasurer the proper warrant) the debt or installments of interest be not paid at the time and place of maturity thereof, it should be the duty of the treasurer at any time afterwards to pay the same as funds in his hands applicable to that use might admit; but if the treasurer was ready with funds to make payment at maturity, and the holder of the security did not have the same then and there present and in readiness to be surrendered, or to have payment indorsed thereon, as provided by the law, the county should not thereafter be bound to pay interest thereon until payment should have been afterwards demanded and refused at the office of the county treasurer. This provision was carried into the Revised Statutes, and is yet the law of the state. Rev. St. Ohio, § 1064.

What are the facts of this case? It is stipulated as an agreed fact that the auditor never drew any warrant for the payment of principal or interest of any of the bonds sued upon, or of any others of the same class, and that it has been the uniform custom in Brown county, ever since the passage of the law of 1867 authorizing the improvement of county roads by assessment, for the treasurer to pay the bonds and coupons issued for such improvement without such warrant upon presentation to him of the bonds or coupons, provided there was money in the treasury applicable to the payment of the same. It is enough to say of this custom that it is not worth the slightest consideration. It was at all times the auditor's duty to look to the statute. There was no such money in the treasury until February 28, 1878, when there was paid upon assessments the sum of \$2,426.95. In August, 1878, were paid \$359.54, and subsequently there were payments from year to year until in February, 1884, the last payment, of \$4,016.05, was made, the total being \$61,097.98, and the total amount of the principal of the bonds issued and outstanding, \$56,000. It is proven, moreover, that the treasurer always refused to pay interest on the coupons and upon the overdue installments of interest. Simple interest at 6 per centum per annum, or 6 per cent. "straight," as he expresses it, was all he would pay. It is beyond question that the

failure of the auditor to draw the proper warrants and deliver them to the treasurer is no defense to the plaintiff's claim. Is he, then, entitled to interest upon his coupons, and upon the overdue installments of interest upon the bonds issued without coupons? The law of Ohio provides for the payment of interest upon every debt due and unpaid, without any stipulation to that effect in the contract or obligation out of which the debt arose. The cases of *Monnett v. Sturges* and *Cook v. Courtright*, cited above, establish that the law applies to overdue installments of interest as fully as to the principal. But the proposition is so plain as to need no authority to support it. The law was in force when the bonds in suit were issued, and it entered into and was part of the obligation of the bonds, and it is the duty of this court to enforce it. The plaintiff is entitled to the interest upon his coupons and overdue installments of interest which he demands, and judgment will be entered accordingly.

The objection to the jurisdiction of this court has been heretofore disposed of, and need not be further considered. It is not well taken.

UNITED STATES v. SHRIVER.

(District Court, S. D. Illinois. 1886.)

INTERNAL REVENUE—RETAIL LIQUOR DEALER'S LICENSE.

A party having paid special tax as retail liquor dealer at a particular town, who fills orders received by mail to ship liquors in retail quantities to another town, there to be delivered to the party so ordering upon payment of the price of the liquor, together with the express charges, is liable to the payment of special tax as retail liquor dealer at the place where such delivery is made.

Indictment for carrying on business of retail liquor dealer at Fairfield, Illinois, without payment of special tax.

James A. Connolly, Dist. Atty., for prosecution.

Bluford Wilson and *J. Bowman*, for defense.

TREAT, J. The defendant is indicted for carrying on the business of a retail liquor dealer at Fairfield, Illinois, without having paid the special tax required by the laws of the United States. It appears that his residence and regular place of business were at Shawneetown, Illinois, where he carried on business as wholesale and retail liquor dealer, having paid his special tax as such; and so far as his business was carried on there, it appears to have been in strict accordance with the law. But it appears that he went to Fairfield, Illinois, to solicit trade, taking with him samples of his liquors which he exhibited to different persons there; took some orders, and while there made a contract with the agent of the express company at that place, whereby the agent was to act as his agent for receiving and distribut-

ing such liquors as he might ship there, and collect his bills for him, for which he was to pay the express agent 10 per cent. on all money so collected by him. He arranged with this Fairfield agent that parties ordering liquors from him at Shawneetown, who desired to save the return express charges, should have their liquor sent to them by express, in jugs, with no charges on the way-bill to be collected by the express company, except the mere charge for carrying, and in such cases the jugs were to have a shipping-tag attached to them, on which would appear the name of the consignee and the value of the liquor. All such jugs the Fairfield agent was to hold until the persons named on the tags called for them, when, upon paying the amount named on the tags and the express charges, the agent should deliver the jugs to such persons, or to any others who should come with orders from the persons named on the tags.

In other cases where the order directed the shipment to be made by express, "C. O. D.," the charges were to appear on the express way-bill, and be collected upon delivery of the liquor in the ordinary way of the business of the express company. Under this arrangement the defendant, during the summer and fall of 1884, made a large number of shipments of liquor in retail quantities from his store in Shawneetown to persons in Fairfield by express, some being sent "C. O. D.," others in jugs as above described. In deciding this case, it only seems to be necessary to consider the effect of the sales made by shipment from Shawneetown to Fairfield by express, "C. O. D.," to be delivered at Fairfield by the agent of the shipper to the consignee on payment of the price. It is clear that the express agent at Fairfield was also the actual agent of the defendant in receiving and delivering the liquor shipped to Fairfield, and in collecting the money for it; for the defendant employed him for that purpose, and agreed to pay him 10 per cent. on the money collected by him, without reference to whether the liquor was shipped "C. O. D.," or by tags attached to the jugs with the price and address marked thereon. Certainly, then, as to all the packages shipped "C. O. D.," the ownership and possession of the liquor remained in the defendant, after reaching the hands of his agent in Fairfield, just as completely as before it left his store in Shawneetown, and the sale did not take place until the defendant, by his agent, received the money at Fairfield and delivered the liquor there to the purchaser. This would be true, too, even if the Fairfield express agent had not been specially employed as the defendant's agent in the handling of this liquor; for, in the case of liquor shipped by the defendant to Fairfield by express, "C. O. D.," the liquor is received by the express company at Shawneetown as the agent of the seller, and not as the agent of the buyer, and on its reaching Fairfield it is there held by the company as the agent of the seller until the consignee comes and pays the money, and then the company, as the agent of the seller, delivers the liquor to the purchaser. In such cases the possession of the ex-

press company is the possession of the seller, and generally the right of property remains in the seller until the payment of the price.

An order from a person at Fairfield to the defendant at Shawneetown for two gallons of liquor, to be shipped to Fairfield "C. O. D.," is a mere offer, by the person sending such order, to purchase two gallons of liquor from the defendant, and pay him for it when he delivers it to him at Fairfield; and a shipment by the defendant according to such order is practically the same as if the defendant had himself taken two gallons of liquor from his store in Shawneetown, carried it in person to Fairfield, and there delivered it to the purchaser, and received the price of it. It would be different if the order from Fairfield to the defendant was a simple order to ship two gallons of liquor by express to the person ordering, whether such order was accompanied by the money or not. The moment the liquor, under such an order, was delivered to the express company at Shawneetown, it would become the property of the person ordering, and the possession of the express company at Shawneetown would be the possession of the purchaser,—the sale would be a sale at Shawneetown,—and if it were lost or destroyed in transit, the loss would fall upon the purchaser. But in the case at bar, by shipping the liquor to Fairfield "C. O. D.," the defendant made no sale at Shawneetown. The right of property remained in himself, and the right of possession, as well as the actual possession, remained in him through his agent. Had it been lost or destroyed in transit, the loss would have fallen upon himself. He simply acted upon the request of the purchaser, and sent the liquor to Fairfield by his own agent, and there effected a sale by receiving the money and delivering the liquor. In the case of *Pilgreen v. State*, 71 Ala. 368, cited by counsel for defense, the distinction between absolute and conditional sales seems to have been overlooked.

The defendant, not having paid the special tax as retail liquor dealer at Fairfield, is guilty as charged in the indictment.

UNITED STATES v. BAREFIELD.

(District Court, E. D. Texas. February 16, 1925.)

1. CRIMINAL LAW AND PROCEDURE—WITNESS—CONVICT IN STATE PENITENTIARY—APPLICATION FOR SUBPOENA OR ATTACHMENT.

A United States district court will not grant a process by subpoena, attachment, or otherwise, on application of the United States district attorney, for a party confined in a state penitentiary for assault with intent to murder, whose testimony it is desired to have in a criminal prosecution pending in such court.

2. SAME—COMPETENCY OF WITNESS—STATUTE OF TEXAS—REV. ST. U. S. § 858.

It would seem that such a witness could be excluded as a witness both under the laws of Texas and under those of the United States, if objected to by defendant.

Application for Subpoena.

Asa E. Stratton, Jr., U. S. Dist. Atty., for the United States.

Edward Guthridge, for defendant.

SABIN, J. Application by United States district attorney for a process by subpoena, attachment, or otherwise, for one Tobe Barefield as a witness in this case; said Tobe Barefield being at present a convict in the penitentiary at Rusk, Texas, that being one of the penitentiaries of the state of Texas, for assault with intent to murder. The application shows that he is a material witness for the government, and that it is believed that the state authorities will permit him to appear as a witness if he is brought before this court and safely returned to the prison at Rusk, after testifying, provided that the state of Texas is at no expense therefor. The process of subpoena is always at the command of the United States district attorney, without the authorization of this court, and witnesses, when subpoenaed under his order and discharged by him, are allowed by the court their *per diem* and mileage, and the court in this case does not feel it necessary to control the action of the district attorney by either ordering or refusing a subpoena. This court has no control over the volition of the state authorities in the matter of their bringing their state convicts before it to give testimony. If they bring them in obedience to a subpoena they will be paid like other witnesses, if ordered by the United States district attorney. The question of their competency does not strictly arise upon this motion, although it is presented to my consideration and a decision expected thereon. If an incompetent witness is placed upon the stand and sworn, and gives testimony without objection, his incompetency being known, such testimony is proper for the consideration of the jury. The defendant in this case cannot be called upon to say whether he objects to such witness or not until he is produced. But as the question of competency is again presented at this term of court it seems proper to allude to the authorities. At common law, persons convicted of crimes which render them infamous are excluded from being witnesses. Infamous crimes in this sense are regarded as comprehending treason, felony, and the *crimen falsi*. Whart. Crim. Ev. § 363, and authorities there cited. I must confess that I cannot regard the state in which a United States court is held as a foreign state, although it has a different species of jurisdiction.

Section 858 of the Revised Statutes of the United States, after providing that persons should not be excluded as witnesses by reason of color, or of being parties to a suit, and after making some provision in reference to actions by and against executors, etc., provides that in all other respects the laws of the state in which the court is held shall be the rule of decision as to the competency of witnesses in the courts of the United States in trials at common law, and in equity and admiralty.

Article 54 of the Penal Code of the state of Texas provides that every offense that is punishable by death or by imprisonment in the

penitentiary, either absolutely or in the alternative, is a felony; every other offense is a misdemeanor; while subdivision 5 of the Code of Criminal Procedure of the state of Texas, art. 730, provides that all persons who have been convicted of felony in this state or in any other jurisdiction, unless such conviction has been legally set aside, or unless the convict has been legally pardoned of the crime for which he was convicted, are incompetent to testify in criminal actions. Article 500 of the Criminal Code of the state of Texas provides that if any person shall assault another with intent to murder, he shall be punished by confinement in the penitentiary not less than two nor more than seven years. If the assault was made with a bowie-knife or dagger, or in disguise, the punishment shall be doubled. It would seem, therefore, as admitted, that, under the laws of Texas, the proposed witness could be excluded as a witness; and it seems to me, likewise, that he also could be excluded both under the laws of Texas and under those of the United States, if objected to by the defendant; and hence the court declines to make any order in the matter, leaving the United States district attorney and the state authorities to the use of such writ or writs of subpoena, and such voluntary action in the production of the said Tobe Barefield before the court or as a witness, as to them or each of them may seem proper and lawful to do; and hence the court declines to make any order upon the motion presented.

UNITED STATES v. KING.

(Circuit Court, S. D. Alabama. February 21, 1885.)

SEAMEN'S WAGES—SECTION 10 OF THE ACT OF JUNE 26, 1884.

The provisions of this section do not apply to steam-boats engaged in trade and navigating the inland waters of the United States.

Criminal Information for violation of section 10 of act of June 26, 1884.

The case is tried by the court upon the following agreed statement of facts, viz.:

It is agreed that H. Clay King was clerk of the steam-boat Mary, a vessel of 328 tons burden, which navigated the waters of the Mobile and Alabama rivers, from Mobile to Montgomery and back again, making trips once a week; that said waters are navigable, and within the admiralty and maritime jurisdiction of the United States; that on, to-wit, the thirtieth of September, 1884, the said King, as clerk of said boat, for the master thereof, did pay to Henry C. Thrower, who was acting for, or in copartnership with, John H. Wallace, 25 cents for each of the crew of said vessel shipped on board of said vessel at the time aforesaid for a trip on board said steam-boat from Mobile to Montgomery and return, whose names are mentioned in the criminal information in this case; that the manner of shipping the crew of said vessel is as follows: The said Thrower and said Wallace have an office on Front street, in Mobile,

the home port of said steam-boat, in which they keep blank contracts for the shipment of the crews or deck hands of steam-boats plying the waters of the Alabama, Tombigbee, and Warrior rivers, two of which rivers are navigable in the state of Alabama, and the other, the Tombigbee, in the adjoining state of Mississippi; that on the day aforesaid the mate of the said steam-boat Mary brought in person, or sent, with a strip of paper from the mate, which identified the person, the crew or deck hands to the office of said Thrower and Wallace to sign them up, by which he meant that the said Thrower should sign their names when they could not write, and to let them sign them when they could, to the contract between the said master of said vessel and the said deck hands for said trip or voyage. The said Thrower did let them sign, or signed for them, the said contract, and then the captain or master of said vessel, by himself or by one of the officers of said boat for him, signed the said contract, and the said Thrower signed his name to said contract as a witness. It is also agreed that the said contract shall be brought into the court and made an exhibit to the court. It is also agreed that said Thrower and Wallace, at the request of the masters of said vessels, keep a register or list of the names of the seamen or deck hands against whom any captain of said boats may have complained for desertion or general misconduct on the boats, and that, by an agreement between the captains of all the boats, men whose names are on the said list are not to be allowed to sign said contracts for any steam-boat plying said rivers, unless the captain who made the complaint withdraws his complaint, or the captain who wants to ship the man comes and requests it. It is also agreed that said Thrower and Wallace receive 25 cents for each seaman or deck hand who signs said contract and is accepted. Sometimes, after a larger crew has signed than is wanted by the captain, at the captain's request some of the names are stricken out, for which men so stricken out the 25 cents per man is not paid.

George M. Duskin, U. S. Atty., for the United States.

R. Inge Smith, for the U. S. Shipping Commissioner.

M. B. Kelly, for defendant.

BRUCE, J. This is a criminal information against the defendant, charging him with a violation of section 10 of the act of congress, approved June 26, 1884, known as the "Dingley Bill." The act is entitled "An act to remove certain burdens on the American merchant marine, and encourage the American foreign carrying trade, and for other purposes." Section 10 of the act provides "that it shall be, and is hereby, made unlawful in any case to pay any seaman wages, before leaving the port at which such seaman may be engaged, in advance of the time when he has actually earned the same, or to pay such advance wages to any other person, or to pay any person, other than an officer authorized by act of congress to collect fees for such service, any remuneration for the shipment of seamen. Any person paying such advance wages or such remuneration shall be deemed guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not less than four times the amount of the wages so advanced or remuneration so paid, and may be also imprisoned for a period not exceeding six months, at the discretion of the court. * * *

There is an agreed statement of facts in the case, and it is insisted by the prosecution that the facts show a shipment of seamen, within the meaning of the act, on the steamer Mary, navigating the Alabama

river, by one Thrower, as the agent of one Wallace, neither of them being shipping commissioners, or master or owners of the boat, and a remuneration of 25 cents per seaman so shipped, paid by the defendant, King, as clerk of the steam-boat Mary, in violation of section 10 of the act quoted, *supra*.

It is not necessary to recite here in full the agreed statement of facts in the case; but it shows the existence of an understanding or agreement between Wallace and the masters of steam-boats navigating the Alabama and Tombigbee rivers from Mobile, as their home port, and return; that the seamen or deck hands employed on said boats are engaged by Wallace, who keeps an office on Front street, and has blank agreements prepared, to which he secures the signatures of the hands whom he engages, and keeps a record of those with whom the masters of steam-boats may have had trouble and difficulty; and for each seaman so engaged or employed for a trip or voyage the masters pay 25 cents. This arrangement is a voluntary one, depending for its existence and continuance upon the assent of the parties, and is not binding upon the hands only so far as, in its practical operation, it is the means of securing employment. It is not claimed that any law exists which requires the masters of these boats to have the services of a shipping commissioner or any other person in obtaining and engaging a crew for a voyage, nor is there any law requiring the seamen to be employed or shipped under the superintendence of a shipping commissioner or any person whatever; nor is it claimed as a fact that any charge at all is made by the masters of the steam-boats against the hands for the services paid for by them for the engaging and shipping of crews. This arrangement, by which the masters of steam-boats obtain, for a consideration, the assistance of persons in obtaining and shipping deck hands, is held to be in violation of the statute. It is not claimed that the masters may not ship their hands themselves; but the proposition is that if they require assistance of agents or persons other than themselves, that they must procure the services of a regularly appointed shipping commissioner to superintend and ship their men, so that the rights and interests of the men may be protected, as well as that of the masters of the boats, and that this was the object of congress in the enactment of this tenth section of this Dingley bill. It may admit of doubt whether the arrangement indicated and more fully set out in the agreed statement of facts in the case as to the manner in which crews are obtained and engaged for river steamers, constitutes in effect, or can be considered, a *shipment of seamen*, within the meaning of the act under consideration; and I do not discuss that question further, because, even if it is so, the first and controlling question here is whether this law has any application at all to the shipment of seamen (deck hands) on steam-boats navigating rivers such as the Alabama, Tombigbee, and Warrior.

The language of section 10, quoted *supra*, is broad and sweeping,

and if it stood alone it might be held that congress intended by it to go a step further than it had ever done before, and embrace within it cases such as the one at bar. Such, however, does not seem to have been the purpose of congress in the passage of the act of June 26, 1884. As already observed, it is an act entitled "An act to remove certain burdens on the American merchant marine." A reference to the former acts of congress upon the subject throws light upon the scope and purpose of congress in the passage of this last act which we are now considering. The act of congress of June 7, 1872, "to authorize the appointment of shipping commissioners by the several circuit courts of the United States, to superintend the shipping and discharge of seamen engaged in merchant ships belonging to the United States, and for the further protection of seamen," invested shipping commissioners with many and important functions. Section 12 of this act provides that the master of every ship bound from a port in the United States to any foreign port, or of any ship of the burden of 75 tons or upwards, bound from a port on the Atlantic to a port on the Pacific, or *vice versa*, shall, before he proceeds on such voyage, make an agreement in writing or in print with every seaman whom he carries to sea as one of the crew, in the manner hereinafter specified; * * * and by the next section this agreement must be signed by each seaman in the presence of a shipping commissioner, who shall certify the same.

By act of January 15, 1873, congress limited section 12 of the former act, and provided that the section should not apply to masters of vessels when engaged in trade between the United States and the British North American possessions, or the West India islands, or the republic of Mexico. But the operation of the shipping commissioners' act—that is, the act of June 7, 1872—was limited in a most decided manner by act of congress of June 9, 1874, which provided, that "*none of the provisions of an act entitled 'An act to authorize the appointment of shipping commissioners by the several circuit courts of the United States, to superintend the shipping and discharge of seamen engaged in merchant ships belonging to the United States, and for the further protection of seamen,' shall apply to sail or steam vessels engaged in the coastwise trade, except the coastwise trade between the Atlantic and Pacific coasts, or in the lake-going trade touching at foreign ports, or otherwise, or in the trade between the United States and British North American possessions, or in any case where the seamen are by custom or agreement entitled to participate in the profits or result of a cruise or voyage.*"

The effect of this act was not only to cut off the operation of the act of June 7, 1872, as to vessels in the coastwise trade, with the exceptions named,—that is, that in the shipping of seamen the agreements of masters with the seamen need not be signed under the superintendence of a shipping commissioner,—but it swept away all the penal provisions of the act in so far as they applied to vessels in

the coastwise trade, with the exceptions named in the repealing act. These penal provisions were for the protection of seamen. One of them, in section 8 of the act, provided "that any person, other than a commissioner under this act, who shall perform, either directly or indirectly, the duties which are by this act set forth as pertaining to a shipping commissioner, shall incur a penalty of not exceeding five hundred dollars."

The repeal of this and other penal provisions of the commissioners' act of June 7, 1872, shows that it was the purpose of congress to release masters of vessels in the coastwise trade, with the exceptions named, of the necessity of shipping their seamen under the superintendence of a shipping commissioner, and to leave masters at liberty to obtain and contract with seamen for voyages upon terms as to wages which they could secure by agreement, and contract with the seamen themselves. If congress deemed, as it must have done, that seamen upon ships in the coastwise trade did not require the protection which was afforded under the provisions of the act of June 7, 1872, then, certainly, for a stronger reason, seamen, *deck hands*, upon steam-boats navigating rivers, did not require such protection, and the conclusion is clear that the object and purpose of this legislation was, and is, to leave masters and seamen free to contract and be contracted with on such terms as they shall mutually agree upon, the courts being open to appeal for redress in cases of oppression and violation of contract obligations.

It is true that the seamen are called the wards of the admiralty, and in voyages to foreign ports, where much time is occupied and seamen are without the reach of courts of law to which they may apply for redress, and are compelled to submit to the will of the masters of the vessels,—in such cases there is good and strong reason why their contracts should be made under the superintendence of a shipping commissioner; but this has little application to seamen or deck hands upon steam-boats navigating our rivers, and if masters may contract with and ship their men themselves on terms mutually agreed upon, it is difficult to see why they may not employ agents or agencies on shore to aid them in obtaining and shipping crews. But the proposition is that if they employ any agents for such purpose, it must be the shipping commissioner and no other person. But such construction of the act would not be on a line with the legislation of congress upon the subject to which we have just adverted, and the present act is not a return to the stringent, and to some extent onerous, provision of the act of June 7, 1872, but, as the title to the act states, it is to remove burdens and not to impose them upon the merchant marine. To give section 10 the construction here claimed by the prosecution, would indicate a new, if not a wide, departure from the action of congress heretofore had upon the subject, which, had it been intended, would have been indicated more clearly and distinctly than we have it in the section under consideration.

The other and subsequent clauses of the section give force to this view of the subject, and show that the purpose was to afford protection to seamen on vessels bound on voyages to distant ports, where a protracted absence was in contemplation, and not to cases such as the one at bar.

The defendant, H. Clay King, is discharged.

See *The State of Maine*, 22 FED REP. 734.—[ED.]

BANKS and others v. MANCHESTER.¹

(Circuit Court, S. D. Ohio, E. D. March 3, 1885.)

1. COPYRIGHT—OHIO STATE REPORTS—OPINIONS, ETC., OF THE JUDGES.

The statutes of Ohio authorize the publication of the reports of the supreme court, and of the supreme court commission, of the state, (1) under the direction of the supervisor of public printing; or (2) under a contract made by the secretary of state. The official reporter, who receives from the state a fixed salary for his services, is required to secure a copyright for "each volume of the reports" published under the first method. The statute provides that when the reports are published under the second method, the contractor "shall have the sole and exclusive right to publish such reports, so far as the state can confer the same," but imposes no requirement upon the reporter to secure copyright. No authority is given anywhere in the statutes to copyright the opinions of the judges. Advance sheets of volumes, included in the complainant's contract with the secretary of state, were copyrighted by the reporter for the benefit of the state and of the complainants. The respondents published the opinions, *syllabi*, and statements of cases prepared by the judges and contained in said advance sheets. *Held*, that the copyrights secured do not cover the matter published by the respondent.

2. SAME—WORK OF OFFICIAL REPORTER.

The reporter might, in this case, copyright the volumes for the benefit of the complainants and of the state, but such copyright would protect only the portion of the volumes prepared by the reporter.

In Chancery. Hearing on bill and answer.

E. L. Taylor, for complainants.

Geo. B. Okey, for respondent.

SAGE, J. The complainants, partners under the style "Banks Brothers," and law-book publishers at the city of New York, are contractors with the state of Ohio for the publication of forthcoming volumes 41 and 42, Ohio State Reports. They seek to enjoin the defendant, who is the proprietor and publisher at Columbus, Ohio, of the American Law Journal, from publishing therein any of the decisions and opinions of the judges of the supreme court of Ohio, or of the supreme court commission of Ohio, in cases which are to be reported in either of said volumes. It appears from the bill that, under arrangements with the complainants by the proprietors of the Ohio Law Journal and of the Weekly Law Bulletin, copyrighted advance

¹ Reported by Harper & Blakemore, Esqs., of the Cincinnati bar.

publications of said decisions are made at Columbus, Ohio, in supplements to those periodicals. The copyrights are secured by the official reporter in pursuance, it is averred, of the duties of his office, and for the benefit of the state of Ohio, and the protection of the rights and interests of the complainants under their said contract.

The complainants charge that the respondent has unlawfully infringed said copyrights by republishing said decisions; and that he has declared to them in writing his intention to continue so to do; wherefore they pray that he may be restrained by injunction. The respondent answers, admitting the publication of the opinions and decisions referred to in the bill, but avers that they are solely and exclusively the production of the judges of the supreme court of Ohio, and of the supreme court commission of Ohio; and that the judge, to whom the duty is assigned to prepare an opinion, prepares also the statement of the case, and syllabus, the latter being subject to revision by the judges concurring in the opinion; that the duty of the reporter is limited to preparing abstracts of arguments of counsel, tables of cases, indexes, reading proof, and in arranging cases in their proper order in the volumes of reports of said courts, for all which he is paid out of the treasury of the state a stated annual salary, fixed by law; and that he has no pecuniary interest in the publication of said reports. The respondent admits that he intends to continue said publication, but denies that the reporter has any right or authority to secure a copyright upon the publication described in the bill, or that said copyright was secured by him for the benefit of the state of Ohio, or for the protection of the rights of the complainants.

The respondent also avers that complainant, for the consideration of \$600, contracted with the proprietors of the Ohio Law Journal and of the Weekly Law Bulletin, to give to them exclusive right to publish in said periodicals said opinions and decisions, and to protect said pretended right by commencing and prosecuting, at their own cost, such suits as might be necessary; and that therefore the complainants have no interest in result of this controversy.

The provisions of the statutes of Ohio bearing upon the questions involved are referred to in the bill and in the answer. Section 437 of the Revised Statutes of Ohio empowers the secretary of state, when authorized by resolution of the general assembly, to contract with any responsible person or firm to publish the reports authorized by law, and to furnish, for the use of the state, the number of copies required to supply the state, at a cost not exceeding one dollar and fifty cents per volume, and the number of copies required to meet the demands of the citizens of the state, at a cost not exceeding one dollar and seventy-five cents per volume; also to furnish advance sheets as provided in sections 430 and 431. Section 437 further provides that "such contractor shall have the sole and exclusive right to publish such reports, so far as the state can confer the same," during the period of the contract. Sections 429-435 provide for the printing and

binding of the volumes of reports under the direction of the supervisor of public printing. These sections do not apply when, as in this case, the secretary of state is authorized to make the contract as provided in section 437.

Section 436 requires the reporter to secure a copyright for the use of the state for each volume of the reports published under the provisions of sections 429-435, but the duty of the reporter is limited to securing a copyright "for each volume of the reports so published." No such duty is imposed upon him with reference to volumes published under contracts made by the secretary of state by virtue of the provisions of section 437. Under that section,—which applies in this case,—the sole and exclusive right to publish the reports, so far as the state can confer the same, is granted to the contractor. Nowhere in the statute law relating to the publication of reports is authority given to the reporter, or to any other person, to acquire a copyright in the decisions or opinions of the judges. This is significant, in view of the unanimous opinion of the justices of the supreme court of the United States in *Wheaton v. Peters*, 8 Pet. 668, that no reporter has or can have copyright in the written opinions delivered by that court. The legislation of the state of Ohio must be considered to have been enacted with reference to that opinion, and therefore to have been intended to limit the provisions above cited to the volumes of reports, and to exclude copyright of the opinions of the judges.

It is in accordance with sound public policy, in a commonwealth where every person is presumed to know the law, to regard the authoritative expositions of the law by the regularly constituted judicial tribunals as public property, to be published freely by any one who may choose to publish them. And such publications may be of everything which is the work of the judges, including the syllabus and the statement of the case, as well as the opinion. The copyright of the volume does not interfere with such free publication. It protects only the work of the reporter; that is to say, the indexes, the tables of cases, and the statement of points made and authorities cited by counsel. *Wheaton v. Peters*, 8 Pet. 653; *Little v. Gould*, 2 Blatchf. 165, 362; *Chase v. Sanborn*, 4 Cliff. 306; *Myers v. Callaghan*, 5 Fed. Rep. 726, S. C. 10 Biss. 139; *Myers v. Callaghan*, 20 Fed. Rep. 441.

Counsel for complainants cite Judge DRUMMOND's dictum, in *Myers v. Callaghan*, 5 Fed. Rep. 728, that "if an adequate compensation was paid by the state to the reporter for the work done by him in preparing volumes of reports, then, whatever property there was in the volumes, arising from the labors of the reporter, ought to belong to the state and not to him." "Now," say counsel, "in Ohio the state undertakes to pay the reporter adequate compensation, and by statute that amount is all he can receive. He has no perquisites. The theory is that the state pays him for his labor, and that the result of his labor belongs to the state." And counsel proceed to claim that "this is precisely the theory upon which the state is entitled to the

v.23F,no.3—10

decisions of the judges. They are paid a stipulated price or sum for their services, and this, by their consent,—impliedly given when they accept the office,—is in full of their services, and the result of their labors is the property of the state." Mr. Drone, in his work on Copyright, 161, states substantially the same view, although he says he has seen no sound, clear exposition of the law governing copyright in judicial decisions, and that it has not been expressly declared in any modern case that copyright will vest in a judicial decision. Mr. Justice STORY, one of the judges who concurred in the decision in *Wheaton v. Peters*, said, in *Gray v. Russell*, 1 Story, 21, that while it was held in that case that the opinions of the court, being published under the authority of congress, were not the proper subject of copyright, it was as little doubted by the court that Mr. Wheaton had a copyright in his own margined notes, and in the arguments of counsel, as prepared and arranged in his works. Whether the state, through its reporter, can secure a copyright in the opinions of the judges, is, however, not a question arising, nor can it be decided, in this case. It is sufficient to say that the state has not adopted legislation for such copyright; that the enactments providing for copyright of the volumes of reports, or of the reports, do not authorize copyrights of the opinions of the judges.

The averments of the answer respecting the contract by and between the complainants and the proprietors of the law journal, at Columbus, which, with complainants' consent, publish the opinions of the judges, complainants binding themselves to protect them in their assumed exclusive right of publication, are not material. If the reporter had the right to secure copyright in those opinions for the benefit of the complainants, the complainants had the right to make the arrangement referred to, and it would be not only the right but the duty of complainants to institute suits for the protection of the publishers in their exclusive license. But the reporter has no such right. The statute gives him no power, no authority or right whatever, with reference to copyright of even the volumes included in complainants' contract. Whatever sole and exclusive right to publish such reports the state could confer, was, by the express terms of the statute, conferred upon the complainants. As held in *Myers v. Callaghan*, the reporter is entitled, in the absence of express legislation to the contrary, to copyright his volumes of reports, to the extent that the same consist of the work of his own hand, notwithstanding he may not have a copyright in the opinions of the court. And in this case he might secure copyright in the volumes of reports, not for his own benefit, but for the benefit of complainants; but the copyrights he has attempted to secure in the opinions of the judges are invalid.

The bill will be dismissed at complainants' costs.

See *Sarony v. Burrow-Giles Lithographic Co.* 17 FED. REP. 591, and note. 593.—[Ed.]

GORDON and others v. ST. PAUL HARVESTER WORKS and another.¹*(Circuit Court, D. Minnesota. March, 1885.)***1. EQUITY PRACTICE—HEARING ON DEMURRER AND PLEA—RULE-DAY.**

Complainants filed their bill November 10, 1884, and on January 3, 1885, one of the defendants filed a demurrer, and the other defendant filed a plea to part of the bill and an answer to the residue, the December term of court not having adjourned. On January 21st complainant had the demurrer and plea set down for argument on rule-day, and served written notice on defendants. *Held*, that the demurrer and plea could be disposed of on the rule-day.

2. PATENTS—INFRINGEMENT—ASSIGNMENT BY INFRINGER FOR BENEFIT OF CREDITORS—STATE INSOLVENT LAW—MULTIFARIOUSNESS.

A bill averring the infringement of a patent by a corporation and its assignee under a state insolvent law, and that such assignee is about to distribute the assets of the insolvent corporation among its creditors without regard to the rights of complainant, and praying for an injunction, and for a decree to account for and pay over all such gains and profits as have accrued or arisen from the sale and use of complainant's patent, is not multifarious.

3. SAME—JURISDICTION OF CIRCUIT COURT.

Such a suit is properly brought in the United States circuit court.

In Equity.

Geo. D. Emery, for complainants.

H. J. Horn, for defendants.

NELSON, J. The complainants filed their bill on November 10, 1884, against the St. Paul Harvester Works, a corporation duly organized under the laws of the state of Minnesota, and Lyman D. Hodge, charging infringement of certain letters patent, and praying relief. On January 3, 1885, the corporation filed a demurrer to the bill, and the defendant Hodge filed a plea to part and an answer to the residue. On January 21st the complainant's solicitor requested the clerk to enter an order setting down the demurrer and plea for argument on the rule-day, February 2, 1885, and gave defendants' solicitor written notice that the plea and demurrer had been set down for argument, and would be brought on therefor at the rule-day, to-wit, February 2d, at the opening of court on that day, or as soon as counsel could be heard. At the time of the hearing the solicitor of the defendants objected, and urged that the argument could not be heard until the next June term of the court. This objection is not sustained. The plain implication of the equity rules is that pleas and demurrers may be disposed of at rule-day; but there is another reason why the objection is not well taken. The December term had not adjourned at the time the demurrer and plea was filed, and at the time the notice of argument was served upon the defendant's solicitor the suit was pending in court on the docket under equity rule 16,

¹ Reported by Robertson Howard, Esq., of the St. Paul bar.

and the sufficiency of the plea and demurrer could be called up and tested without formal notice, in term, in presence of counsel, or by proper notice in his absence.

In the argument, counsel fully presented their views, and I will now dispose of the plea and demurrer.

And, *first*, upon the demurrer. The bill alleges that the complainants are sole owners of letters patent for a new and useful improvement in grain binders for the district of Minnesota and the entire territory of the United States, except the state of Michigan, and that the improvements have been extensively applied to practical use; and further alleges that by virtue of certain assignments of certain interests and rights in and to letters patent, the entire right, title, and interest in and to the inventions described in the letters patent, naming them, were secured to your orators. And the bill charges infringement, prior to the commencement of this suit by the defendant harvester works, of the patents owned by complainants; and it is further alleged that the said defendant harvester works, on or about May 31, 1884, assigned and transferred to the defendant Hodge all its property and assets in trust, and for the benefit of its creditors, but how much and of what value is unknown, and prays a discovery thereof, and charges that since the assignment aforesaid the said Hodge has continued the business of said St. Paul Harvester Works, and has made and sold a large number of binding-machines embodying the patented improvements aforesaid, and thereby infringed upon the exclusive rights of the complainants; and that the said Hodge, as assignee, threatens and is about to distribute to the creditors of the St. Paul Harvester Works the moneys realized by him from the property and assets aforesaid, without regard to the rights and claims of your orators against the said St. Paul Harvester Works, unless restrained by the injunctive order of this court. There is an allegation that the improvements described in the several letters patent are so nearly allied in character as to be capable of joint as well as several use in grain-binding machines, and that the said inventions, or substantial and material parts described in the said letters patent, have been and are used conjointly by the said defendants, etc.

A writ of injunction is prayed for, and a prayer for a decree to account for and pay over all such gains and profits as have accrued or arisen to, or been earned or received by, said defendants from the unlawful use of said inventions, and from the infringement thereof as aforesaid, and to pay the damages sustained, etc. Copies of the several letters patent are attached to and made a part of the bill. The demurrer is interposed for the reason, as alleged, that the bill is exhibited against the defendants for several and distinct matters and causes which have no relation to each other, in which, or in the greater part thereof, it is urged that the defendant the St. Paul Harvester Works is not in any way interested or concerned, and ought not to be

implicated, and that the matters and alleged causes of action pleaded against Hodge are distinct from the alleged cause of action pleaded against the defendant the St. Paul Harvester Works, and ought not to have been joined together in one bill; that the bill is multifarious.

The rule invoked by the counsel for the defendant, that two or more distinct subjects cannot be embraced in the same bill, has no application to this case. The pleadings show that there is a privity of connection between the corporation and Hodge in reference to the object of the action and the subject-matter thereof. Hodge is the assignee by voluntary assignment for the benefit of creditors. He is a trustee required to execute the trust created by the corporation; and if any property or effects remain after its fulfillment, he must turn it over to the *cestui que trust*. He is alleged to be in possession of all the assets and moneys of the defendant the St. Paul Harvester Works by a voluntary transfer, which moneys, or a portion thereof, the bill charges were gains and profits derived from the infringement of the complainants' improvements designated in the letters patent. If in equity, as is the settled doctrine, an infringer is treated as a trustee of the patentee of the gains derived by him from the infringement, (1 Ban. & A. Pat. Cas. 485,) and is held accountable accordingly, certainly an assignee of such gains in trust for creditors is a proper party for the purpose of obtaining a just account of these profits. He is a necessary party, upon the same principle as an agent who represents his principal and manages his business. How far and to what extent the funds alleged to be in his hands would be affected if the complainants should obtain a decree is not involved on this hearing. The bill is not open to the criticism suggested by the demurrer, and the same is overruled.

Secondly. The defendant Hodge files a plea to part of the bill, and claims that he cannot be compelled to render account for any such gains or profits as may have been earned by the alleged infringement of complainants' rights by the St. Paul Harvester Works prior to the assignment to him; and he urges that such voluntary assignment to him, in trust for creditors, is in law a bar to all relief claimed in the bill by the owners of the alleged infringed letters patent. The implication of the plea is that his conduct as trustee under the assignment, and the management of the property in his possession, is to be regulated exclusively by the laws of the state of Minnesota, and that he is responsible to the district court of Ramsey county for the faithful discharge of his duties, and therefore any claim which the complainants may have for infringement of letters patent must be presented to the assignee, and if the infringement is disputed by him, settled and adjudged by the state court. I do not agree to this proposition. If the defendants confess the allegations and charges of the bill, and the amount of alleged damages, it may be that the only method of enforcement of the complainants' claim against the insolvent corporation, or at least the quickest way of sat-

isfying the decree, would be to file the claim as settled, and participate in the funds; but as the defendants do not confess the infringement, or any of the matters alleged in the bill, to be true, except as stated in the plea, the complainants can litigate their rights in this court, and the fact of an assignment made by the insolvent corporation to the defendant Hodge is no bar to the prosecution of their suit.

I do not see how the insolvent law of the state of Minnesota can affect the proceeding to enforce the rights of a patentee against an infringer. If the defendants will admit the charge of infringement, and permit a decree to be entered settling the amount of the complainants' claim, there would be some force in the suggestion that the complainants must apply for payment under the laws of the state of Minnesota regulating assignments for the benefit of creditors. It is true that the complainants, if they were so disposed, could present their claim to the assignee and abide by his decision; but they are not compelled to do so, and no state law can deprive the complainants of the right to litigate disputed infringements of letters patent in this court.

This is not an action involving contract rights between the parties thereto, but is a case arising under the patent-right laws of the United States, and the jurisdiction vested in the courts of the United States is exclusive of the courts of the state. Rev. St. § 711, p. 135.

The plea is overruled.

McFARLAND and another v. SPENCER and another.

(Circuit Court, S. D. New York. February, 1885.)

PATENTS FOR INVENTIONS—METAL TENON FOR BLIND-SLATS—PATENT No. 76,491.

Letters patent No. 76,491, issued to William McFarland and John H. Campbell, April 7, 1868, for a metal tenon for blind-slats, *held* valid, and infringed by defendants.

In Equity.

Peter Van Antwerp, for complainants.

Edward S. Clinch and *E. T. Rice*, for defendants.

COXE, J. The complainants are the owners of letters patent No. 76,491, issued to William McFarland and John H. Campbell, April 7, 1868, for a metal tenon for blind-slats. The object of the invention is to provide tenons for blind-slats when the original tenons are broken off or injured so as to become inoperative. The following diagrams will serve to illustrate the invention:

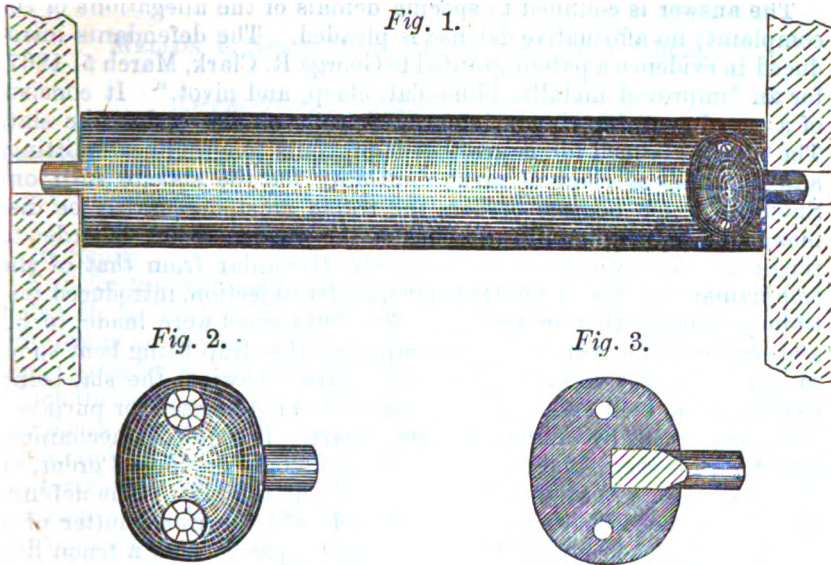


Fig. 1 represents the tenon applied and fitted to a blind-slat, and working in the mortise of the frame, in place of the one broken or removed; Fig. 2, the face view of the tenon, with escutcheon plate on its inner end; Fig. 3, the same reversed, showing the connection of the escutcheon plate to the tenon by means of a beveled shoulder. The inventor declares in the specification that "heretofore the breaking off or the decay of a tenon has caused the entire loss of the slat, there being no means or device known, previous to my invention, whereby the tenon could be restored or repaired without incurring too much expense; and furthermore, the repair or restoration of a broken tenon is difficult without the removal of one of the side-bars of the frame." The advantages of the invention are economy, simplicity, symmetry, and durability. It is much cheaper to use the metal tenon than to remove the slat. A person possessed of a pocket-knife and a very limited amount of mechanical skill can make the repair. Prior to the invention it was necessary to take down the blind, separate the frame, remove the broken slat, substitute the new slat, attach it to the hand-rod which operates the series of slats, and readjust the frame. All this required time and skill, was expensive and inconvenient, and when the work was done it was found almost impossible to make the new slat correspond in color with the old ones. The device is an exceedingly simple and unpretending one,—so simple that, to one who sees it now, the wonder is that it did not occur to some one long before the date of the patent. But it never did. Criticism that an invention is so plain that it must be perceived by all, comes with poor grace from those who did not themselves perceive it.

The answer is confined to specific denials of the allegations of the complaint; no affirmative defense is pleaded. The defendants introduced in evidence a patent granted to George R. Clark, March 5, 1867, for an "improved metallic blind-slat, clasp, and pivot." It consists of a metal cap, carrying a tenon, which fits on the end of the slat. The merits claimed for it are that it prevents longitudinal splitting, and furnishes a pivot of great durability for the slat to turn on. Should a tenon become broken, the frame must necessarily be dismembered, precisely as in the case of the wooden tenon, in order to repair it. The Clark device is wholly dissimilar from that of the complainants. The defendants also, under objection, introduced testimony showing that in 1837 or 1838, 200 tenons were made, to fill a special order, out of 16-gauge strap-iron, the strap being bent so as to grasp the slat on both sides, and a pivot to swivel the slat being riveted to the bent end. These tenons could not be used for purposes of repair, except by taking the frame apart. It required mechanical skill to apply them, and they could be made only on special order, as it was necessary that they should exactly fit the slat. The defendants also proved that between 1849 and 1851 the iron shutter of a building on Reade street, New York, was repaired with a tenon like the complainants'; also that in 1844 and 1846, in Germany, similar tenons were used in the original construction of iron shutters, and that for 300 years shutters so made had been used in the tower of the church at Wittemberg, to the front door of which Martin Luther nailed his theses. It will be seen that even had the defendants pleaded prior use, as required by section 4920 of the Revised Statutes, there is nothing in this testimony which anticipates the complainants' invention. There is no allegation that the inventor or other persons here had knowledge of the alleged prior use in Germany; but in any view the evidence is wholly inadequate to defeat the patent. As showing the state of the art, the testimony, though involved in obscurity and doubt, may be admissible, and, were the question one of infringement, such proof might require the narrow construction of a broad claim; but it is obvious that it cannot avail the defendants where they deal in the identical contrivance covered by the patent. No one, so far as the record shows, ever used, prior to the patent, a tenon like the complainants,' on wooden blind-slats, for the purposes of repair. This is what the invention covers.

There should be a decree for the complainants for an injunction and an account, with costs.

MELLON v. SMITH-DAVIS MANUF'G Co. and others.

(Circuit Court, E. D. Missouri. March 2, 1885.)

PATENTS—METALLIC SPRING-BEDS.

Letters patent No. 238,703, granted to Peter A. Mellon for an improvement in "metallic spring-beds," *held* void for want of novelty.

In Equity.

Suit for the infringement of letters patent No. 238,703, granted to Peter H. Mellon for an improvement in metallic spring-beds. The improvement relates, as the specifications state, "to a spring-bed made entirely of metal, and it consists in duplicate iron frames, to which the bottoms and tops of the outer row of the double spiral springs are secured by wire; the inner rows of springs being connected to each other and to the outer row by means of open-wire links." The inventor claims as his invention "the combination in a spring-bed of the frames, A, A¹, braces, D, and double spiral springs, C, connected to each other and to the frames substantially as and for the purpose set forth."

W. M. Eccles, for complainant.

Finkelnburg, Rassieur & Dexter Tiffany, for defendants.

TREAT, J. The several claims in plaintiff's patent are for the combinations therein respectively named. As to some of such combinations, obviously there is no infringement. From the state of the art at the date of said patent, no novelty as to the alleged invention is discernible. The court can detect no exercise of inventive faculty wherefrom the mechanical arrangements named are patentable, within the purview of the patent law. There is no suggestion in the patent as to adjustability, and indeed the specifications show that the opposite was in the mind of the patentee. Soldering, welding, or the use of reversely screw-threaded couplings would make the connection of the two parts fixedly rigid. Such, also, would be the effect of a collar as in the patent described. The court, therefore, is of the opinion that the patent is void for want of novelty. *Morris v. McMillin*, 5 Sup. Ct. Rep. 218.

Bill dismissed, with costs.

¹Reported by Benj. F. Rex, Esq., of the St. Louis bar.

THE PACIFIC.¹

(District Court, W. D. Pennsylvania. February 20, 1885.)

1. SEAMEN'S WAGES—LEAVING VESSEL.

A seaman was hired without signing shipping articles on a vessel about to proceed on a voyage from a port in one state to a port in a state not adjoining. *Held*, that he could leave the vessel at any place.

2. SAME—REV. ST. §§ 4520, 4523.

Sections 4520 and 4523 of the Revised Statutes of the United States *held* to apply to the hiring of seamen on vessels navigating rivers of the interior states.

3. SAME—WAGES NOT FORFEITED.

A seaman left a vessel at a place where a substitute could easily be obtained, and the boat suffered no detriment by reason of his refusal to work. *Held*, not to be such misconduct as would forfeit his wages for the time he performed his duty.

In Admiralty.

On March 14, 1884, Taylor Harlan, the libelant in this case, was hired by the mate of the steam tow-boat Pacific as a deck hand on said tow-boat while she was lying at the port of Pittsburgh, Pennsylvania, without any shipping articles being signed. The tow-boat Pacific was upwards of 50 tons in burden, and was engaged in navigating the Monongahela and Ohio rivers. At the time of the hiring of libelant nothing was said about the duration of the voyage of the Pacific or the port to which she intended going, but it was understood that Harlan should receive the same rate of pay that other deck hands were getting for similar services. The Pacific made up a tow of coal barges and proceeded down the river to Louisville, Kentucky, where she left her loaded barges, and the same day started back for her home port with three empties. On the twenty-second day of March, 1884, the Pacific arrived at a coaling station called Ludlow, a small town three miles below Covington. Here the mate ordered the watch on deck to carry coal from a flat into the tow-boat. Harlan, the libelant, having, as he testified, sprained his wrist by a fall some weeks previously, refused to obey the mate's order, and said he was going to quit work. The mate referred him to the captain, who told him unless he performed his duty he would forfeit his wages for the entire trip, and on his continued refusal to work ordered him ashore, and threatened to arrest him if he did not leave the boat. The libelant went ashore, and on his arrival at Pittsburgh libeled the Pacific for his wages for the eight days that he had worked on the steam tow-boat. It was admitted that the rate of wages for that trip for deck hands was \$35 a month.

Albert York Smith, for libelant, cites, *inter alia*:

Sec. 4520, Rev. St. Every master of any vessel of the burden of 50 tons or upwards, bound from a port in one state to a port in any other than an

¹From the Pittsburgh Legal Journal.

adjoining state, except vessels of the burden of 75 tons or upward, bound from a port on the Atlantic to a port on the Pacific, or *vice versa*, shall, before he proceeds on such voyage, make an agreement in writing or in print, with every seaman on board such vessel except such as shall be apprentice or servant to himself or owners, declaring the voyage or term of time for which such seaman shall be shipped.

Sec. 4523. All shipments of seamen made contrary to the provisions of any act of congress shall be void; and any seaman so shipped may leave the service at any time, and shall be entitled to recover the highest rate of wages of the port from which the seaman was shipped, or the sum agreed to be given him at his shipment.

When seamen are shipped without signing articles they may leave the service at any time. *Desty, Shipp. & Adm.* § 184; *Graham v. The Exporter*, 21 Int. Rev. Rec. 110; *The Fremont*, 10 Amer. Law Reg. (N. S.) 340.

Every trivial act of disobedience will not work a forfeiture of wages.

Leaving in a place where the master could easily obtain a substitute is not desertion. *Desty, Shipp. & Adm.* §§ 181, 184; *The Crusader*, 1 Ware, 437.

Geo. C. Wilson, for respondent.

ACHESON, J. I do not see that it can be denied that this case comes within sections 4520 and 4523 of the Revised Statutes. *Graham v. The Exporter*, 21 Int. Rev. Rec. 110; *The City of Fremont*, 2 Biss. 415. Hence the libellant had the right to quit the boat without being chargeable with desertion. *Id.*; *The Crusader*, 1 Ware, 436. Having thus a right to leave the vessel, he is entitled to wages during the time of his actual service, unless he forfeited them by reason of his alleged misconduct. Now he swears that he had sprained his wrist, and that this was his reason for declining to aid in coaling the boat. He should have made this explanation to the mate at the time; but, still, I cannot say his failure to do so should deprive him of his wages. He did state the fact to Capt. Gould before he left finally. The boat suffered no detriment by reason of the libellant's refusal to assist the other hands on this occasion, or by his leaving the vessel at Ludlow; and, upon the whole, I do not perceive upon what just ground his claim for wages can be denied.

Let a decree in favor of the libellant be drawn.

THE CHASCA.¹

(District Court, S. D. New York. February 11, 1885.)

SUFFICIENCY OF DUNNAGE—PERIL OF THE SEA.

The bark C., laden with nitrate of soda, in bags, while on a voyage from Pisagua to Hampton Roads, under a charter of affreightment which exempted her from liability for losses from perils of the seas, encountered heavy weather, and was thrown on her beam ends, in which position she lay for about 48 hours. She was finally nearly righted. On arrival she was found badly strained and unseaworthy; and about 200 tons of the soda had been dissolved in washed-out spaces, 30 feet long by about 6 wide, along the bilges on each side, abreast of the main hatch. The dunnage was so placed as to be held in position by the bags only. On arrival, the dunnage along the washed-out places was found to have fallen down. In all the rest of the ship it was in proper place. No specific negligence in respect to the dunnage was alleged in the libel; and no evidence was given of any custom to fasten the side dunnage. The respondents proved that the vessel was dunnaged in the usual manner. *Held*, that the water was admitted through the straining of the vessel when thrown on her beam ends, which dissolved a portion of the cargo, by reason of which the dunnage fell before the pumps could be made effective; and the dissolving of the cargo, after the dunnage was down, continued for the rest of the voyage. *Held, also*, that the weight of proof showed that sufficient open spaces were left by the dunnage to conform to the custom, and that, as the bark was dunnaged in the usual manner at the place of shipment, the court had no right to assume that it was negligence on the part of the bark to rely upon the cargo to keep the dunnage in its place, there being no contrary evidence on that point; that the damage, therefore, resulted from a peril of the sea, and the vessel was not liable.

In Admiralty.

Sidney Chubb, for libelants.

Owen & Gray, for claimants.

Brown, J. This libel was filed to recover damages for the non-delivery and loss of about 200 tons of nitrate of soda, part of a cargo of about 900 tons, or 6,546 bags, which were shipped at Pisagua, Chili, on board the bark Chasca, bound for Hampton Roads and orders, in June, 1883. The bark was chartered to the libelants under a charter of affreightment that exempted her from liability for losses by perils of the seas. The question litigated was whether the loss of the nitrate is to be ascribed to perils of the sea, or to insufficient or improper dunnage.

The bark sailed from Pisagua on June 21st. About the middle of July she met with very heavy weather, and a succession of gales, lasting about three weeks. On the nineteenth of July, in a very severe gale, she was thrown upon her beam ends, shifting her cargo between-decks to the port side. She lay in that condition for about 48 hours, in a high sea; after which she wore round so as to be upon her port tack. She was then partially righted by trimming the cargo between-decks, though still having a considerable list to port, which remained

¹ Reported by R. D. & Edward Benedict, Esqs., of the New York bar.

during the rest of the voyage. She arrived at Hampton Roads about October 25th, unseaworthy and cranky, through loss of so much cargo in her lower hold, and was towed to New York about the first of November. On examination there was found in her lower hold a space of about 30 feet in length by 6 or 8 feet in width, in the wings on each side of the ship, abreast of the main hatch, where the bags were wholly or partially empty, being washed out by water; and the side dunnage there was nearly all down. Forward and aft of this washed-out space, on each side, the bags were dry and intact; and the dunnage was in place as when loaded. There was no shifting of the cargo in the lower hold. On discharging the cargo it appeared that about 100 tons on each side had been dissolved and lost in these washed-out spaces. The cargo in the center of the ship, fore and aft, over the keelson, and to the extent of four tiers of bags on each side of the keelson, was uninjured. It is evident that the loss of the soda arose through its being dissolved in the water that came in contact with it along the bilges, as the vessel rolled from side to side; while there was at no time sufficient water to reach above the height of the dunnage along the keelson amid-ships, as the water washed from side to side.

The weight of testimony is clearly to the effect that the cargo was well dunnaged, and in the usual manner, when loaded, giving about a foot of space above the floor of the hold, and from 14 to 16 inches along the turn of the bilge. Two witnesses swear to this positively. It is confirmed by the condition of the dunnage forward and aft of the washed-out spaces, as testified to by careful observers; and there is no reason to suppose that it was different abreast of the main hatch from what it was elsewhere. The testimony, based on the examination made after the dunnage was all down in the washed-out spaces, is insufficient to countervail this proof. There is no question that the vessel encountered very severe weather. Upon arrival at Hampton Roads she showed nearly all over her marks of very severe strain and injury. These injuries, and the leaks arising from them, would naturally produce all the water in the hold necessary to account for the loss. Mr. Reed, a very competent expert, so testifies, and no one contradicts it. A clear mark of a water-line was apparent on both sides of the ship along the washed-out spaces. This was about two feet above the floor, as stated by some of the libellant's own witnesses. Mr. Reed, for the defense, states this with more particularity, and testifies that no dunnage could have prevented the loss of cargo with such a depth of water along the bilges. Water at the point of saturation holds in solution about half its weight of nitrate of soda. To dissolve and carry off 200 tons of nitrate of soda, 400 tons at least of water must, therefore, have passed through the hold and the ship's pumps; or an average of over four tons a day from the time the bark was thrown upon her beam ends until she arrived at Hampton Roads. The fact that so great an amount of water was necessary to carry off

this soda is cited by the libellant, and, as I think, conclusively, to show that neither the whole loss, nor, indeed, any great part of it, took place during the 48 hours' time that the vessel was lying upon her beam ends. A small fraction of the amount of water necessary to dissolve all this soda, if it were in the hold at any one time, would have submerged nearly all of the cargo there; whereas, the fact that along the keelson the cargo was not injured, shows clearly that there could have been but a comparatively small amount of water in the hold at any one time. Four tiers of bags on each side of the keelson were unharmed; only the outer three tiers were more or less damaged. That the loss of the nitrate was gradual, and by a long-continued process, is further proved by the fact that the crankness of the bark, which arose only from the loss of nitrates, increased gradually up to the time she reached Hampton Roads.

These circumstances, it seems to me, indicate clearly enough the way in which the loss of the nitrate took place. When the bark was thrown upon her beam ends her leaks increased, as a consequence of the severe strain on her hull; and as the pumps were unable to reach the water along the port side while the ship lay in that position, the water accumulated there until, at the turn of the bilge, it rose above the 14 or 16 inches space allowed by the dunnage. Lying in this position for 48 hours in a heavy gale and rolling badly, the nitrates in the bags upon the port side were rapidly dissolved, and the dunnage, which depended upon the bags to hold it in position, being thereby loosened, became wholly disarranged and broken down. The bags at the sides against the dunnage were but two tiers high, and thence towards the center were piled gradually higher. When the bark wore round and came upon her port tack, with heavy weather still continuing and much rolling of the ship, the accumulation of water at once passed from the port side to the starboard side, rising at once above the dunnage there also, and soon producing on that side the same results by dissolving the lower bags and throwing down the dunnage. In the severe weather and the high sea the pumps were not able to be worked so as at once to bring the accumulation of water that passed from the port to the starboard side down below the dunnage in the starboard bilges, and in this way the water lines on both sides, as observed by the witnesses, were probably formed. When the captain and others went down into the lower hold after the heavy weather had subsided, about the fifth of August, *i. e.*, between two and three weeks after the vessel was thrown upon her beam ends, they found the dunnage along the washed-out spaces all disarranged and down on each side. They endeavored to replace it to some extent, but could not do so effectively. No lights could be taken into the hold for fear of an explosion. During the remainder of the voyage, therefore, there was, in effect, no side dunnage at all along the washed out spaces to serve as a protection for that part of the cargo against the water that usually runs along the bilges. Hence

the bags were constantly exposed to the action of water there, and were constantly dissolving and settling down. In the ordinary rolling of the ship nothing that the pumps could do would prevent this process from going on continually in some measure, and in rough weather the action of the water would be more rapid and destructive, and this would be still further increased by the increasing crankness of the vessel through the loss of cargo. I do not perceive any special difficulty in the fact testified to, that the greater loss was upon the starboard side; for the loss arose chiefly through the breaking down of the dunnage caused by the water taken in, that could not be reached by the pumps, in the gale of July 19th. If the bark afterwards sailed more on the port tack than on the starboard tack, the action of the water and consequent loss would be greater, because longer continued, on the starboard side.

In this way, therefore, there is no doubt, I think, that the severe gale of the nineteenth of July was the true cause of the loss. Had the side dunnage and the floor dunnage been securely fastened at the bilges, otherwise than by the bags themselves, comparatively little damage would probably have been done. If it was the custom with such cargoes to fasten the dunnage securely, then the neglect of this precaution would have made this bark liable. The case of *The Tommy* is cited, in which the omission to fasten the dunnage to prevent its falling in rough weather was held negligence, for which the ship was liable. 16 FED. REP. 601, 607. But the cargo there was of a wholly different character. To rebut the charge of negligence, it is sufficient to show that the ship has been dunnaged in the manner usual and customary for such cargoes. *Shear. Neg.* § 6; *Baxter v. Leland*, 1 Blatchf. 526; *Lamb v. Parkman*, 1 Spr. 343, 351; *The Titania*, 19 FED. REP. 101, 107, 108; *The George Heaton*, 20 FED. REP. 323; *Clark v. Barnwell*, 12 How. 283; 3 Kent, *217.

The evidence in this case is to the effect that the bags of nitrate formed a very compact and solid mass; that the dunnage which, in this case, was without other fastening than such as the bags afforded, was secured in the usual and customary manner. Of the various witnesses examined by the libelants, I have found none who testify that it was usual or customary to secure dunnage otherwise than was done in this case. The dunnage of the rest of the cargo was in place, and is proved to have been done in the customary manner. I have no right to assume, therefore, that it was negligence in the ship to rely upon the bags to keep the dunnage in place, when it appears that such has been the usual practice with cargoes such as this.

There was no proof that the bark was not seaworthy when she left Pisagua. The water which dissolved the nitrates did not reach the cargo through her decks, nor, as in the case of *Hubert v. Recknagel*, through defects for which the ship is answerable. 13 FED. REP. 912. The cargo between decks was uninjured. The water plainly reached the hold through leaks in the sides or water-ways

caused by general strain. There was evidently no lack of diligence on the part of the bark in handling the pumps. The log and the proof show that they were well attended to. And, as I have said, there is no proof of neglect to dunnage this cargo in the way customary for such cargoes. The loss is attributable, therefore, to the perils of the sea originating in the severe gale of July 19th, and the throwing of the bark upon her beam ends. This was clearly a sea peril; and the same cause so disarranged the dunnage, without the ship's fault, as to subject the cargo to constant loss afterwards, which the vessel could not prevent. This was still, therefore, a peril of the sea; and for such loss the ship, under the exceptions of this charter, is not liable. *The Shand*, 10 Ben. 294; *Transportation Co. v. Downer*, 11 Wall. 134; *Clark v. Barnwell*, 12 How. 272; *The Titania*, *supra*. In the case of *The Sloga*, 10 Ben. 315, cited by counsel, the evidence showed that the brig, though encountering severe weather, suffered no considerable injury, nor any leakage approximating to that in the present case, nor were there any such special causes of loss as existed here.

The libel is dismissed, with costs.

DUDGEON WATSON.

(Circuit Court, S. D. New York. March 7, 1885.)

1. EQUITY—PLEADING—COMPLAINANT NON COMPOS MENTIS—PLEA.

A plea alleging that complainant "was at the time of the commencement of the suit *non compos mentis* and incapable to sue," but failing to allege that he has been so found by inquisition or that any committee has been appointed, is bad.

2. SAME—PRACTICE—MOTION TO STRIKE BILL FROM FILES—STAY.

The proper practice in such a case is by an application to the court to strike the bill from the files because filed without authority, or to apply for a stay of proceedings until a committee or next friend may be appointed.

In Equity.

Edward Wetmore, for complainant.

Jas. McKeen, for defendant.

WALLACE, J. The plea of the defendant alleging that complainant "was at the time of the commencement of the suit *non compos mentis* and incapable to sue," does not allege that he has been so found by inquisition or that any committee has been appointed. In the absence of such an allegation there is no authority for such a plea. *Mitf. Pl.* (4th Ed.) 229; *Mitf. & T.* 320. The proper practice in such a case is by an application to the court to strike the bill from the files because it has been filed without authority, owing to the mental incapacity of the complainant, or to apply for a stay of proceedings until a committee or next friend may be appointed. *Wartnaby v. Wartnaby*, 1 Jac. 377; *Attorney General v. Tyler*, 2 Eden, 230; *Norcom v. Rogers*, 16 N. J. Eq. 484. The court can then ascertain whether there is any reasonable foundation for suspending the progress of the suit. It would be intolerable to permit a defendant whenever so disposed to challenge the mental capacity of a complainant by a plea, and the practice might lead to grave abuses. The defendant has no interest in such an inquiry beyond being protected from a vexatious suit. Any person may volunteer to act as a next friend and bring a suit for an insane person when no committee has been appointed, and the court will entertain it and decide its merits. *Jones v. Lloyd*, 43 Law J. (Ch.) 826, against the objections of the defendant. The person thus officiously constituting himself the protector of the lunatic does so at his risk and may be compelled to pay the defendant's costs, and must establish the propriety of his act if called to account by a committee subsequently appointed. The solicitor who files a bill assumes the same responsibility.

The plea is overruled.

v.23F,no.4—11

FISHER v. PORTER.¹*(Circuit Court, D. Nebraska. February 27, 1885.)*

1. MORTGAGE—REFORMATION AND FORECLOSURE—MISTAKE IN DESCRIPTION OF PROPERTY.

Where the uncontradicted evidence, in a suit to reform and foreclose a mortgage, shows that there was a mistake made in describing the property intended to be covered by it, the mortgage will be reformed so as to carry out the intention of the parties.

2. SAME—USURY—AGENT RETAINING COMMISSION.

When an agent who negotiates a loan, secured by mortgage, bearing 10 per cent. interest, which is legal at the time, retains as a commission 10 per cent. of the amount of the loan, the transaction will not be held usurious when it appears that the mortgagee did not share in the commission retained, or agree to do so, and that the agent was acting solely as agent of the mortgagor.

Suit to Reform and Foreclose Mortgage.

Mayne & Hunter, for complainant.

Geo. S. Smith and Geo. W. Doane, for respondent.

DUNDY, J. There was a mistake made in the mortgage, in properly describing the land intended to be covered by it. This is uncontradicted. The mortgage must, therefore, be reformed so as to carry out the intention of the parties.

The defense of usury relied on is not sustained by the proof, especially if the later decisions in this court are to be followed in determining that question. The Porters applied to Tullys, of Council Bluffs, to borrow \$1,900. Tullys was a loan broker, whose business it was to procure loans for others, he charging a large commission therefor. The Porters specially employed him to negotiate a loan for them, and agreed to pay him 10 per cent. commission if he procured for them the \$1,900 desired. This he did. The money came into his hands, and he retained his commission according to agreement. This he had a right to do, unless he (Tullys) was the agent of Fisher, the mortgagee. Tullys went to Plattsmouth to look after the matter, prepared all the papers, did all the business for the Porters, received the money, kept his commission, and gave to the Porters the balance. There is no testimony in the record that shows that Fisher, the mortgagee, ever received, or was to receive, anything whatever from the Porters, except the principal of \$1,900, and interest thereon at 10 per cent. per annum. That was lawful at the time. There is nothing that connects Fisher in any way with the commission retained by Tullys, nor is there anything that shows Fisher even knew of that part of the transaction. Tullys expressly says in his testimony that he was not agent for Fisher, and did not represent him, and that he was acting solely for the Porters. If Fisher had shared in the commission retained, or had agreed to do so, or if Tullys had in any sense been agent for Fisher, then Fisher would be

¹ Reported by Robertson Howard, Esq., of the St. Paul bar.

held responsible for Tullys' acts. As it is, he was not responsible therefor.

Decree will be allowed plaintiff for amount due on mortgage, and for taxes paid by him on the land.

NORTH v. KNOWLTON and others.¹

ORTON v. NORTH.¹

(Circuit Court, D. Minnesota. March, 1885.

MORTGAGE—PRIOR RECORD OF SECOND MORTGAGE—CONSTRUCTIVE NOTICE—FORECLOSURE.

The rule that if the owner of a prior unrecorded mortgage puts it on record before a subsequent purchase of the property the record will be constructive notice to the purchaser, is applicable to a case where the purchase is upon the foreclosure of a mortgage prior in record, but subsequent in date.

In Equity.

On July 24, 1878, Knowlton and wife made their promissory note to the order of Anna North for \$700, with interest at the rate of 9 per cent. per annum, with coupons attached, payable at the office of Corbin Banking Company, unpaid interest drawing 10 per cent.; and on failure to pay interest within five days after due, the holder may collect principal and interest at once. The note was secured by first mortgage on lots 1, 2, 3, 4, and 5, and S. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$, section 5, township 121, range 46, situated in Big Stone county, Minnesota. Mortgage was recorded August 3, 1878, in Big Stone county. On April 1, 1880, Knowlton and wife made their note for \$200, payable to W. I. Austin, or order, six months after date, with interest at 10 per cent. per annum, and also made their note for \$200, payable 18 months after date to order of W. I. Austin, at 10 per cent. interest, and secured the two notes for the aggregate sum of \$400 by mortgage on said property covered by first mortgage, which was recorded in the county of Stevens, state of Minnesota, June 20, 1880; and the same mortgage was also recorded in Big Stone county, May 8, 1882. The first mortgage also was recorded in Big Stone county, May 31, 1881. The Austin mortgage was foreclosed under the power of sale by virtue of the statute of the state of Minnesota, and on default the property was sold, April 12, 1882, to C. K. Orton, he being the highest bidder, for the sum of \$513.51, and a certificate given the purchaser by the sheriff. He went into possession, and on April 26, 1883, commenced an action in the state court against North to determine the adverse claim, which was removed to this court and stands

¹Reported by Robertson Howard, Esq., of the St. Paul bar.

for hearing. There were other conveyances from Orton and wife, but the case, by stipulation of counsel and other proceedings, has been freed from any embarrassment on that account. Suit is brought by Anna North to foreclose her mortgage, making Orton a defendant, and the two cases are heard together. No defendant appears but Orton. At the time her mortgage was first recorded, August 3, 1878, Big Stone was an unorganized county, and continued so until February, 1881. It was attached to Stevens county for judicial purposes, and conveyances and mortgages by statute were authorized to be recorded in Stevens county, and until the record of May 31, 1881, her mortgage was not properly recorded so as to give constructive notice of its existence and its contents. Austin's mortgage was properly recorded, and, though later in date, it was prior in record to the North mortgage.

C. J. Berryhill, for Anna North.

L. Emmett, for C. K. Orton.

NELSON, J. The purchaser, Orton, at the foreclosure sale of the Austin mortgage, is entitled to a decree in his favor, if Austin took his mortgage without notice of the North mortgage, actual or constructive, and paid a valuable consideration therefor. Gen. St. Minn. 1878, p. 537, § 21. He cannot claim precedence of title unless the evidence clearly establishes these facts; for it is not disputed that at the time of his purchase the North mortgage was properly recorded, and it is well settled that if the owner of the prior unrecorded mortgage puts it on record before a subsequent purchase of the property, the record would be constructive notice to the purchaser; and this rule applies where the purchase is upon the foreclosure of a mortgage prior in record, but subsequent in date. See 3 Washb. Real Prop. 282-287. It is necessary for North to show that Austin had actual notice or knowledge of facts sufficient to put him upon inquiry to ascertain if there was any incumbrance or lien prior to his mortgage when he took it, and if this is not proved, it is still necessary for Orton to show that Austin paid value for his mortgage. The Austin mortgage contains an erasure of the covenant against incumbrances; it was a printed form containing several other covenants, and none were erased but this. No explanation is given, and it is a fair inference that there was a motive known to Austin for this erasure; at least, Orton should offer some explanation, which he fails to do.

Again, the evidence that Austin paid the \$400 consideration mentioned is not full and satisfactory. Orton is the only witness, and his testimony is brief. He says: "I know what that mortgage was given for; it was given for lumber sold by Austin to Knowlton and put into a house which Knowlton was erecting at that time." It was necessary to prove a consideration actually paid; the recital in the mortgage of such payment is not enough, and this proof is too meager and unsatisfactory. The conclusion is that Orton does not stand in

the situation of a *bona fide* purchaser for a valuable consideration, and has no precedence of title, by virtue of his purchase, to defeat a foreclosure by North.

Decree ordered in favor of North, and a reference to B. F. Shipman, master.

WINDLE v. BONEBRAKE and others.

(Circuit Court, D. Kansas. March 13, 1885.)

VENDOR AND VENDEE—NEGOTIABLE BOND SECURED BY MORTGAGE—ASSIGNMENT—PAYMENT BY PURCHASER—FRAUDULENT SATISFACTION OF RECORD—FORECLOSURE BY ASSIGNEE.

B. and wife executed a negotiable bond to S. for \$500, payable in five years, at the National Bank of Chester County, Pennsylvania, with interest, payable semi-annually at the same place, for which coupons were attached, and to secure payment, executed a mortgage on 160 acres of land in Allen county, Kansas. S. recorded the mortgage, and sold and transferred the bond and mortgage to H., who transferred and sold them to W. Immediately after the execution of the bond and mortgage, and before the assignment of the mortgage was recorded, B. sold and conveyed the land to A. subject to the mortgage, and A. sold and conveyed to L., who sold and conveyed to D. S. S. represented that he was still the owner and holder of the bond and mortgage, and before D. S. accepted a deed from L. he paid S. the amount of the bond, and S. satisfied the mortgage of record. The bond and mortgage were not in the possession of S., nor had he any authority to satisfy the record. W. brought an action to foreclose the mortgage. *Held*, that D. S. took the land subject to the mortgage, and that W. was entitled to foreclose.

In Equity.

E. A. Barber, for plaintiff.

J. H. Richards, for defendant Sheer.

FOSTER, J. The complainant brings his bill in equity, seeking a decree of foreclosure of a mortgage on real estate. On the twenty-seventh of June, 1879, Isaac Bonebrake and wife executed a negotiable bond to one J. W. Stover for \$500, payable in five years, at the National Bank of Chester County, Pennsylvania, with interest, payable semi-annually at the same place, and for which coupons were attached; and to secure the same, executed a mortgage on 160 acres of land in Allen county, Kansas. Stover immediately placed the mortgage on record, and then sold and transferred the bond and mortgage to one David Hurd, who soon thereafter, and on the sixteenth day of August, 1879, sold and transferred them to this plaintiff, who thereby became the *bona fide* holder of the same. Immediately after the execution and delivery of the mortgage, Bonebrake and wife sold and conveyed said real estate to one Boydston, subject to said mortgage, and who in turn sold the land to one Likes, who, on the eighteenth day of August, 1879, sold and conveyed it to defendant David Sheer. At the time Sheer bought the property there was no assignment of the mortgage on record, and Sheer had no knowledge of the transfer and sale of the bond and mortgage, and Stover falsely repre-

sented to Sheer that he (Stover) was still the owner and holder of the same, and had them in his possession, and that he would release the mortgage of record upon Sheer paying the money to him. Relying upon these representations of Stover, they together went to the office of the register of deeds, and Stover then and there satisfied the mortgage of record, and Sheer paid him the money and took a deed for the land. Stover did not have possession of the bond or mortgage, and had no title or interest in them, nor any authority to satisfy the record. The mortgage recited the debt which it was given to secure, and the time and place of payment, (June 27, 1884, at the National Bank of Chester County, Pennsylvania.) The controversy is now between this plaintiff and David Sheer, as to whether the mortgage is a lien on the land as against Sheer's title. When Sheer began negotiations for the land the records disclosed the existence of the mortgage unsatisfied, the debt not due for several years to come, and payable at a bank in Chester county, Pennsylvania, and a negotiable obligation outstanding for which the mortgage was given to secure. Neither Stover nor any one else told Sheer that the debt had been paid; on the contrary, he was told that the debt was not paid, and in this transaction he undertook to pay it off and get the record clear.

It appears to have become the established doctrine that a mortgage given to secure a debt is but an incident to the debt and partakes of its negotiability. *Carpenter v. Longan*, 16 Wall. 271; *Burhans v. Hutcheson*, 25 Kan. 626; *Kellogg v. Smith*, 26 N. Y. 20; *Keohane v. Smith*, 97 Ill. 156. From this rule it would naturally follow that while its negotiable character existed the purchaser would take the security as he does the debt to which it is the incident, free of equities and defenses existing between the original parties. The *bona fide* purchaser, in such case, obtains vested rights to the debt and the security. How far are his rights liable to be divested by reason of the registry laws concerning real estate? Must he put upon the records his assignment of the mortgage, or in default thereof remain in constant danger of the mortgagee, at any time wiping out his security with a stroke of the pen? The statute of this state declares that the recording of an assignment of a mortgage does not of itself impart notice to the mortgagor, so as to invalidate any payment made by him, his heirs or personal representatives, to the mortgagee. Section 3, c. 68, Laws 1879. This statute evidently requires actual notice to the mortgagor of the assignment, to protect the rights of the assignee against payments by the mortgagor to the mortgagee. But the supreme court of Kansas has construed this provision as not applying to mortgages given to secure negotiable paper. *Burhans v. Hutcheson*, 25 Kan. 626. In any event, the grantee of the mortgage is not included in the terms of the statute, and it may well have been intended that a subsequent purchaser of the real estate should be charged with notice of all the record shows at the time of his purchase. *Jones, Mortg.* § 473; *Belden v. Meeker*, 47 N. Y. 307; *Van Keuren v. Corkins*, 66 N. Y. 77.

In this case the records showed, at the time of Sheer's purchase, an unsatisfied mortgage to secure a negotiable bond, due more than four years hence, and payable in Chester county, Pennsylvania. He was informed that it was not paid off; but Stover, the mortgagee, falsely represented that he was still the owner of it, and that it was in his possession; and relying upon these statements, and without requiring Stover to produce or surrender the note or mortgage, he paid him the amount of the debt, and had satisfaction entered of record. This transaction occurred on the eighteenth day of August, 1879, and but two days after the plaintiff bought the note and mortgage in Pennsylvania, not sufficient time having elapsed to enable plaintiff to have put his assignment on record; and, as a matter of fact, it was not recorded until July, 1881. This bond being negotiable, and the mortgage of record disclosing that fact, as well as the time and place of payment, it was great carelessness on the part of Sheer not to have required the production of the papers, or some evidence that Stover held the same. *Keohane v. Smith*, 97 Ill. 156; *Purdy v. Huntington*, 42 N. Y. 334; *Jones, Mortg.* § 474; *Bank v. Anderson*, 14 Iowa, 545. Had Sheer found the record of the mortgage released and satisfied by the mortgagee, and he had no actual notice of the assignment, or that the debt was unpaid, he might well have relied on the record; and in such a case he would take the land free of incumbrance, although the record may have been released by fraud, accident, or mistake, or merger of titles. *Jones, Mortg.* § 472; *Purdy v. Huntington*, 42 N. Y. 334; *Gillig v. Maase*, 28 N. Y. 191; *Brown v. Byldenburgh*, 7 N. Y. 141; *Kellogg v. Smith*, 26 N. Y. 18; *Van Keuren v. Corkins*, 66 N. Y. 77; *Bank v. Anderson*, 14 Iowa, 544; *Van- nance v. Bergen*, 16 Iowa, 555; *McClure v. Burris*, Id. 591; *Cornog v. Fuller*, 30 Iowa, 212; *Bowling v. Cook*, 39 Iowa, 200; *Baldwin v. Sager*, 70 Ill. 505; *Ogle v. Turpin*, 102 Ill. 148; *Ayers v. Hays*, 60 Ind. 452; *Etzler v. Evans*, 61 Ind. 56.

This great array of authorities has been examined and cited by reason of a supposed conflict on this question, and there are some cases, I believe, in Michigan and Wisconsin, and a dissenting opinion in *Bank v. Anderson, supra*, giving to a mortgage securing a negotiable debt the same protection in the hands of *bona fide* holders as the note itself. But in reason, as well as by the great weight of authority, I think the doctrine before announced is fully established. At the same time it must be kept in mind that the record which will protect the subsequent purchaser is the record as he *finds* it, and not as he *makes* it, or *procures it to be made*. For instance, take the case of *Cornog v. Fuller, supra*. The court say: "When Fuller purchased the land he had no notice that the Hall note was unpaid, and in the possession of plaintiff. He saw upon the records the satisfaction of the mortgage," etc. In the case of *Insurance Co. v. Eldredge*, 102 U. S. 545, when the insurance company made its loan the deed of trust to secure the notes held by Eldridge was released.

But the release was procured by the agent of the insurance company, and such record could not avail the company. If this was not the rule it would open wide the door for fraud and carelessness, as a party could take advantage of his own wrongful or careless act. The only case which seems to recognize a different doctrine, I have been able to find, is *Lewis v. Kirk*, 28 Kan. 497; and while the correct rule, as an abstract proposition of law, is stated in that case, I think the court overlooked this distinction, or else they took the finding of the court below, that Kirk was a *bona fide purchaser*, as conclusive, notwithstanding the *status* of the record. The case of *Keohane v. Smith*, *supra*, is directly in point with the case at bar; as also is the case of *Bent v. Stiger*, lately decided by the supreme court of Illinois and not yet reported. The lien of the plaintiff's mortgage must be held superior to Sheer's deed, and a decree entered as prayed in the plaintiff's bills.

BREWER, J., concurring.

MCALPINE v. UNION PAC. RY. CO.¹

(Circuit Court, D. Kansas. January 30, 1885.)

1. RAILROAD COMPANIES—CONSOLIDATION—PURCHASE OF LANDS—NOTICE OF EQUITIES.

At the time of the consolidation of the Union Pacific, Kansas Pacific, and Denver Pacific Railway Companies, the consolidated company became invested and possessed of all the rights and privileges and property, real, personal, and mixed, of the constituent companies, subject to all liens, charges, and equities existing thereon, and took the same with full knowledge of those liens, charges, and equities. A contract for the sale of lands standing on the books of the Kansas Pacific Company is sufficient notice to the consolidated company to prevent it from being a *bona fide* purchase without notice. *Whipple v. Union Pac. Ry. Co.* 28 Kan. 474, distinguished.

2. SAME—CONTRACT TO EXCHANGE REAL ESTATE—SPECIFIC PERFORMANCE.

Where officers of a railway company enter into negotiations and contract for an exchange of real estate, and the board of directors of the railway company subsequently authorize the exchange of the lands to be made, and the deed of the company to be properly executed and delivered to the party with whom the contract is made, upon the performance of certain conditions on the part of such party, and such conditions are afterwards complied with and performance of the contract tendered, specific performance will be decreed.

In Equity. Bill for specific performance of contract for exchange of lands. The opinion states the facts.

James W. Mason, Henry Smith, John W. Day, and James A. Troutman, for complainant.

John P. Usher, A. L. Williams, and Charles Monroe, for defendant.

FOSTER, J. The negotiations for an exchange of real estate be-

¹From the Kansas Law Journal.

tween the plaintiff and the officers of the Kansas Pacific Railway Company culminated on the twenty-eighth of June, 1878, in the following order of the board of directors of the company:

"Kansas Pacific Railway Company. Extract from minutes of board of directors:

St. Louis, June 28, 1878.

"Pursuant to call of President:

"Present—Messrs. Perry, Meier, Edgell, Treadway, Edgerton, and President Carr The president presented a form of deed to Maria W. McAlpine, to 25½ acres of land in Wyandotte county, in exchange for 2 70-100 (2.70?) acres of land at the landing, in Wyandotte county, and asked for instructions in regard to signing the same. On motion of Mr. Meier, and seconded by Mr. Perry, it was resolved that the exchange of said lands be made, reserving the right of way therein, and the deed of the company be properly executed and delivered to Maria W. McAlpine, whenever the land to be conveyed by her has been released from the tax claim thereon, and a proper deed made for the same is delivered."

In my opinion this record of the board of directors measures and fixes the limits of the liability and obligation of the railroad company in this case. It authorizes the deed of the company for the 25½ acres of land to be delivered to McAlpine, whenever the land to be conveyed by her has been released from the tax claim thereon, and a proper deed made for the same. It does not appear that McAlpine in terms accepted this proposition, but from the evidence and the action of the parties I think an acceptance may be fairly implied. In a conversation with Mr. Devereaux, the attorney of the company, McAlpine expressed the opinion that the best way for him to remove the tax claim would be to buy in the land at the ensuing tax sale, under the new law, which he subsequently did at an expense of several hundred dollars, and directly thereafter tendered performance of the contract. The company in the mean time remained in the quiet use and occupation of the ferry tract, (the title to which, subject to a disputed tax claim, was vested in Maria W. McAlpine.) I think, from the evidence in the case, this removal of the tax claim was made by plaintiff because of the requirement of the company, and may be regarded as part performance of the contract. At the time of making this contract the Kansas Pacific Railway was in the hands of receivers, but their rights were merely temporary possessory rights, the title of the property remaining in the company, and at the termination of the receivership I presume the possession was restored to the company. Lewis and Burnham, as trustees, held a mortgage on this 25½ acres, which the parties agreed was to be released, and the deed which Mr. Carr, the president, presented to the directors, was transmitted to him with such release by Mr. Devereaux, and I think a fair construction of that order is that McAlpine was to have a clear title to the land.

In May, 1879, a consolidated mortgage, as it is called, was made by the Kansas Pacific Company to Gould and Sage, as trustees, cov-

ering the 25½ acres, and in January, 1880, the consolidation of the Union Pacific, Kansas Pacific, and Denver Pacific Railways was made, and together formed the defendant company. Of course the rights of Gould and Sage cannot be adjudicated in this case, as they are not parties; but it does appear that at the time of making said mortgage this order of June 28, 1878, was a matter of record on the books of the company, and unrevoked. McAlpine had got possession, rightfully or wrongfully, of the 25½ acres, and the company was in the use of the ferry tract. Under this state of facts, it is claimed by plaintiffs that Gould and Sage took with notice of their claim.

The Kansas Pacific Company is not made a party to this suit, and, assuming this to be a valid and subsisting contract as to the 25½ acres, what are the liabilities of the defendant company in this matter? To determine that question we will have to refer to the articles of consolidation. In article 8 each constituent company assigns and transfers to the consolidated company all its rights, privileges, property, real, personal, and mixed, all claims, demands, choses in action, and all property of every name and nature, etc., to be held, owned, and controlled by said consolidated company, as fully and completely as the respective parties hereto can own, hold, use, or control the same. Then it adds: "This assignment, transfer, sale, and conveyance is made to said consolidated corporation, subject to all liens, charges, and equities pertaining thereto."

Now it must be admitted that this land passed to the defendant company under this article. It is also true that all rights of the Kansas Pacific Company in this contract with McAlpine passed to the consolidated company, and it could demand of plaintiffs a performance thereof. And it seems to me it is equally apparent that defendant company does not stand as a *bona fide* purchaser without notice. With this land passed, also, to the defendant company all the rights and equities of the Kansas Pacific Company in this contract, and the right to receive the deed for the ferry tract in exchange for the 25½ acres. The whole and entire right, title, and interest, and equities of the Kansas Pacific Company in and about these lands, and the right of action, passed to the defendant company. Can the defendant claim and receive the benefits of the contract, the full consideration, and repudiate the burdens and obligations attending it? I think not. Wat. Spec. Perf. § 512. This is quite a different case from *Whipple v. Union Pac. Ry. Co.* 28 Kan. 474. In that case it was sought by Whipple to charge the defendant company with a general judgment for unliquidated damages for a personal injury incurred before consolidation, and while the Kansas Pacific Company was operating the road.

This case is a contract appertaining to specific real estate transferred by the articles of consolidation to the new company, and while the first clause of article 10 exempts the new company from liability for outstanding debts, obligations, and liabilities of the constituent companies, the next clause reads as follows: "But nothing herein con-

tained shall prevent any valid debt, obligation, or liability of either constituent company from being enforced against the property of the proper constituent company, which by force of these articles becomes the property of the consolidated company." This clause expressly authorizes the enforcement of obligations and liabilities against the property of the constituent companies, which passes under the consolidation to the new company. Of course there can be no decree or money judgment rendered against the defendant company for the other land, but the plaintiff, Mrs. McAlpine, is entitled to a conveyance of the 25½ acres; and, inasmuch as she declares herself satisfied with a conveyance with usual covenants for quiet possession, I see no objection to granting such decree. *Reese v. Hoeckel*, 58 Cal. 281; *Wat. Spec. Perf.* § 424; *Wallace v. McLaughlin*, 57 Ill. 58. And it is so ordered.

D. M. OSBORNE & Co. v. BRYCE and others.

(Circuit Court, E. D. Wisconsin. February 3, 1885.)

1. PROMISSORY NOTES—ACTION AGAINST GUARANTOR—SALE OF MACHINES—DEFENSE OF BREACH OF WARRANTY.

A breach of warranty by the principal in a transaction cannot be set up by a guarantor when sued on his contract of guaranty.

2. SAME—COUNTER-CLAIM—FAILURE OF CONSIDERATION FOR ORIGINAL CONTRACT.

A mere counter-claim growing out of a breach of warranty is not available to a guarantor or surety, whether he be an indorser for value or merely an accommodation indorser; but if there is any fact from which a total failure of consideration for the original contract arises, the guarantor or surety has a right to avail himself of that fact.

At Law.

G. D. Emery and Chapin, Dey & Friend, for plaintiff.

Charles B. Pratt and W. C. Williams, for defendants.

DYER, J. This is a suit at law upon money demands, brought by the plaintiff corporation, a citizen of New York, against the defendants, Charles H. Sproat, Samuel G. Ormiston, and John Bryce, as co-partners under the firm name of Sproat, Ormiston & Co. It is alleged that Sproat is a citizen of Minnesota, that Ormiston is a citizen of Dakota, and that Bryce is a citizen of Wisconsin. Only the last-named defendant has been served with process, and appears in the action. The complaint contains 24 causes of action. In the first cause of action it is alleged that at a time and place in the territory of Dakota, particularly stated, one Foley executed his promissory note, whereby he promised to pay to the order of the plaintiff, on a day named, a certain sum of money, with interest; that as part of the same transaction the defendants jointly and severally, by their firm name, for value received, duly indorsed and guaranteed the payment

of said note to the plaintiff, at maturity, and waived demand, protest, and notice of non-payment thereof; that this indorsement, guaranty, and waiver was as follows: "For value received, I (or we) hereby guaranty the payment of the within note at maturity, or any time thereafter, and waive demand, protest, and notice of non-payment thereof. [Signed] SPROAT, ORMISTON & Co." It is further alleged that thereupon, in good faith, and for a valuable and sufficient consideration, the note and guaranty were delivered to the plaintiff, who became the owner and holder thereof. Demand of payment, and refusal to pay by the defendants, is then alleged. All the other causes of action are similar to the first, except that promissory notes of different dates and amounts, by different makers, and payable at different times, are therein set forth, the defendants being charged as guarantors upon all the notes. Copies of the notes are annexed to the pleadings, which show that the terms of those obligations, and the guaranty on the back of each, correspond with the allegations of the complaint.

The aggregate amount of the notes is \$2,736.35, for which amount, with interest, judgment is demanded against the defendants. The answer of the defendant Bryce admits the citizenship of the defendants as alleged in the complaint, and their copartnership at the several times therein stated. To the first cause of action he then sets up the following affirmative defense: That on the fourth day of December, 1880, Sproat, Ormiston & Co. entered into a written contract with the plaintiff, by the terms of which they became the agents of the plaintiff to sell certain machinery mentioned therein; that the note mentioned in the first cause of action was executed by the maker thereof, Foley, at the time and place, and for the amount stated in the complaint; that this note, at the time it was executed, and before guaranty of payment by Sproat, Ormiston & Co., and before delivery of the same to the plaintiff, was the property of the plaintiff, and the guaranty was made after the note thus became the plaintiff's property, and not at the request of the maker, or for his benefit, but that it was made at the request of the plaintiff, and in accordance with the terms of the contract between the plaintiff and Sproat, Ormiston & Co., and without any other consideration than that stated in the answer; that the maker of the note, at the time of its execution and delivery, was pecuniarily responsible; that the note was taken by Sproat, Ormiston & Co. for and in behalf of the plaintiff, and for its benefit; that no notice has been given the defendant Bryce by the plaintiff that the maker of the note was not, at the time it was executed and delivered, pecuniarily responsible, or that the note was bad or hard to collect, as, by the terms of the contract referred to, it is alleged the plaintiff was bound to do if such were the facts; that the note was given as part consideration for a harvester sold by the plaintiff to Foley; that the plaintiff warranted to Foley that the harvester was well built, of good material, and capable of cutting, if properly

managed, from 10 to 15 acres per day; and that Foley was thereby induced to purchase the machine. The breach of this warranty is then charged, and it is alleged that the guaranty of Sproat, Ormiston & Co. was made and based upon this warranty, as per the terms of said contract, and upon no other consideration, and that the guaranty would not have been given had not the plaintiff so warranted the machine sold to Foley.

The same defense is interposed to each of the several causes of action, the defenses differing only with respect to the names of the makers of the different notes guarantied by Sproat, Ormiston & Co.; and upon the defenses so alleged, the defendant Bryce demands judgment that the plaintiff take nothing by its suit. The plaintiff now moves for judgment against the defendant Bryce upon the pleadings; the general ground of the motion being that the answer sets up no valid defenses to the plaintiff's demands, and by stipulation between the parties the court is now to pass upon this motion.

The motion, in the form in which it is made and submitted, seems to be equivalent to a demurrer to the answer, and the principal question argued is whether it is competent for the defendant Bryce to set up as a defense to the action a breach of the warranty given by the plaintiff to the purchasers of machines. The determination of the question thus presented appears largely to depend upon the construction to be given to the contract entered into between the plaintiff and Sproat, Ormiston & Co. The contention of the defendant is that Sproat, Ormiston & Co. had already by their contract, in legal effect at least, guarantied or become liable for the payment of the purchase price of the machines; that it was not necessary to guaranty payment of the notes; that the machines were in the outset sold conditionally to Sproat, Ormiston & Co.; that the defendants became liable therefor under the contract; that, therefore, the warranty given by the plaintiff to purchasers of machines inured to the benefit of Sproat, Ormiston & Co.; and that the consideration for the guaranty of the notes was the plaintiff's warranty of the machines. It is true that the contract, in its preliminary recitals, states that the parties have bargained for the conditional sale of the machines to Sproat, Ormiston & Co.; but, looking at the contract in its entirety, it seems evident that what the parties contemplated was a sale of the machines as the property of the plaintiff, by Sproat, Ormiston & Co., as the plaintiff's agents, to third parties, with an obligation on the part of Sproat, Ormiston & Co. to account for the proceeds in the manner prescribed, and with a reserved right in the plaintiff, in certain contingencies, to make Sproat, Ormiston & Co. their absolute debtors for the machines. Many of the important provisions of the contract contain language expressive of the relation of principal and agent. If, by virtue of the contract, a sale outright of the machines to Sproat, Ormiston & Co. was intended, or if there was thereby created an absolute liability to pay for all machines furnished, many of the pro-

visions of the contract would seem to be superfluous and quite meaningless. The defendants were to receive the machines under the contract at certain retail prices, less a certain discount for commissions. They were not to sell or become interested in the sale of any mowing and reaping or self-binding machines other than those manufactured by the plaintiff. Their agreement was, as we find it expressed in the contract, to make all reasonable efforts to sell the machines to responsible persons only, and only within certain territory; and this agreement, which also includes an obligation with reference to advertising machines and canvassing territory, supports the view that an agency was established. And in case of violation of these stipulations it was declared, in effect, that Sproat, Ormiston & Co. were to be liable for machines at their full retail price, without any discount or commission.

The defendants also contracted to make prompt settlement with purchasers of machines upon delivery of the same, and to see that all machines sold were properly set up and operated; that all machines received from the plaintiff should be sold either for cash, or good and approved notes, or for part cash and part good notes. And it was expressly stipulated that all such machines should be and remain the property of the plaintiff until so sold or otherwise settled for, as provided in the contract, and that, when sold for cash, either in whole or in part, the moneys received, to the amount of the price for said machines, should be received by Sproat, Ormiston & Co. as the moneys of the plaintiff, and be transmitted to the plaintiff without delay; that when not wholly paid for in cash, a note of the form prescribed by the plaintiff should be taken for the unpaid balance, signed by the purchaser, and payable to the order of the plaintiff, and that the same should be indorsed, and the payment thereof guaranteed by Sproat, Ormiston & Co., waiving demand, protest, and notice of non-payment; that all such notes should become and be the property of the plaintiff immediately when executed, and be transmitted to the plaintiff without delay; such notes to bear 10 per cent. interest from the date of the sale or delivery of the machine for which they were given. It was also provided by the contract that for the purpose of ascertaining the responsibility of makers of notes given in payment of machines under the contract, an agent of the plaintiff should have the privilege of submitting the same to a cashier of a bank, or some other responsible person acquainted with the general pecuniary standing and responsibility of the people of the neighborhood, and that any of such notes which he should pronounce bad, or hard to collect of the makers thereof, might be returned to Sproat, Ormiston & Co., who should give cash or other notes therefor, which notes such cashier, or other responsible person, should pronounce good and collectible. Embodied in the contract is the form of a warranty which was to be given to purchasers on sales of machines. This warranty is as follows:

"All our machines are warranted to be well built, of good material, and capable of cutting, if properly managed, from ten to fifteen acres per day. If, on starting the machine, it should in any way prove defective and not work well, the purchaser shall give prompt notice to the agent of whom he purchased it, and allow time for a person to be sent to put it in order. If it cannot then be made to do good work, the defective part will be replaced, or the machine taken back and the payment of money or notes returned. Keeping the machine during harvest, whether kept in use or not, without giving notice as above, shall be deemed conclusive evidence that the machine fills the warranty."

Another provision of the contract was this: that in case any of the machines should remain unsold at a time specified, it should be optional with the plaintiff then or at any time thereafter to receive them back, or to require payment therefor by Sproat, Ormiston & Co. at the price specified in the contract, less the discount, with interest, or to require a renewal of the contract for such machines by Sproat, Ormiston & Co.; and in case the plaintiff should elect to receive back such unsold machines, then Sproat, Ormiston & Co. agreed to store the machines without charge until a certain time, and pay all local taxes that might be assessed upon them, and to deliver them at any time required, at any convenient railroad depot, free of all back freight or charge for storage or handling; and it was also agreed either to renew the contract or make a new one with the plaintiff upon certain terms; in either case such contract to cover such unsold machines. Or, in case the plaintiff should elect to receive back any of such machines, then Sproat, Ormiston & Co. agreed to settle and pay for them, and give their notes for the amount thereof, payable at specified times, with interest.

There was also a clause in the contract by virtue of which the plaintiff reserved the right to revoke the contract at any time upon the happening of certain contingencies, and that immediately upon such revocation all the machines previously delivered to Sproat, Ormiston & Co., and remaining unsold, should be deemed to be in the possession of the plaintiff, without any claim thereon by Sproat, Ormiston & Co.; and that any sales made, changing the conditions, prices, terms of sale or warranty, as provided in the contract, should be made at the risk, responsibility, and cost of Sproat, Ormiston & Co.

Thus it will be seen that under certain circumstances occurring in the prosecution of the business, or upon the happening of certain contingencies, the plaintiff was to have and did have the right to treat Sproat, Ormiston & Co. as its absolute debtors for machines furnished them and remaining unsold. Still, it was evidently contemplated that all machines sold should be disposed of as the property of the plaintiff, and that all notes taken and moneys received on account of sales should also be the property of the plaintiff in its absolute right. And the court does not see how the conclusion is to be avoided, that in the sale of machines, Sproat, Ormiston & Co. were acting as the plaintiff's agents or representatives, not themselves holding the title

to the machines, but liable as such agents to account for the proceeds of sales. It does not follow that because in certain contingencies the plaintiff had the right or option under the contract to hold Sproat, Ormiston & Co. liable for the machines, they are to be regarded as chargeable in the first instance, and in any event, with the retail price of the machines. If the parties dealt with the machines sold as the property of the plaintiff, it may well be assumed that the relation between them as to such machines was that of principal and agent, and that they understood and intended that the plaintiff was to look for payment to the maker of the note and the subsequent guarantors, either or both. Then, as the court understands the pleadings and the contract, (a copy of which is annexed to the answer,) Sproat, Ormiston & Co. sold the machines in question to the various makers of the notes in suit as the property of the plaintiff, and in behalf of the plaintiff executed to such purchasers the warranty which the contract required to be given in each case of sale. This warranty was the obligation of the plaintiff. From the allegations of the answer it is evident that the remedy which the purchasers of machines would have if there was a breach of the warranty, would be one against the plaintiff, and not against Sproat, Ormiston & Co.

The question, therefore, is, does a breach of this warranty alone constitute a defense to this suit against Sproat, Ormiston & Co. upon their contract of guaranty, by virtue of which they guaranteed the payment of the notes received on the sale of the machines? The court is of the opinion that it does not. The breach of warranty, if shown, would not give the defendants a right of action against the plaintiff, nor necessarily cause them any damage. The makers of the notes might have a right of action against the plaintiff for damages sustained by them in consequence of the breach, or they might set off or recoup their damages in a suit against them upon the notes. There is no averment in the answer that Sproat, Ormiston & Co., or the defendant Bryce, have sustained any injury on account of the alleged failure of the machines to answer the requirements of the warranty. There is no allegation that the makers of the notes have sought to enforce any remedy against the defendants, or that they are under any liability to such makers on account of the alleged breach of warranty. Until some injury, actual or threatened, has resulted to the defendants from some claim made against them by the makers of the notes, how can it be said that they can avail themselves of the defense here interposed, in an action wherein their liability to the plaintiff as guarantors of the notes is sought to be enforced? The makers of the notes can, I think, alone elect to set up the defense of breach of warranty given on the sale of the machines, and they are not parties to this action. The defense is one not arising out of the defendants' contract of guaranty. The liability of the plaintiff, if any, resulting from a breach of their warranty, is one wholly in favor of the purchasers of the machines. It is hardly correct to say that the consideration

for the guaranty of the notes by the defendants was the plaintiff's warranty of the machines.

Looking at the contract in question from its four corners, so to speak, the consideration for the guaranty consisted, among other things, of the benefits and profits which Sproat, Ormiston & Co. were to realize from sales of the plaintiff's machines, and from the relation in which they stood to the plaintiff as its representatives, having, by virtue of the contract, the right to engage in the business of selling machines for the plaintiff. They chose to agree that they would guaranty the payment of all notes taken for machines which were not sold for cash. By guarantying the notes in suit they complied with that obligation of their contract. No damage or injury has resulted to them, so far as here appears, from the alleged breach of the warranty which the plaintiff gave to purchasers of machines. And the court does not perceive that there is any substantial distinction between this case and cases cited on the argument, wherein it has been held that a breach of warranty by the principal in a transaction cannot be set up by a guarantor when sued on his contract of guaranty. *Gillespie v. Torrance*, 25 N. Y. 806; *Lasher v. Williamson*, 55 N. Y. 619; *Henry v. Daley*, 17 Hun, 210; *Hiner v. Newton*, 30 Wis. 640. It is true that these were cases where indorsers, for the accommodation of the makers of notes, or the surety of the makers, sought to avail themselves, in a suit by the payee, of a breach of warranty by way of defense, recoupment, or counter-claim; but the principle governing the determination of those claims seems to be applicable to the case at bar. The defenses here interposed do not arise upon a failure of the consideration of the contract on which the plaintiff's action is founded. They are rather to be regarded as the setting off of distinct causes of action, one against the other. The non-performance of the plaintiff's engagement to the makers of the notes is not to be regarded as a failure of consideration, but as an independent cause of action which the makers of the notes, and they only, may assert. It is in their election to determine whether it shall be used defensively, or whether they will bring their own actions for the damages, or whether they will forego their claims altogether. The defendants have no control over them in this respect, and cannot borrow, or avail themselves of their right. *Lasher v. Williamson*, *supra*.

Of course it will be understood that these observations are made upon the state of facts disclosed in the pleadings before the court. In *McDonald Manuf'g Co. v. Moran*, 52 Wis. 203, S. C. 8 N. W. Rep. 864, it was held that, in an action against an accommodation indorser of promissory notes, the facts that the notes were given for a machine warranted to answer certain purposes, but which proved on trial to be absolutely worthless for such purposes, that the plaintiff took the notes with notice of the warranty and of the breach thereof, and after the maturity of the notes, and that the principal maker was utterly insolvent,—entitled the indorser to be subrogated to the rights which

the maker would have in such a suit against him. But such a state of facts does not appear in the case in judgment.

Aultman v. Thompson, 19 FED. REP. 490, was cited by counsel for the defendants on the argument. The opinion of the court in that case does not disclose the facts developed at the trial upon which the ruling was made, and it is not by any means clear from the opinion that the question here presented was there either discussed or determined. Since the submission of the present motion, the record in that case has been furnished by counsel for the defendant, from which it appears that the suit was one against the defendant as guarantor of certain notes executed by one Valentine for machines sold to Valentine through the defendant, who was Aultman & Co.'s agent under a certain contract between the parties. There, as here, was a warranty of the machines by Aultman & Co. to the purchaser. And, among other defenses interposed, a breach of warranty was alleged. Further, that Aultman & Co. attempted by certain changes to make the machines fulfill the warranty, but failed; and that thereupon the purchaser, Valentine, rescinded the contract and tendered back the machines to Aultman & Co., and notified them that he elected to so rescind the contract and return the machines. It was further alleged by way of defense that the defendant's guaranty was made without any knowledge of the warranties of the machines; that the changes in the machines, in order to make them fulfill the requirements of the warranties, were made without the defendant's knowledge; that they were wholly worthless, and therefore that there was a total failure of consideration for the guaranty. Thus it will be seen that the defense in that case was not merely breach of warranty and counter-claim arising therefrom, but a rescission of the contract by the purchaser of the machines, founded upon a breach of warranty which was incorporated in the purchaser's notes, and the total failure of consideration for the guaranty.

Such a defense, as I understand the case, was held admissible by the court. In the case at bar the defense is not based upon any rescission of the contract of purchase by the purchaser of the machines and a failure of consideration, but upon a mere counter-claim arising out of an alleged breach of warranty. No rescission of the contract of purchase is here set up, and I understand the rule to be, under the authorities, that a mere counter-claim, growing out of a breach of warranty, is not available to a guarantor or surety, whether he be an indorser for value or merely an accommodation indorser; but that if there is any fact from which a total failure of consideration for the original contract arises, the guarantor or surety has a right to avail himself of that fact. In the case cited the machines failed to meet the terms of the sale, and were, in fact, returned by the purchaser. And in some of the defenses to that action it was also alleged that the purchaser of the machines was wholly insolvent. So that the case would appear to stand upon the same footing as *McDonald*

Manuf'g Co. v. Moran, supra. For the reasons stated I am of the opinion that *Aultman v. Thompson* is not a controlling authority upon the question here in judgment. The facts in the two cases, and the character of the defenses as disclosed by the record, are materially dissimilar.

Upon the argument of the plaintiff's motion for judgment some other points affecting the sufficiency of the defendant's answer were made, but they were points which, if ruled against the pleading, would still leave it amendable; and counsel were understood to unite in a request for the judgment of the court upon the principal question, namely: Whether the defendants, as guarantors of the notes in suit, could defend this action on the ground alone of a breach of the contract of warranty made between the plaintiff and the purchasers of the machines. Upon that question the court entertains the views which have been expressed, and, unless the difficulties that have been suggested in the way of setting up the defenses here interposed can be remedied by amendment of the answer, the court is of the opinion that these defenses are unavailing against the application for judgment.

PRESTON and others v. CANADIAN BANK OF COMMERCE.

(District Court, N. D. Illinois. December Term, 1883.)

BANKS AND BANKING—CLEARING-HOUSE—PAYMENT UNDER MISTAKE.

C. deposited certain collaterals with P., K. & Co., bankers and members of the Chicago Clearing-house, with the understanding that he should have a right to draw checks on them to within 10 per cent. of the value of the securities. On August 5, 1881, C. drew his check for \$4,000, which was deposited with the defendant bank, also a member of the clearing-house, to his credit, and went into the exchanges for collection through the clearing-house on the morning of August 6th. Under the rules of the clearing-house each member was required to pay its balances to the clearing-house by 12 o'clock, and any check which was found not to be good when returned from the clearing-house to the bank against which it was drawn, was to be returned to the bank which collected it through the clearing-house by half past 1 o'clock of the same day. When C.'s check came from the clearing-house into P., K. & Co.'s bank, his account was examined and the collaterals deemed sufficient to pay that check and others drawn on them by him, and they were handed over to the book-keeper to be charged into his account. At 42 minutes past 1, P., K. & Co. heard that C. had failed, when a second examination was had and it was found that a mistake had been made, whereupon the check was sent to defendant bank and payment demanded at 15 minutes before 2 o'clock and refused. P., K. & Co. brought suit against defendant to recover the amount of the check as money paid under mistake. *Held*, that they were not entitled to recover; distinguishing *Merchants' Nat. Bank v. National Eagle Bank*, 101 Mass. 281.

At Law.

J. P. Wilson, for plaintiffs.

W. H. Swift, for defendant.

BLODGETT, J. This is an action in *assumpsit* to recover the amount of a check drawn on the plaintiffs by Gardner P. Comstock, August

5, 1881, for the sum of \$4,000, deposited with the defendant, the Canadian Bank of Commerce, by Comstock to his credit, and paid by the plaintiffs to the clearing-house, as plaintiffs claim, by mistake as to the condition of Comstock's account.

The main facts in the case, which I deem material for the purpose of disposing of the question, are briefly these:

Both the firm of Preston, Kean & Co. and the Canadian Bank of Commerce were members of the Chicago Clearing-house at the time this check was drawn and paid. Gardner P. Comstock carried on business in the city of Chicago under the name of G. P. Comstock & Co., and had an account both with the defendant bank and the banking firm of Preston, Kean & Co. So far as the proof shows, the account with the defendant was an ordinary deposit account for whatever money was deposited in the due course of Comstock's business with the defendant as Comstock's banker. The account that Comstock kept with the plaintiffs, Preston, Kean & Co., was not strictly a deposit account, but was an arrangement for credit; that is, Comstock left with the firm of Preston, Kean & Co. warehouse receipts for grain and provisions, and against these pledges of collaterals it was understood that Comstock should have a right to draw checks to the extent of the market value of the articles represented by these securities; that is, the agreement was that they were to pay his checks to within 10 per cent. of the value of the securities deposited with them. On August 5, 1881, Comstock drew his check on the plaintiffs for \$4,000, which was deposited with the defendant bank to the credit of Comstock, and went into the exchanges for collection through the clearing-house on the morning of August 6th. By the rules of the clearing-house each member must pay its balances to the clearing-house, whatever they are, by 12 o'clock of that day, and any check which is not found to be good, when returned from the clearing-house to the bank against which it is drawn, must be returned to the bank which collected it, through the clearing-house, by half past 1 o'clock of the same day. The checks usually come into the banks from the clearing-house at from 11 to half past 11 o'clock each day, and the check in question came to the banking-house of the plaintiffs about half past 11. When the checks from the clearing-house on the day in question came into the plaintiffs' bank they were looked over by the cashier and assistant cashier, and passed upon as soon as they could be in the due course of business, and before half past 1 o'clock this check and the collaterals deposited with Comstock had been examined, and the collaterals deemed sufficient to justify the payment of the check in question, together with five other checks drawn by Comstock on the plaintiffs, amounting in all to about \$13,000, and they were handed over to the book-keeper to be charged up to Comstock's account. At about 42 minutes past 1 o'clock information came to the plaintiffs' bank that Comstock had failed to make good his margins on the board of trade, and the cashier directed the assistant cash-

ier to look over Comstock's collaterals again. The assistant cashier testifies that he re-examined the collaterals at once and found that he had made a mistake the first time, and that the collaterals in hand were not sufficient to meet the checks which had been drawn. He at once sent a messenger with the check in question to the defendant bank, and, as the proof shows without dispute, it was presented to the defendant and payment demanded at 15 minutes before o'clock, which payment was refused. At the same time another of Comstock's checks for about \$4,500, which had come in to the clearing-house from the Commercial National Bank, was also returned to that bank.

The plaintiffs seem to rest their right of action solely on the principle that this is money paid by reason of a mistake in the first examination of Comstock's account by their cashier; that they would have returned the check to the defendant before half past 1 o'clock, if their cashier had not, from the examination he first made of Comstock's collaterals, concluded them sufficient to justify them in paying; but the cashier states that on making a second computation of the value and amount of collaterals held by them, he found that he had counted one item twice and thereby made the amount too large.

The authority mainly relied on by the plaintiffs, aside from the general proposition that money paid by mistake may be recovered back, is the case of *Merchants' Nat. Bank v. National Eagle Bank*, 101 Mass. 281. That was a clearing-house case, and like this in many important particulars. The rule in the Boston Clearing-house required that checks which were found not good should be returned by a certain hour of the day on which they were received from the clearing-house; but, in that case, the plaintiff bank attempted in apt time to comply with the rule, sent its messenger to the defendant bank with the check, and, the messenger mistaking the directions, went to the wrong bank, and by reason of being obliged to return for more explicit directions, was a few minutes late in the presentation of the check at the defendant bank, and the court held that, under the circumstances, this was money paid by mistake.

The rule of the Chicago Clearing-house is found in section 5 of the constitution of that body, and is as follows: "All checks received in the morning exchanges not found good are to be returned the same day received, before one and a half p. m., to the member from whom received, who shall immediately reimburse the holder of the same." Section 11 of the constitution of the clearing-house also contains the following clause: "These articles of association shall be approved by the respective banks or bankers becoming members, and from that day shall become operative and binding."

There is no doubt of the general principle that money paid under a mistake of fact may be recovered back; but it is equally true and equally a fundamental proposition of law that parties who are competent to make a contract may agree within what time they may correct mistakes, if they are made. Every one at all familiar with bank-

ing business knows that in the dispatch and haste, or apparent haste, with which large sums of money and complicated accounts are handled and business transacted during banking hours, mistakes are liable to occur; and the rapidity with which the different accounts are adjusted at the clearing-house is such as to make it possible, if not probable, that mistakes will occur; and it is therefore entirely competent for parties who are dealing with each other through an agency like the Chicago Clearing-house to make an agreement as to the time within which such mistakes shall be rectified. I cannot construe this rule of the Chicago Clearing-house as anything else than an agreement that checks shall be returned by half past 1 o'clock to the bank from which they come, when they are found not good; that is, it is a contract stipulation to that purport and effect between the members of the clearing-house. Now the question is, shall a mistake made by the bank against whom a check was drawn be allowed to abrogate that rule?

It seems to me that the Boston case has gone to the very verge of the application of the rule that money voluntarily paid under a mistake can be recovered back; and it is noticeable that the next succeeding case in the volume of Massachusetts Reports in which the case relied upon by the plaintiffs is reported, was where a bank sued to recover on the ground they had paid a check by reason of having made a mistake of fact as to the amount to the credit of the drawer, and the court held that no such recovery could be allowed, because it was laches to make such a mistake of fact.

If parties competent to contract within what time they may correct mistakes in their dealings with each other have so contracted, it seems to me the courts have no right to override or disregard such an agreement. If a mistake which is discovered within an hour, or within 10 minutes, after the expiration of the time limited by the agreement for its correction may be corrected, I can see no reason why it cannot be corrected a week afterwards, or whenever it is discovered. The Massachusetts court puts its decision on the ground that you may correct a mistake of this kind at any time after it is discovered, if it places the party to whom the check is returned in no worse condition than it would have been if it had been returned within the stipulated time; thus overlooking the rule that parties may agree that they shall not have the right to correct mistakes unless done within a limited time.

The issues are found for defendant.

HAYES v. BICKELHOPT.

(Circuit Court, S. D. New York. March 7, 1885.)

1. PATENTS FOR INVENTIONS—SKY-LIGHTS AND VENTILATORS—INFRINGEMENT.

Held, on rehearing, that claims 2 and 3 of reissued patent No. 8,688, and claim 3 of 8,689, are valid, and have been infringed by defendant. S. C. 21 FED. REP. 567.

2. SAME—COSTS.

Held, further, that as complainant prevails, on account of a disclaimer filed since suit brought, and fails as to a large part of his case, he is not entitled to costs.

In Equity.

Livingston Gifford, for orator.

Arthur v. Briesen, for defendant.

WHEELER, J. This cause has been before heard and considered. *Hayes v. Bickelhaupt*, 21 FED. REP. 567. A rehearing has been granted and had as to the second claim of reissue 8,675, the second and third claims of 8,688, and the second and third claims of 8,689, on account of mistake of models of patent for those relied upon to show infringement, and of error in reference to former decisions upon the same patents. It was said by Judge BENEDICT, in *Hayes v. Seton*, 12 FED. REP. 120, that the second claim of 8,675 appeared to be for the same invention described in the original patent. He states no comparison of this claim of the reissue with those of the original. Its basis must be the first claim of the original. That is for an arrangement and this for a combination of parts. There are parts in each not mentioned in the other. They may be said to appear to be the same, by considering the parts specified in the claim of the reissue, and not mentioned in the claim of the original, as implied from the specification of the original into the claim, by the words, "as specified," in the claim. What is said there as to infringement of this claim indicates this construction. A moulding secured by rivets, bolts, etc., to form a brace, is one of the elements of the combination of the reissue not specified as such in the arrangement of the original. The alleged infringement did not have that, and it was held not to be an infringement. The alleged infringement here does not appear to have that, and does not appear to be an infringement. Construed to cover the infringement, the reissue would depart from the original, and constructed to follow the original it does not appear to be infringed.

Claim 2 of 8,688 appears to be identical with claim 1 of the original, and has once been held valid, in view of the alleged anticipating devices. *Hayes v. Bockel*, 11 FED. REP. 87. It was held not to be infringed because the gutters were not under cover of the bases which supported the glass in *Hayes v. Seton*, *supra*, and *Hayes v. Dayton*, 20 FED. REP. 690. Here the alleged infringement has the

gutters under those bases where they will not obstruct the light of themselves according to the patent. Following these prior decisions, this claim is held by the court now to be valid and to be infringed. The disclaimer reduces claim 3 of 8,638 to the same as that of the original. Question is made about the propriety of the disclaimer now. It is in the case. No motion has been made to suppress it, nor for leave to take testimony to meet it. It is said that the bill should have been amended to make it admissible, or to adapt the case to it; but that does not appear to be necessary. The claim before the disclaimer was for alternatives, and the disclaimer dispenses with one of them. A bill that would cover both would cover the one left. The claim as it was in the original, and now is, is for a clip of sheet-metal for supporting the ends of abutting glasses in a sky-light by being bent to form a groove for the upper edge of the lower glass, a rabbet to support the lower edge of the upper glass, and a gutter for water from the inner surface of the upper glass. A prior patent to the plaintiff is relied upon as an anticipation, but it does not meet this clip. This claim appears to be valid. The principal point in respect to infringement is made upon the fact that the defendant's clip is made of two pieces of sheet-metal bent so as to join and form the clip, while the patent describes only piece of sheet-metal bent so as to form the clip. This difference does not, however, seem to be material. It pertains to the workmanship rather than to the structure, and when the two things are done they amount to the same thing. The defendant does not have the covering strips of claim 2 of 8,689, arranged to straddle the posts, as specified in the patent, and consequently does not infringe that claim. Claim 3 of that patent appears to stand, in respect to validity and infringement, as at the former hearing.

It is urged that infringement has not been properly proved because no expert has been called to show and explain how the defendant's structures infringe the different claims of the patents, and many cases in which it is held that infringement must be proved have been cited. There can be no question but that infringement, if not admitted, must be proved by competent evidence. There does not appear to be any prescribed method of proof by experts, however. Explanations of matters not commonly or readily understood may be necessary, but when it is proved that the defendant has done what is plainly an infringement, further proof to establish the fact would not seem to be necessary. It is urged that the bill should be dismissed because it set forth that all the claims of all the patents were infringed in one structure to avoid multifariousness, and that this was denied in the answer and shown to be untrue by the proofs. But all the claims held to be valid and to be infringed are infringed by one structure, the Sherwood studio building, therefore this position is not tenable. The orator appears to be entitled to a decree that claims 2 and 3 of 8,638, and claim 3 of 8,689, are valid and have been infringed by the defendant, but not to costs, because he prevails on account of a dis-

claimant filed since the suit was brought, and also because he fails as to a large part of his case.

Let there be a decree for the orator for an injunction and an account, without costs, accordingly.

CANAN v. POUND MANUF'G Co.

(Circuit Court, N. D. New York. March 10, 1885.)

PATENTS FOR INVENTIONS—EXPIRATION OF FOREIGN PATENT—REV. ST. § 4887—RECITALS IN LETTERS.

A patent granted for an invention which has been previously patented in a foreign country is not void because not limited on its face to expire at the expiration of the foreign patent, but will be valid for the term of the foreign patent only.

At Law.

Crowley & Laughlin, for complainant.

Ellsworth & Potter and Worth Osgood, for defendants.

WALLACE, J. The defendant insists that the plaintiff's patent is void because it is granted for the term of 17 years from the date of its issue, August 12, 1879, and is not limited upon its face to expire December 5, 1883, the time of the expiration of the plaintiff's Canadian patent for the same invention. This position is founded on the language of section 4887, Rev. St., which declares "that every patent granted for an invention which has been previously patented in a foreign country shall be so limited as to expire at the same time with the foreign patent, or, if there be more than one, with the one having the shortest term; and in no case shall it be in force more than 17 years." Reading this section without reference to the context, it would fairly authorize the argument that the limitation should be expressed upon the face of the patent; and if this were the true meaning of the law, a serious question would arise whether a patent issued in disregard of the mandate would not be void. But the section is to be read in connection with sections 4883, 4884, and 4885, and resort may be had for interpretation to the pre-existing statutes; and thus read there seems to be no room for fair doubt that section 4887 is not to be construed as requiring the limitation to be expressed in the patent, but merely as controlling the effect or duration of the grant.

Sections 4883, 4884, and 4885 prescribe the formalities by which patents shall be authenticated, and what they are to recite and contain. Section 4884 enacts that "every patent shall contain a short title or description of the invention or discovery, * * * and a grant to the patentee, his heirs or assigns, for the term of 17 years, of the exclusive right to make, use, and vend the invention," etc. There is an apparent conflict between the requirements of this sec-

tion and those of section 4887, but upon resorting to the original sources of the provisions it will be seen that this conflict is apparent only. Where the meaning of the Revised Statutes is plain the court cannot recur to the original statutes to see if errors were committed in revising them, but it may do so when necessary to construe doubtful language used in the Revision. *U. S. v. Bowen*, 100 U. S. 508. Sections 4883, 4884, 4885, and 4887 are reproduced from sections 21, 22, 23, and 25 of the act of July 8, 1870, revising and amending the statutes relating to patents. The first three sections relate to the regulations which are to be observed by the executive department respecting the form and contents of the instrument which they are to issue to the patentee. Section 25 relates to the rights which may be acquired by an inventor or discoverer who has previously patented his invention in a foreign country. It did not enact that his patent should "be limited so as to expire" at the same time with his foreign patent, but declared that his patent should "expire at the same time" with the foreign patent. Obviously congress was considering the effect and extent of the grant to such a patentee, the estate with which he would be invested when his patent had been issued, and not the formal requisites or terms of the instrument evidencing the grant. This is very clear by reference to the other provisions of that section, all of which relate to conditions which may defeat his patent.

The change of phraseology in section 4887 by which the words "shall be so limited as to expire" are substituted in place of the words in section 25, "shall expire at the same time," should not be interpreted as intended to control the provisions of section 4884. The word "limited," as used in reference to the term of duration of a patent where the invention has been first patented in a foreign country, originated in section 6 of the patent act of 1839, where it was declared that "every such patent shall be limited to the term of 14 years from the date or publication of such foreign letters patent." In the case of *Smith v. Ely*, 5 McLean, 76, it was held that the patent to Morse for the electric telegraph was void under this section because having first been patented in France, the letters patent here did not upon its face limit the term of the grant to 14 years from the date or publication of the foreign patent. The court held that the patent was issued not only without authority of law, but in violation of it. This conclusion was overruled by the supreme court in *O'Reilly v. Morse*, 15 How. 62, where the point was distinctly made that the patent was void because it ran 14 years from the date of its issue instead of that length of time from the date of the French patent; but the court held that the only effect of the French patent was to limit the monopoly to 14 years from the date of that patent. From that time to the present the general practice of the patent-office it is understood has been to issue patents where a foreign patent has been obtained by the patentee, reciting a grant for the full term authorized by law in the case of ordinary patents without any limita-

tion upon the face of the instruments. If it had been intended in the revision of the statutes to introduce a new rule or change the construction which had been placed by the supreme court and the executive department upon the former provisions of law, plain and unequivocal language would have been employed which would have demonstrated that intention beyond a doubt.

In several cases in this circuit and other circuits similar patents have been under consideration, and been treated as valid for the term of the foreign patent, although upon their face they specified a longer term. *Weston v. White*, 13 Blatchf. 364; *Henry v. Providence Tool Co.* 3 Ban. & A. 501; *Reissner v. Sharp*, 16 Blatchf. 383; *De Flores v. Reynolds*, 17 Blatchf. 436; S. C. 8 FED. REP. 434; *Holmes Electric Co. v. Metropolitan Co.* 21 FED. REP. 458. The point now taken was not considered in these cases, but it could not have escaped the attention of the judges. No court would direct a decree or order a preliminary injunction upon a patent void upon its face, and the circumstance that the point was not adverted to implies that it was not thought to have any merit.

Judgment is ordered for plaintiff for \$133, with interest.

KAPPES and others v. HARTUNG.

(Circuit Court, S. D. New York. February, 1885.)

PATENTS FOR INVENTIONS—MOSAIC FLOORS—KAPPES' PATENT—INVENTION.

Patent No. 87,853, granted to J. George Kappes, March 16, 1869, for an improved mosaic floor, held void for want of invention.

In Equity.

Briesen & Steele and *Antonio Knauth*, for complainants.

Ludwig Semler, *Edward C. Schaffer*, and *Frost & Coe*, for defendant.

COXE, J. This suit is brought by the complainants, as representatives of J. George Kappes, deceased, for infringement of letters patent, No. 87,853, granted to him March 16, 1869, for an improved mosaic floor. The patentee says:

"This invention relates to a new manner of arranging the lower soft-wood layer of that kind of mosaic floors in which the ornaments are produced from very thin pieces of hard wood; and the invention consists in constructing the said soft-wood layer of narrow pieces, or bars, which are grouped together in such manner that the separate plates, composed of such groups, will not be able to shrink, so as not to displace the hard-wood covering which is glued upon them."

A number of narrow, parallel strips of soft wood, *b, b*, are connected by tongues and grooves. To the ends of these are fastened, in like manner, transverse strips, *c, c*, of equal thickness, the grain

of the end and parallel strips running at right angles. Upon the top of the plates thus constructed the mosaic flooring, *a*, is laid. The claim is as follows: "The combination of the parallel bars, *b, b*, cross-bars, *c, c*, and the upper layer, *a*, connected together in the manner described, the whole forming squares for mosaic floors, as herein set forth and shown." The defenses are, prior use and lack of invention. It therefore becomes necessary to ascertain what was known, prior to the patent, with reference to flooring of this character and other kindred subjects.

The complainants' expert testifies that "the tongued and grooved arrangement between the center strip is so old and well known a device in carpentry as to be in no sense an element of the invention in question." The patentee admits, in the description, that sectional marquetry flooring, laid upon single pieces of soft wood, was old. The defendant proved, by uncontradicted testimony, that the precise construction of the lower layer, as shown in the specification, was very old, and had before been used in pastry-boards, drawing-boards, doors, wainscoting, portable sectional floors, table tops, mirror backs, wash-tub lids, door-jam heads, desk tops, drawer fronts, fire-place inclosures, church-pew backs, counter fronts, and, in many instances, as a foundation for hard-wood veneer. The defendant also proved that in 1864 the firm of Ziegler & Co. imported, from Vienna, designs of marquetry flooring similar in every respect to the construction shown in the patent; that they remained, as samples, in the possession of the firm till 1879, when they were sold with the rest of the stock at public auction. During this time they were openly and frequently exhibited to customers. It is by no means certain that the defendant has not succeeded in proving a complete anticipation by the evidence relating to the Vienna designs. *Parker v. Ferguson*, 1 Blatchf. C. C. 407. But let it be assumed that the record shows nothing more than this; that both the mosaic flooring and the soft-wood foundation were well known; that the former had previously been laid, in sections, on single pieces of soft wood, and that the latter had been used as a foundation for hard-wood veneer. In the light of all this knowledge is the person who simply laid hard-wood marquetry on soft-wood strips, tongued and grooved together, entitled to the rewards of an inventor? Doubtless a floor constructed on the principle of the lower layer described in the patent, would preserve a carpet or an oil-cloth longer than an ordinary one, but is he who first lays down an oil-cloth on such a floor entitled to a monopoly—to a patent for a combination of the oil-cloth with the flooring? The men who placed the old swiveling car-truck under the forward end of a locomotive, who substituted the figured roller for the plain one, who attached the mirror to the front hood of a street car, displayed, respectively, as much ingenuity as he who placed the old soft-wood foundation under the old mosaic flooring. *Pennsylvania R. Co. v. Locomotive Truck Co.* 110 U. S. 490; S. C. 4 Sup. Ct. Rep. 220; *Stimpson v. Woodman*, 10

Wall. 117; *Stephenson v. Brooklyn Cross-town R. Co.* 14 FED. REP. 457.

Giving to the evidence the most favorable interpretation for the complainants, it shows that Kappes exercised mechanical skill merely. The problem was to produce a suitable foundation for an inlaid floor. Experience had demonstrated that strips of soft wood, tongued and grooved, and provided with end-pieces, would, for many purposes, resist the tendency to shrink and swell. This Kappes knew. He constructed a square in the well-known manner, and said, "Lay the flooring on that." This was not invention. It was what any skilled cabinet-maker would say. To adopt the language of the supreme court in the recent case of *Hollister v. Manufacturing Co.* 5 Sup. Ct. Rep. 717, the idea seems "not to spring from that intuitive faculty of the mind put forth in the search for new results or new methods, creating what had not before existed, or bringing to light what lay hidden from vision, but, on the other hand, to be the suggestion of that common experience which arose spontaneously and by a necessity of human reasoning in the minds of those who had become acquainted with the circumstances with which they had to deal. * * * It is but the display of the expected skill of the calling, and involves only the exercise of the ordinary faculties of reasoning upon the material supplied, by a special knowledge, and the facility of manipulation, which results from its habitual and intelligent practice; and is in no sense the creative work of that inventive faculty which it is the purpose of the constitution and the patent laws to encourage and reward."

There should be a decree for defendant.

DAY V. FAIR HAVEN & W. R. CO.

(Circuit Court, D. Connecticut. March 16, 1885.)

PATENTS FOR INVENTIONS—DAY SNOW-PLOW—INVENTION.

The fourth claim of reissued patent No. 8,388, granted to Augustus Day, August 27, 1878, for a horse railway track-clearer, or snow-plow, held void for want of invention; following *Hollister v. Manufacturing Co.* 5 Sup. Ct. Rep. 717.

In Equity.

Sprague & Hunt, for plaintiff.

Wm. Edgar Simonds, for defendant.

SHIPMAN, J. This is a bill in equity to prevent the infringement of the fourth claim of reissued letters patent No. 8,388, granted to Augustus Day, August 27, 1878, for a horse railway track-clearer or snow-plow. The original patent was granted April 9, 1872. The invention is said, in the original specification, to consist "in the combination of a pair of independently acting scrapers, pivotally secured

to the floor of a car, and resting upon the track, when in operation, wholly by their own weight, with means for raising and lowering such scrapers simultaneously; in the combination, with an independently acting scraper, resting, when in operation, wholly by its own weight upon the track, of a draw-bar, in the direct line of draught, and a supplemental and diagonal draw-bar, which at the same time acts as a brace, the forward ends of both of said bars being secured on the same axial line; in the peculiar construction and arrangement of a cast-shank with relation to the scraper, which is secured thereto, and the draught-irons which connect it to the under side of the car; in the pendent guards, which lift the scraper from the track on meeting with an obstruction on the outside of the rail, and deflect outwardly from the track; and in a peculiar crank for operating the shaft, which raises and lowers the pair of scrapers at each end of the car."

The fourth of the nine claims of the reissued patent is for "the combination, with the draw-bar, C, and scraper, A, of the diagonal brace, E, as and for the purpose set forth."

The whole apparatus is apparently a skillfully contrived and an efficient track-clearer, but as the fourth claim is a very broad and simple one, it is only necessary to speak of so much of the mechanism as is included in that claim. That part of the apparatus consists of a draw-bar pivoted to the bottom of the car, and a scraper diagonally set across the rail in a manner not unusual. As the scraper, when in operation, rests upon the track, it is, of course, subjected to lateral pressure in moving obstructions from the rail. To resist this pressure, and to prevent the scraper from being crowded inward, a diagonal brace is secured to the rear end of the draw-bar, and is pivoted to the bottom of the car near its longitudinal center; the draw-bar and brace being pivoted in the same axial line, "so that when it is desired to raise and lower the scrapers, the same will be done without disturbing the vertical position thereof with relation to the track."

The track-clearers of the defendant have a scraper, and a draw-bar in the line of the draught, and a diagonal brace, the two bars being pivoted to the car in the same axial line; but the methods by which they are fastened to the scraper or to the car are not the methods of the patent. The defendant's scraper is pressed upon the track by elastic steel arms.

The fourth claim is for a scraper and a draw-bar in the line of the draught, irrespective of the method of pivoting scraper and draw-bar together, or the method of raising and lowering either, and a diagonal brace irrespective of the method by which it is fastened to the draw-bar or to the car, except that the bar and the brace must be pivoted on the same axial line. The scraper and the draw-bar were both old. The only part of the combination which is claimed to be new is the diagonal brace to enable the scraper to be kept in its place on the track. The method by which these two bars are secured to the

scraper, or to each other and to the car, and the method by which the scraper, draw-bar, and brace can be easily and effectively raised and lowered from the platform of the car, undoubtedly required inventive skill; but the mere employment of a diagonal brace pivoted to the car in the same axial line with the draw-bar, to resist lateral pressure upon the scraper, if such resistance was deemed important, seems to me the obvious and natural suggestion which would occur to any mechanic. The use of a diagonal stay to resist a strain upon a sled or sleigh runner, and, in general, the use of a "corner brace," to resist tendency to lateral displacement, are within the range of the most ordinary mechanical knowledge and of common experience, and this is about all that the patentee included in this claim. Being simply for the addition of a diagonal brace to the draw-bar for the purpose of resisting lateral pressure upon the scraper, the only mechanical requirement being that the bar and the brace should be pivoted upon the same axial line, and not including the patented mechanism by which either of the three members of the combination is secured to the other, or is made effective, the claim is so general that it does not define the actual invention of the patentee. That is stated in the other claims. The suggestion of the patentee in the reissued but not in the original patent, that the diagonal brace serves also as a supplementary draw-bar, was not important, and does not seem to have been so considered by his expert witnesses.

I cannot perceive that the mechanism which is included in the fourth claim was an "invention," in view of the definitions of that word in recent decision of the supreme court. *Hollister v. Manufacturing Co.* 5 Sup. Ct. Rep. 717.

The bill is dismissed.

NEW YORK BUNG & BUSHING CO. v. DOELGER.

(Circuit Court, S. D. New York. March 7, 1885.)

PATENTS FOR INVENTIONS—BUNGS AND BUSHINGS—REISSUE No. 10,368—PATENT No. 107,473.

Reissue patent No. 10,368, granted to the New York Bung & Bushing Company August 25, 1883, for an improvement in bungs and bushings, compared with patent No. 107,473, granted to Vincent Fountain, Jr., September 20, 1870, for an improvement in bungs, and held void for want of invention, and not infringed by defendant.

In Equity.

Louis W. Frost and *Wyllys Hodges*, for complainant.

Henry Brodhead and *Philip R. Voorhees*, for defendant.

Coxe, J. This is an equity action for infringement, founded upon reissued letters patent No. 10,368, granted to the complainant August

25, 1883, for an improvement in bungs and bushings. The original patent, No. 141,473, was granted to Samuel R. Thompson, August 5, 1873, for an improvement in bushings for faucet holes. It was first reissued, No. 8,483, to McKean, Jackson, and Brown, November 12, 1878. This reissue having been pronounced invalid, as containing an unlawfully expanded claim, the patent was again reissued in form substantially like the original, except that the inventor limits the construction of the bushing to wood. The second reissue is the one in controversy. The inventor declares:

"The present invention relates to certain new and useful improvements in bushings for faucet-holes of barrels, etc., having for their principal object the production of a simple, economical, and effective bushing that will admit of the easy adjustment and withdrawal of the faucet without injury to the barrel, and that may be readily and cheaply replaced when worn. My improvements consist, mainly, of a bushing of wood, etc., constructed and arranged, as will be hereinafter more fully described, so as to receive and allow of the yielding either way of a faucet, which, when slightly struck, is readily withdrawn from the bushing without detriment to the barrel. * * * In my original specification I mentioned the use of other material than wood for the bushing, *a*. This I desire now to disclaim, and confine my invention to wood alone, in combination with the protecting casing, *b*, or to the casing, *a*, of wood alone, when made with the interior bevels."

The first claim of the reissue, the second of the original, is the only one in controversy, and is in these words: "The combination of a wooden bushing, *a*, and casing, *b*, constructed and arranged as described, and for the purposes specified." In the original the word "wooden" is omitted. The defenses are want of novelty and invention, non-infringement, and invalidity of the reissue as a reissue. As bearing upon the first of these defenses, the defendant offered in evidence letters patent No. 107,473, granted to Vincent Fountain, Jr., September 20, 1870, for an improvement in bungs. The description contains these words:

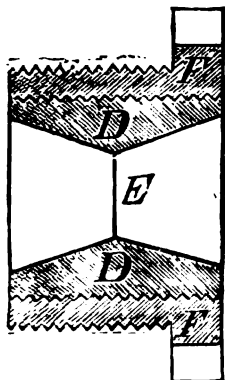
"The nature of my invention consists in the construction of a bung which has an opening through its center applicable for receiving not only a faucet for drawing off the contents of a barrel, but also for a stopper, which is inserted from the inside, as will be hereafter more fully described. * * * F is a bush, of the ordinary construction. D is a bung which has an opening extending through its centre, beveled from each side towards the line, E."

The claim is as follows:

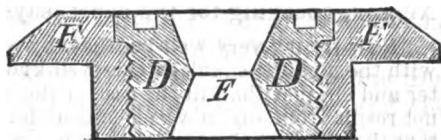
"A bung, having an opening through its center, one side of which is applicable for receiving a cork or stopper, G, and the other for receiving a faucet, in the manner and for the purposes set forth."

Here is a perfect description, in general terms at least, of the complainant's device, and if the word "wooden" were inserted before the word "bung," it can hardly be doubted that it would amount to a complete anticipation. A skilled mechanic reading such description would make precisely what Thompson made. The similarity will appear most clearly by placing the two drawings in juxtaposition.

THOMPSON'S
BUNG AND BUSHING.
AUG. 5, 1873.



FOUNTAIN'S
BUNG AND BUSHING.
SEPT. 20, 1870.



The same letters have been used to indicate corresponding parts on each of these drawings. D represents the double beveled bung, and F the bushing. In Fountain's specification the material of neither is designated. That this patent is an anticipation cannot be successfully maintained. But it seems equally clear that, in connection with the other proof, it defeats complainant's patent for want of invention. Thus, it must be conceded that after Fountain nothing remained upon which mechanical ingenuity could operate, except the choice of materials. If choosing wood for the bung was invention, choosing copper or brass for the bushing would be equally so. There is nothing in Fountain's patent which necessarily precludes the idea of wood being used. For aught that appears from the patent itself, wood was the very material he had in mind. If lead, or cork, or rubber had been named there would have been greater scope for the ingenuity of others. The question, then, is this: Did Thompson become an inventor because he made Fountain's bung of wood? If there were any doubt as to how this question should be answered, an examination of the proofs bearing upon the state of the art makes a negative answer alone possible. At the date of Thompson's application wooden bungs, wooden bungs with double conical holes through them, bungs inclosed in bushings, having beveled openings through the center to receive the faucet, iron bushings, and wooden plugs in iron bushings were all old. It was also well known that the elasticity of wood presented a suitable yielding bearing to hold a faucet. With the theater of invention thus crowded to its utmost capacity, with scarcely room for another actor on the stage, can it be said that he who merely suggests the change, in an old device, of one known material for another which had been previously used for kindred purposes, possesses what the supreme court defines as "that intuitive faculty of the mind put forth in the search for new results or new

methods, creating what had not before existed, or bringing to light what lay hidden from vision?" *Hollister v. Manufacturing Co.* 5 Sup. Ct. Rep. 717.

The mere substitution of one known material for another has been decided over and over again to be insufficient to sustain a patent. In *Hotchkiss v. Greenwood*, 11 How. 248, porcelain was substituted for wood or metal in the manufacture of door-knobs. Mr. Justice NELSON, speaking for the court, says:

"Now it may very well be, that, by connecting the clay or porcelain knob with the metallic shank in this well-known mode, an article is produced better and cheaper than in the case of the metallic or wood knob; but this does not result from any new mechanical device or contrivance, but from the fact that the material of which the knob is composed happens to be better adapted to the purpose for which it is made. The improvement consists in the superiority of the material, and which is not new, over that previously employed in making the knob. But this, of itself, can never be the subject of a patent. No one will pretend that a machine made, in whole or in part, of materials better adapted to the purpose for which it is used than the materials of which the old one is constructed, and for that reason better and cheaper, can be distinguished from the old one, or, in the sense of the patent law, can entitle the manufacturer to a patent. The difference is formal, and destitute of ingenuity or invention. It may afford evidence of judgment and skill in the selection and adaptation of the materials in the manufacture of the instrument for the purposes intended, but nothing more."

In *Hicks v. Kelsey*, 18 Wall. 670, the change from wood to iron in a wagon-reach; in *Palmenburg v. Buchholz*, 21 Blatchf. C. C. 162; S. C. 13 FED. REP. 672, the substitution of *papier-mache* for the wire of the frame of a lay figure; and, in a case referred to in *Hotchkiss v. Greenwood*, *supra*, "the substitution of wood for bone as the basis of a button covered with tin," were held, respectively, to be wanting in patentable novelty. See, also, *Collins Co. v. Coes*, 21 FED. REP. 38; *Brown v. Piper*, 91 U. S. 37; *Roberts v. Ryer*, Id. 150; *Smith v. Nichols*, 21 Wall. 112; *Pickering v. McCullough*, 104 U. S. 310; *Welling v. Crane*, 14 FED. REP. 571; Walk. Pat. § 28; Sim. Pat. 31. The case of *Smith v. Goodyear Dental Vulcanite Co.* 93 U. S. 486, has been examined, and it is thought that it enunciates no principle in conflict with the position here taken. It must, therefore, be decided, in the language of *Palmenburg v. Buchholz*, *supra*, that, "although the device may have been mechanically new, it was not intellectually novel."

But upon the question of infringement the difficulties which confront the complainant are almost equally as numerous and insurmountable. In the case of *This Complainant v. Hoffman*, 20 Blatchf. C. C. 3, S. C. 9 FED. REP. 199, this court decided, in substance, that the first reissue was void, because it sought to do precisely what complainant now seeks to do, viz., to cover broadly a hollow wooden bung inside an iron or rigid bushing. The court was unquestionably right in holding that this reissue, if valid, was infringed. To hold, however, that the defendant's device infringes the original or second re-

issue, is quite a different proposition. What the defendant uses is covered by the broad claim of the first reissue; but the court, in the *Hoffman Case*, decided that the patentee was not permitted to claim "any form of a wooden bushing in an iron one," but that he must be confined to the particular form and combination described in the original patent. It was further decided that the form of the wooden bushing, or bung, with the double conical opening through the center, was "the very essence of that part of the invention," and could not be disregarded. How, then, does the defendant infringe? His bung is not bored through; it has no bevels; it is not screwed into the iron bushing; the iron bushing has no interior screw threads, and the bung has no exterior screw threads. If the complainant had a valid claim broadly covering a hollow wooden bung inside an iron bushing, the defendant would be compelled to pay tribute; but, confining the claim within the narrow limits indicated, it must be held that he does not infringe.

The bill is dismissed.

NEW YORK BUNG & BUSHING Co. v. FOEHRENBACH.

(Circuit Court, S. D. New York. March 7, 1885.)

COXE, J. The decision in *New York Bung & Bushing Co. v. Doelger*, ante, 191, disposes of this action also. The bill is dismissed.

ELECTRIC GAS-LIGHTING Co. v. SMITH & RHODES ELECTRIC Co.

(Circuit Court, S. D. New York. March 16, 1885.)

PATENTS FOR INVENTIONS—REISSUE—VALIDITY.

Electric Gas-lighting Co. v. Tillotson, 21 FED. REP. 568, followed, and the fifth claim of reissued patent No. 9,743, for electrical apparatus for lighting street lamps, held void.

In Equity.

Edwin H. Brown, for orator.

Samuel B. Clarke, for defendant.

WHEELER, J. The only question presented in this case now, was decided in *Electric Gas-lighting Co. v. Tillotson*, 21 FED. REP. 568, on the same patent. It is whether the fifth claim of the reissue is supported by the original, and has been reargued and reconsidered. The patent is for an electric gas-lighting apparatus. The foundation for this fifth claim is sought for in the original first claim. That

was for a circuit breaker located at the burner and operated automatically, substantially as described; this is for the combination of a wire through which a current of electricity is passed actuating mechanism for letting on the gas, an electro-magnet connected with the wire, an armature operated by the magnet, mechanism actuated by the armature breaking the circuit at the burner and producing sparks for lighting the gas, the whole operating automatically. The specification is the same in both the original and reissue. The inventor might have claimed upon it everything which he has claimed; but that is not sufficient. *Manufacturing Co. v. Ladd*, 102 U. S. 408. The reissue is between eight and nine years later than the original, and could not lawfully cover what was not either claimed in some manner in the original or included within what was so claimed. *Mahn v. Harwood*, 112 U. S. 360; S. C. 5 Sup. Ct. Rep. 174. This claim of the reissue is for machinery breaking an electric circuit at the burner and producing sparks there to light the gas. It may or may not include machinery for turning on the gas. The claim in the original was not for any machinery but the circuit breaker. It was for the circuit breaker operated, but that did not include the machinery to operate it. If it included the operation, that is a different thing from the means by which the operation is performed. *James v. Campbell*, 104 U. S. 356; *Powder Co. v. Powder Works*, 98 U. S. 126. So, whether this claim in the reissue includes the machinery for turning on the gas or not, it is for a part of the invention not claimed in the original. *Turner & S. Manuf'g Co. v. Dover Stamping Co.* 111 U. S. 319; S. C. 4 Sup. Ct. Rep. 401. And, as the claim in the original was not for any combination of parts, the combination of this claim of the reissue cannot be said to be the same combination further restricted by additional elements, and is not included in what was claimed in the original. The patent for the circuit breaker as located and operating, and machinery for turning on the gas, without the machinery for operating the circuit breaker, appears to have been satisfactory at the time when the patent was taken out, and for so long a time afterwards, that it could not be made to cover the machinery for operating the circuit breaker. The conclusion reached is the same as before.

Let there be a decree dismissing the bill of complaint.

SCOTT v. SEVENTY-FIVE TONS OF PIG-IRON.

(District Court, D. Connecticut. March 9, 1885.)

1. SALVAGE—REPLEVIN OF SALVED PROPERTY BY OWNERS—LIBEL TO ENFORCE LIEN—JURISDICTION.

When a cargo of iron, on board a vessel that has been pumped out and brought into her port of destination by salvors, has been replevied by the owners in a state court, for the express purpose of melting it up and putting it beyond the reach of any court, and the control of the state court over it was a fiction, the district court of the United States will have jurisdiction of a libel to enforce the lien of the salvors, and the iron may be seized by the marshal under monition issued by the court.

2. SAME—AMOUNT OF AWARD.

The services rendered in this case considered, and the sum of \$350 allowed to libelants as compensation, with costs.

In Admiralty.

Samuel Park, for libelant.

Arthur B. Calef and *Samuel L. Warner*, for claimants.

SHIPMAN, J. This is a libel *in rem* for salvage. On October 21, 1884, the schooner *Emily*, a vessel about 32 years old and then worth, with her appurtenances, about \$400, left Perth Amboy with a load of 120 tons of pig-iron, of which 75 tons were consigned to the claimants, the Stiles & Parker Press Company, of Middletown, in this district. Herbert S. Goodale was the captain of the schooner and owned three-fourths of her. One other man constituted the crew. There was no insurance upon her. She went through Hell Gate on October 23d, and on October 25th went down the sound with a north-west wind and strong breeze. Near Shippan Point the foremast, which was an old article, cracked or broke. The mainsail was torn and carried away by the wind. The vessel commenced to leak badly, and the captain ran her into Norwalk harbor, about three-fourths of a mile from the sound, and beached her in a safe and land-locked place, and upon a soft bottom. She filled with water. At high tide she was seven feet under water. At low tide the deck was out of water.

The captain could not find assistance to get his boat or cargo off, and on Sunday, October 26th, telegraphed to the libelant that the schooner was sunk off Norwalk harbor and asked for assistance. The libelant is well known throughout the sound to be engaged in the business of saving wrecked vessels and cargoes, and owns at least two vessels equipped with all the appliances needful for said business, constantly manned and in readiness. The master and crew were not guilty of fraud and had no motive to commit fraud, either in beaching the vessel or in sending for the libelant, and there was no collusion between him and the captain or the crew. The libelant sent on the morning of October 27th, the schooner *Report* and steam-tug *Alert*, Capt. Chesebro in command, with six men on board of each vessel, to the assistance of the *Emily*. The boats reached the wreck

on the evening of the same day, and found her under water, her foremast broken and mainsail and jib torn. Capt. Chesebro made a contract that evening with Capt. Goodale, by which the libelant was to receive 50 per cent. of the value of the saved property delivered at its destination. On the next day, at low water, the schooner was pumped out in three or four hours' time, and was pumped out twice during the night of that day. The 30th and 31st were stormy and the schooner was kept pumped out. On the 31st the only apparent leak in the vessel, about a foot long in the "tuck seam," was found and was temporarily stopped. On November 2d, the libelant's boats, with the Emily, left Norwalk harbor and stopped about 20 hours in the sound, five or six miles from Norwalk, to take some iron out of another sunken vessel, the Marietta. The contract for this service was made by the libelant in New York after the 26th. While this service was being performed, the Emily lay about 400 yards from the Marietta. The Emily was then towed to Bridgeport and 25 tons of iron were delivered to the owners, and then was towed to Middletown. The libelant demanded salvage upon the 75 tons from the claimants, who refused to pay, and brought a writ of replevin for said iron before the superior court for Middlesex county, upon which writ the iron was seized by the sheriff and delivered to the claimants, was put in their store-house, and was immediately put by them into the furnace, in their ordinary business, at the rate of one or two tons per day. The replevin suit was brought to enable the claimants to obtain and to use up the iron promptly. They did not intend that it should be kept in the possession of anybody. The statutory bond was given for the return of the property to the defendants if the plaintiffs failed to establish their right to the possession of the same. The libelant and Capt. Goodale were made defendants.

The libelant subsequently libeled the iron which was not melted, and which was in the claimants' exclusive possession, and possession thereof was taken by the marshal. After the trial of this case, the claimants gave to the marshal a delivery bond, conditioned to be void if they performed the decree of the court in the matter of the libel, and the iron was delivered to them. The value of the iron was \$1,515. The libelant's two vessels and appurtenances, which went to Norwalk, are worth \$16,000.

The first question relates to the jurisdiction of this court, and arises upon the principle which has been often asserted in the decisions of the supreme court, and which is stated in *Buck v. Colbath*, 3 Wall. 334, as follows:

"That principle is that whenever property has been seized by an officer of the court, by virtue of its process, the property is to be considered as in the custody of the court and under its control for the time being; and that no other court has a right to interfere with that possession, unless it be some court which may have a direct supervisory control over the court whose process has first taken possession, or of some superior jurisdiction in the premises. * * * This principle, however, has its limitations, or rather its just

definition is to be attended to. It is only while the property is in the possession of the court, either actually or constructively, that the court is bound or professes to protect that possession from the process of other courts. Whenever the litigation is ended, or the possession of the officer or court is discharged, other courts are at liberty to deal with it according to the rights of the parties before them, whether those rights require them to take possession of the property or not."

If the property was either actually or constructively in the custody of the state court at the time of the service of the monition, no valid seizure of it could be made by the marshal, and this court would have no jurisdiction of this libel. The mere fact that it was in the possession of the claimants would not prevent its being in the custody of the law, and if it was in their hands awaiting the decision of the state court, and in readiness, upon its judgment of return, to be delivered to the defendants in the replevin suit, it would have been incumbent upon the libelant to wait until such an order had been made and the litigation was at an end. But it is idle to say that the iron was in the custody of the law, when the purpose and the effect of the replevin suit were to remove it from the custody of any court, and to prevent it from being subject to any order, and when the object of putting legal machinery in motion was to enable the plaintiffs to effectually preclude its return to the defendants. It is a misuse of terms to say that the iron was in the possession or control of the state court, and it would be an abuse of the authority of that court if such a fiction as its pretended custody of this property should be made to prevent the exercise over it of the ordinary jurisdiction of another court.

The claimants next insist that this court has no jurisdiction because the state court can determine, in the replevin suit, the questions of the existence and the extent of the libelant's lien, and they rely upon the following language of the supreme court in *Freeman v. Howe*, 24 How. 450:

"Where a court has jurisdiction it has a right to settle every question which occurs in the case, * * * and that where the jurisdiction of a court and the right of a plaintiff to prosecute his suit in it have once attached, that right cannot be arrested or taken away by proceedings in another court."

Without stopping to inquire whether the state court could properly determine the amount of the libelant's lien upon the iron, this language is clearly explained in *Buck v. Colbath*, where the court says:

"It is not true that a court, having obtained jurisdiction of a subject-matter of a suit, and of parties before it, thereby excludes all other courts from the right to adjudicate upon other matters having a very close connection with those before the first court, and, in some instances, requiring the decision of the same questions exactly. In examining into the exclusive character of the jurisdiction of such cases, we must have regard to the nature of the remedies, the character of the relief sought, and the identity of the parties in the different suits."

If the iron was in such a condition that it could rightfully be made the subject of a libel *in rem*, the libelant was not excluded from obtaining the judgment of an admiralty court upon the question of a

maritime lien, by reason of the fact that a state court, perhaps, might in another proceeding ascertain the amount which was due him, because the relief which he seeks in admiralty is very different from the relief which he could obtain in a state court.

The existence and the amount of the lien are next to be ascertained. That the *Emily* and her cargo were in distress and needed help are certain, and it is unavailing to say that she ought not to have been in distress. I think that the trouble happened because the schooner was very old, and, with a heavy cargo, was unable to withstand much of a strain, and, moreover, she was insufficiently manned. The libellant, whose business it is to save vessels in distress, was telegraphed to go to her aid, without any previous knowledge that his services were or would be wanted, and in response he sent his vessels amply equipped. They found the vessel in a safe land-locked place, on the mud, in the bottom of Norwalk harbor, but she could not be got away without skilled and energetic and expensive assistance.

The contract which the captain of the *Emily* entered into was an improvident one, so far as the cargo is concerned, in view of the ease with which the libellant could furnish assistance and the lack of immediate peril to the cargo. The rate is too large, under the circumstances of the case, to receive the sanction of the court.

The facts which bear upon the amount of compensation are that the assistance of a skilled man, whose property consists of vessels equipped and manned for saving cargoes, and whose business it is to render dangerous, laborious, and expensive services, was sought; that he sent a sailing vessel, a steam-tug, and 12 men, to aid the schooner and cargo; that the situation of the submerged vessel, though it needed assistance, was not immediately perilous; that the work of raising the vessel by the aid of the libellant's steam-pumps was easy; and that there was no danger to his crews or his property. It is not a case which calls for very large compensation, but the libellant should receive a liberal amount when he is honestly engaged in this uncertain and expensive business.

The sum of \$350 is allowed, with costs.

THE KINGSTON.

(*District Court, D. New Jersey. March 4, 1885.*)

1. MARITIME LIENS—MATERIAL AND LABOR USED IN CONSTRUCTION OF VESSEL—CONTRACT.

When materials are furnished and the labor is performed under a contract with the owner of a vessel, no general maritime lien can be claimed.

2. SAME—LIENS GIVEN BY STATE LAW—HOW ENFORCED IN UNITED STATES DISTRICT COURT.

When it is attempted in the district court to give effect to liens created by state laws, they are enforced subject to all the qualifications and limitations imposed by those laws.

3. SAME—JURISDICTION OF DISTRICT COURTS—ADMIRALTY RULE No. 12.

The district courts of the United States have no jurisdiction to enforce liens arising under state laws, except when they are founded upon a contract maritime in its character.

Libel in rem.

The libel is filed in this case against the ferry-boat Kingston, to recover for materials furnished and work done upon the said steamer while she was in the course of construction at Newburgh, in the state of New York, and after she was launched and removed to Weehawken, in the state of New Jersey. The libel alleges that in the year 1883 the said ferry-boat, being then at Newburgh, in the state of New York, and being in need of certain appliances and machinery for electric lighting, the libelant, at the request of the owners or authorized agents of said ferry-boat, did agree to furnish the boat with such machinery and appliances, for the sum of \$2,625, to be paid upon trial and acceptance of the same. Certain of the materials and some of the labor necessary therefor were furnished by the libelant at Newburgh, and then the said ferry-boat, having proceeded to Weehawken, in the state of New Jersey, the libelant did continue to furnish necessary materials and labor for such electric lighting, and did, in the month of November, 1883, complete the said machinery and appliances, which were thereafter, and in the month of December, 1883, accepted by the West Shore & Ontario Terminal Company, the owner of the said ferry-boat. The said West Shore & Ontario Terminal Company then was and still is a corporation organized and existing under the laws of the state of New Jersey. The libel further alleges that no part of the contract price for materials and labor has been paid, and claims that the libelant has a lien upon the said ferry-boat for the sum due under the general maritime law and the statutes of the states of New York and New Jersey.

The West Shore & Ontario Terminal Company have filed a claim as owner of the boat, and answered, setting up that on or about March 7, 1883, while the boat was in the course of construction at Newburgh, in the state of New York, by Ward, Stanton & Co., for the New York, Ontario & Western Railway Company, under contract, and before said ferry-boat was completed, or was even registered or enrolled, licensed or surveyed, the said libelant entered into a contract with the said New York, Ontario & Western Railway Company, at New York City, whereby said libelant contracted and agreed with said railway company to furnish said ferry-boat with certain electric lighting apparatus and appurtenances for the sum of \$2,625; that afterwards the said railway company sold said boat, at a fair and *bona fide* sale, to the West Shore & Ontario Terminal Company, and the said terminal company did, by a certain agreement, dated July 15, 1883, between the said terminal company, of the first part, the New York, West Shore & Buffalo Railway Company, of the second part, and the New York, Ontario & Western Railway Company, of the third part,

lease said boat and other property to the said two railway companies, jointly, for the period of 99 years from the first day of August, 1883; for which reasons they allege that the libellant has no claim or lien on said boat, but its remedy, if any, is against the New York, Ontario & Western Railway Company; that the services performed and materials furnished were not performed or furnished upon the credit of the boat, but under said contract, and upon the credit of the New York, Ontario & Western Railway Company; and that the libellant is not entitled to the lien claimed by it under the statutes of New Jersey, because the contract was not made within the state of New Jersey, and because the greater part of said materials and services were furnished and performed, not in the state of New Jersey, but in the state of New York, and because more than nine months have elapsed since said debt was contracted. The receivers of the New York, West Shore & Buffalo Railway Company have also answered as lessees of the said ferry-boat, and have set up substantially the same defense.

Butler, Stillman & Hubbard, for libellants.

Vredenburg & Garretson, for respondents.

NIXON, J. 1. Does a lien exist under the general maritime law? The libel admits, the answers claim, and the testimony shows that the materials were furnished and the labor performed under a formal written contract, executed in New York, between the libellant and the owner of the boat then in the course of construction, and not yet finished, or documented in any custom-house. I will not stop here to inquire whether any maritime lien can be implied for materials and labor furnished to a vessel thus circumstanced, with neither enrollment nor license, and not yet ready for employment in commerce or navigation. Waiving that, for the present, it seems to be settled in the American admiralty that, where the materials are furnished and the labor is performed under a contract with the owner of the vessel, no general maritime lien can be claimed. The question was discussed and settled by the supreme court in *The St. Jago de Cuba*, 9 Wheat. 416, and I am not aware that their decision has been qualified or overruled, in any subsequent case. The court there said:

"The necessities of commerce require that, when remote from his owner, he (the master) should be able to subject his owner's property to that liability, (a lien,) without which it is reasonable to suppose he will not be able to pursue his owner's interests. But when the owner is present the reason ceases, and the contract is inferred to be with the owner himself, on his ordinary responsibility, without a view to the vessel as the fund from which compensation is to be derived."

The same question was before Judge HOPKINSON, of the Eastern district of Pennsylvania, in *Sarchet v. The Davis*, Crabbe, 196, and was examined with his usual discrimination and care, and he reached the same result.

But it is insisted that if no general maritime lien exists, a lien has been created by the state laws of New York and New Jersey which

the courts of the United States should enforce. In the first place, it is questionable whether any lien has in fact arisen under the provisions of the laws of either of these states. When it is attempted here to give effect to liens created by state laws, they are enforced subject to all the qualifications and limitations imposed by those laws. It is provided in the New York statute that the debt contracted for materials or labor on any ship or vessel "shall cease to be a lien whenever the ship or vessel shall leave the port at which such debt was contracted, unless the person having the lien shall, within twelve days after such departure, cause to be drawn up and filed specifications of such lien, which may consist either of a bill of particulars of the demand or a copy of any written contract under which the work may be done, with a statement of the amount claimed to be due from such vessel, the correctness of which amount shall be sworn to by such person, or his agent or representative." The debt in this case was contracted in New York while the boat was being built at Newburgh; but after the commencement of the work she was removed out of the port of New York and taken to Weehawken, a port in New Jersey, where the residue of the labor was performed and the materials furnished. There is no proof that any specifications or copy of the contract have been filed in New York, verified by the oath of the parties, which seems to have been necessary in order that any lien should continue to attach.

The New Jersey statute agrees to give liens only for debts contracted within that state. The materials were furnished and the labor done under a contract executed in New York, and made with the owner of the boat before she was finished and ready for service on the water. Does it not follow, under such circumstances, that the libellant waived the lien, and intended to look to the personal responsibility of the owner? But, in the next place, and without expressing an opinion on the above facts, have the district courts of the United States any jurisdiction to enforce liens arising under state laws, except where they are founded upon a contract maritime in its character?

The proceedings in this case are under the twelfth rule of admiralty practice. This rule, as prescribed by the supreme court in 1844, authorized a libel *in rem* where the local law of a state gave a lien upon a vessel for supplies or repairs in her home port. Another change was made in 1859, taking away the right to proceed *in rem* against domestic vessels for supplies or necessities, although a lien was created by the state law. It stood thus until 1872, when the court announced the rule as it now is, to-wit:

"That in all suits by material-men for supplies or repairs or other necessities, the libellant may proceed against the ship and freight *in rem*, or against the master or owner alone *in personam*."

There has been much conflict in the courts as to the meaning of the new rule, but since its adoption the supreme court, in *The Lot-tawanna*, 21 Wall. 580, held that the district courts of the United

States, having jurisdiction of the contract as a maritime one, might enforce liens given for its security, even when created by the state laws. The inference is plain that the court meant to affirm that no such jurisdiction existed when the contract was not of a maritime nature.

The libel is therefore dismissed for want of jurisdiction.

THE PAVONIA.¹

(District Court, S. D. New York. February 27, 1885.)

1. COLLISION—MISCALCULATION OF PILOT—LOOKOUT.

The ferry-boat P. was approaching her New York slip on the North river on a strong flood-tide, which compelled her to go below her slip and swing into it as the tide swept her up. The ferry-boat W., running on a different ferry, at this moment came out of her slip, 744 feet below that of the P. It was the custom of the W. to go to the right of the P. on such occasions, if the P. were "well out" in the river, otherwise to go to the left. On this occasion, the pilot of the W., judging that the P. was well out in the stream, attempted to go to the right, when the P. was already swinging in, and in about 45 seconds after leaving her slip struck the W. on her port side. The pilot of the P. was giving his entire attention to making his slip; the deck hand who should have acted as lookout was under the hood, and did not see or report the W. until a few seconds before collision, when the P., too late, reversed full speed. *Held*, that the W. was in fault in misjudging the distance of the P. and in attempting to go inside and across her bows; and that the P. was in fault in not having a lookout besides the pilot properly stationed and attentive to his duties; and that the damages should be divided.

2. SAME—FERRY-BOATS—NECESSITY OF LOOKOUT.

The legal obligation of ferry-boats to maintain an efficient lookout has been repeatedly declared, and can never be relaxed.

In Admiralty.

Abbett & Fuller, for libelants.

Wilcox, Adams & Mucklin, for claimants.

BROWN, J. At about 6:30 P. M. on the fifteenth of October, 1883, as the Erie ferry-boat Pavonia was approaching her slip at the foot of Chambers street on the North river, she ran into the starboard side of the ferry-boat Weehawken, of the Hoboken ferry, running from the foot of Barclay street. This libel was filed for the recovery of the damages arising from the collision. The tide was strong flood, and the wind heavy from the north-west. It was dusk; but bright moonlight and clear. The upper side of the Barclay-street slip is 744 feet below the upper corner of the Providence pier, which forms the lower side of the Chambers-street slip. The Pavonia was intending to make the upper division of the Chambers-street slip; the lower division being occupied by her sister boat. The flood-tide, at its strength, sweeps past these piers at about the rate of three knots or over. To make their landings on the New York shore at such a time,

¹ Reported by R. D. & Edward Benedict, Esqs., of the New York bar.

the ferry-boats from the west shore usually go somewhat below the slip, and run into it as they drift upwards. Such, according to the testimony of the witnesses on the part of the Pavonia, was her course at this time. Every natural probability gives it credit, there being no obstructions in the way. The pilot testifies that before making his final swing to run into the slip, he looked to see if the Barclay-street boat was coming out, it being time for her, but could not see her; that he then put his wheel hard a-starboard, and swung for his slip, to which he gave his whole attention, until the Weehawken appeared very near to him, when he reversed his engine, but not in season to stop and prevent the collision; and that the collision took place within 100 or 200 feet of the end of the Providence pier and opposite to it.

On the part of the Weehawken it is admitted that, inasmuch as the boats cross each other's course, the established practice is that the Barclay-street boats on a flood-tide shall pass inside, that is, to the right, if the Erie boats are at the time "well out" in the river, i. e., 1,000 feet or upwards; but that otherwise they must go outside of the Erie boats in order to permit the latter to make their landings. This is a manifest necessity to which, under rule 24, the prior rules give way. Her witnesses say that as the Weehawken left her slip the Pavonia was "well out" in the river; that she had not got down as far as the Chambers-street slip, and had not commenced her turn for the slip, which she would not usually do until she had passed below Chambers street; that the collision itself took place some 400 or 500 feet out in the river, opposite the Erie pier, which forms the upper side of the Chambers-street slip, and occurred in consequence of the Pavonia's turning rapidly about, under a starboard helm, and trying to run ahead of the Weehawken. There is considerable testimony on the part of the Weehawken to sustain this theory and the place of the collision as alleged in her behalf. Repeated consideration of the testimony compels me to reject this account as to the place of the collision. I am satisfied it was opposite, or very nearly opposite, the Providence pier, on the lower side of the slip, or a little only above it, and occurred as the Pavonia was coming in her usual course to make the upper rack, and that it was not more than 200 feet outside of the lower pier. The boats, doubtless, within half a minute after had drifted up abreast of the upper pier, and thereby had come nearly into the position testified to by the Weehawken's witnesses, except as to distance out in the river.

The testimony of the pilot of the Secaucus, which lay out in the stream, is referred to as establishing the position of the boats opposite the upper pier at the time of the collision, because the pilot testifies that he could see the bridge of the slip astern of the boats. This, however, is not of much weight, unless the exact position of the Secaucus were known, and that is as liable to error as the position of the Pavonia; and also because, as I have said, the boats drifted im-

mediately to the upper pier, and the Weehawken, being under full headway, would have passed from one pier to the other in about 15 seconds.

There are circumstances that strongly confirm the account of the Pavonia as to the place of the collision. Her pilot, not seeing the Weehawken, had no reason to keep off; nor, on the other hand, is there the slightest probability that, not seeing her, he would have changed his course to run into his slip at a point where it was impossible for him to make the slip. Had the Weehawken been in the position her witnesses allege, there is no conceivable reason why the Pavonia should not have continued down river in the usual manner, until she had passed somewhat below Chambers street, before her final turn for her slip. On the other hand, if the pilot's statement that he did not see the Weehawken is untrue, and if he did see her, it is not credible that he would depart from his usual course to go below Chambers street before turning, so as to be unable to make his own slip, and at the same time so as to run into the Weehawken. All the probabilities of the case, therefore, sustain the witnesses of the Pavonia as to their position nearly opposite the Providence pier at the time when the boats first collided. If that was the place of collision, the fault of the Weehawken necessarily follows; for the time that elapsed after the Weehawken left her slip until she reached the Providence pier, only 744 feet distant, considering the flood-tide, could not have been upwards of 45 seconds; and during this time the Pavonia could not possibly have come inwards more than 500 or 600 feet, at the most, across the tide; so that she could not, at the time the Weehawken left her slip, have been "well out" in the river, so as to justify the Weehawken in undertaking to go inside. The result proves that the pilot of the Weehawken miscalculated her distance out. Considering the nearness of the Pavonia to her slip, and that she was already on her swing, I conclude that it was the duty of the Weehawken to have waited and passed outside.

I cannot acquit the Pavonia of the charge of negligence in not having an efficient lookout. Assuming it to be true, as the pilot states, that just before he made his final swing for the slip he looked for the Barclay-street boats and saw none coming out, it is clear that it must have been very nearly at the same time, at all events but a few seconds afterwards, that the Weehawken started out. The Pavonia's lights, and the changes in them that the pilot of the Weehawken saw, show that she was then just commencing her final swing. From that time the pilot was, as he says, required to give all his attention to make his slip. That made an efficient lookout the more indispensable from that moment onward. The legal obligation of ferry-boats to maintain an efficient lookout has been repeatedly declared, and considering the lives that are endangered through collisions this rule can never be relaxed. *The Monticello*, 15 FEB. REP. 474, and cases cited. There was a deck hand whose duty it was

to act as lookout; but it is clear that he was not performing his duty as such, nor in the proper place for performing it, but was under the hood. If he had been doing his duty, the Weehawken would have been seen coming out of her slip and reported three-quarters of a minute at least before the collision. Had she been thus observed and reported at that time, the Pavonia, by reversing her engine at once, instead of waiting until half this interval had passed, would very clearly either have been stopped altogether before the collision, or else would not have reached the place of the collision until the Weehawken had passed by, which would have been accomplished 10 seconds later. Both boats must, therefore, be held in fault, and the damages divided.

THE STANDARD.¹

(District Court, S. D. New York. February 16, 1885.)

1. COLLISION BETWEEN STEAMERS—CROSSING COURSES—SIGNALS.

As the tug M., with three boats lashed to her sides, was coming out of the Kills into New York bay with the ebb-tide, she came into collision with the barge Sweepstakes, in tow, on a hawser, of the tug S., bound down the bay into the Kills. Previous to the collision, the S. gave two whistles, indicating that she would pass to the left, to which the M. responded with two. But the S., after signaling, did not change her course to correspond, or slacken her speed, but with her tow kept a perfectly straight course. The M. changed her course in accordance with her whistles, but very slightly, and stopped and backed, but not in time to avoid collision. *Held*, that both vessels were in fault,—the S., because, having the M. on her starboard hand and being bound to keep out of the way, she did not change her course to correspond with her whistles; the M. for not changing her course earlier than she did, and for not seasonably stopping and backing.

2. SAME—MISCALCULATION OF PILOT.

The ebb-tide out of the Kills and the ebb down the bay meet near the place of collision; and each vessel, as she approached, had the tide in her favor. *Held*, that both pilots doubtless miscalculated the rapidity with which the boats were approaching. But both were familiar with the tides, and both are chargeable for such miscalculation, and for neglect in not taking measures sufficiently early to avoid each other; and consequently the damages must be divided.

In Admiralty.

Benedict, Taft & Benedict, for libelants.

Beebe, Wilcox & Hobbs, for claimants.

BROWN, J. On September 8, 1882, at about half past 10 in the forenoon, as the libelants' steam-tug Monitor, having in tow one boat lashed upon her port side, and two others lashed to her starboard side, was coming eastward out of the Kills with the ebb-tide, when a little to the southward of the Can buoy, (No. 17,) below Robbins' Reef light, she came in collision with the oil-barge Sweepstakes, which was in tow, on a hawser, of the steam-tug Standard, which had just passed the buoy, and was bound down the Kills. The pilot of the

¹ Reported by R. D. & Edward Benedict, Esqs., of the New York bar.

Monitor was about half-way between Constable's point and the Can buoy—that is, about half a mile distant from the latter—when he saw the Standard coming nearly straight down the bay, and a little above Robbin's Reef light, with her two barges in tow upon hawsers, one behind the other. The Standard signaled to the Monitor with two whistles; to which the latter replied with two, indicating that they would each go to the left. The evidence shows that the Standard, with her tow, kept a perfectly straight course, without changing her helm or slackening her speed, until the collision happened with her tow. The libelants' testimony is to the effect that the Monitor starboarded her wheel so as to change her heading sufficiently to point inside, or to the westward, of the Can buoy; and that before the collision she reversed her engines. The other evidence in the case satisfies me that the Monitor did not starboard much, or change her course to any considerable extent to the northward. The fact that the Sweepstakes, the aft boat of the Standard's tow, struck all three of the boats which were lashed to the Monitor's side, and the fact that the barge ahead of her was going down the bay upon a S. S. W. course, are utterly irreconcilable with any considerable previous change by the Monitor. The Standard passed the Monitor some 200 feet or more distant from her. The Acme, the first boat of her tow, some 200 feet behind, was passed less than 50 feet distant from the Monitor, while the Sweepstakes, about 150 feet behind the Acme, collided with the Monitor's tow, as above stated.

It is very clear that both boats were to blame for this collision; the Standard, because, having the Monitor on her starboard hand, she was bound to keep out of the way, and yet made no change in her course; and, *second*, because, in giving two whistles to the Monitor, she agreed to pass to the left, and having abundant room to do so, and no obstruction, she did not vary her course, but kept nearer to the Can buoy than was necessary or proper, considering that the only reasonable course for the Monitor was to pass to the eastward of the buoy and not through the narrow channel to the westward of it. The Monitor was equally in fault for not starboarding earlier than she did, and also for not seasonably stopping and backing, which were equally within her power. The peculiarities of the tide there at that time doubtless contributed to the collision. Each, as she approached the other, had the ebb-tide in her favor; the Monitor in coming down the Kills, and the Standard in coming down the bay. These two tides met near the place of collision. The real cause of the collision was doubtless the miscalculation of both pilots as to the rapidity with which they were approaching each other; but both were familiar with these tides, and both are chargeable for such miscalculation, and for not taking in time the measures necessary to avoid each other.

The damages must be divided, and a reference ordered to compute the amount, with costs.

WILLARD, Trustee, v. MUELLER.¹

(Circuit Court, S. D. Ohio, W. D. March 21, 1885.)

REMOVAL OF CAUSE—FEDERAL QUESTION—SECTION 3477, REV. ST.

Complainant brought suit in a state court to subject a judgment, obtained by the defendant against the United States in the court of claims, to the payment of a judgment he had against defendant, and for injunction to restrain defendant from collecting, transferring, or otherwise disposing of said claim against the government, and for the appointment of a receiver to collect and hold the fund. The suit was removed to the United States court, and upon motion to remand, *held*, that the suit involved the construction of section 3477, Rev. St., which declares that all "transfers and assignments made of any claim upon the United States, * * * shall be absolutely null and void, unless they are freely made, and executed in the presence of at least two attesting witnesses," etc., and the motion was therefore denied.

On Motion to Remand.

Long, Avery, Kramer & Kramer, for motion.

Lincoln, Stephens & Lincoln, *contra*.

BAXTER, J. This suit, commenced in the common pleas court of Hamilton, Ohio, was, on the defendant's application, transferred to this court for trial. The removal was under the act of March 3, 1875. The complainant moves here to remand it. The complainant seeks, through the aid of a court of equity, to seize \$22,000, adjudged by the court of claims to be due from the United States to the defendant, and have the same applied in part payment of a judgment for a larger amount which he holds against the defendant. As a basis for this relief he alleges that the defendant has no property subject to execution, and that he is about to assign his said claim on the government, to prevent the complainant and other creditors from subjecting it to the payment of his debts. Wherefore, he prays for an injunction to restrain defendant from either collecting, transferring, or otherwise disposing of said claim, and for the appointment of a receiver to collect and hold the fund subject to the order of the court. Both parties being citizens of Ohio, the motion to remand must prevail, unless the controversy involves some federal question.

The government is not and cannot be made a party to this litigation, and I presume would not respect any order which the court might make, directed to the officer charged with the duty of paying the defendant's claim. Whether it would recognize an assignment or power of attorney executed by the defendant under judicial coercion to the court's receiver, is not important to this inquiry. It is certain that a decree compelling the defendant to assign his claim or to execute a power of attorney, authorizing its collection, is the only possible way for the court to obtain possession and control of the money sought to be reached. But the defendant contends that he is protected against

¹ Reported by Harper & Blakemore, Esqs., of the Cincinnati bar.

any such decree by the 3477th section of the Revised Statutes, which declares that all "transfers and assignments made of any claim upon the United States, or any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of such claim, or any part thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such claim, the ascertainment of the amount due, and the issuing of the warrant for the payment thereof."

The complainant's counsel responds that he has invoked no such relief; that he has not asked for a decree either to compel an assignment or the execution of a power of attorney. We concede that he does not expressly pray for this specific relief. But such relief is within the scope of his bill, and included in his prayer for general relief. The controversy, therefore, necessarily involves the consideration of the foregoing enactment. The defense arises under it, and the defendant has the right, under the act of March 3, 1875, to have the questions thus raised passed upon by this court. It follows that in the judgment of this court the transfer of the case from the state to this court was proper, and the motion to remand will be disallowed.

"A case in law or equity consists of the right of one party as well as of the other, and may properly be said to arise under the constitution or a law of the United States, whenever its correct decision depends on the construction of either. Cases arising under the laws of the United States are such as grow out of the legislation of congress, whether they constitute the right or privilege or claim or protection or defense of the party, in whole or in part, by whom they are asserted."¹

"If a federal law is to any extent an ingredient of the controversy by way of claim or defense, the condition exists upon which the right of removal depends, and the right is not impaired because other questions are involved which are not of federal character."²

That the "right, privilege, claim, protection, or defense," under the constitution and laws of the United States, is well taken, is not the criterion of jurisdiction. In action against a railway company for unjust discrimination in its tolls, it defended on the ground that the statute under which the plaintiff sought to recover impaired the obligation of the contract contained in its charter. Judge DRUMMOND said: "The only point we can consider here is whether there appears to be such a question in the case, not whether the immunity claimed by the defendant can be sustained. * * * The only question is whether such a claim can be fairly made under it, so as to raise a constitutional question."³

It is not sufficient that it is *claimed* that the case raises a federal question.

¹ Railroad Co. v. Mississippi, 102 U. S. 135, HARLAN, J.

² W. U. Tel. Co. v. National Tel. Co. 19 Fed. Rep. 561, WALLACE, J.; Frank G., etc., Co. v. Larimer, 8 Fed. Rep. 724; Mayor v. Independent Steam-boat Co. 22 Fed.

Rep. 801; Rothschild v. Matthews, Id. 6; Van Allen v. Railroad Co. 1 McCrary, 598; S. C. 3 Fed. Rep. 645; Connor v. Scott, 4 Dill. 242.

³ People of Ill. v. Chicago, B. & Q. R. Co. 16 Fed. Rep. 708.

The court must be satisfied that such question fairly arises out of the controversy. If the court finds the claim unfounded, the case will be remanded.¹

The fact that the title of the thing in dispute is derived from the United States does not of itself make the question one of federal jurisdiction.²

Section 3477, Rev. St.: "No language could be broader or more emphatic than these enactments. * * * The statute strikes down and denies any effect to powers of attorney, orders, transfers, and assignments which before were good in equity."³

Assignments in bankruptcy, by descent or devise, or voluntary assignments under the state insolvent laws, have been held to be good.⁴—[REPS.]

¹ Mayor v. Independent Steam-boat Co. 22 Fed. Rep. 801; Rothschild v. Matthews, Id. 6.

² Hoadley v. San Francisco, 94 U. S. 4; Albright v. Teas, 106 U. S. 618; S. C. 1 Sup. Ct. Rep. 550.

³ U. S. v. Gillis, 95 U. S. 407, 413, 414; Spofford v. Kirk, 97 U. S. 484-488.

⁴ U. S. v. Gillis, 95 U. S. 407; Erwin v. U. S. 97 U. S. 392; Goodman v. Niblack, 102 U. S. 560.

ADAMS v. COMMISSIONERS OF REPUBLIC CO.

(Circuit Court, D. Kansas. March 3, 1885.)

1. CIRCUIT COURT—JURISDICTION—SUIT ON COUNTY WARRANTS.

County warrants, signed by the chairman of the county commissioners and county clerk, directing the county treasurer to pay to bearer a certain sum, for certain services stated therein, are negotiable and pass from hand to hand and not by assignment, and therefore do not come within the restriction of jurisdiction in the first section of the act of congress of March 3, 1875.

2. SAME—CITIZENSHIP—DEFENSES.

The holder of such warrants, being a citizen of another state, may sue thereon in this court, although the original payee is a citizen of this state but subject to all defenses which existed against them in the hands of the first holder.

At Law.

G. C. Clemens, for plaintiff.

Irwin Taylor, for defendants.

FOSTER, J. This is an original action brought in this court on county orders or warrants, amounting to \$1,000, with interest from September 15, 1873, issued by the defendant county on the date aforesaid. The petition alleges that the orders were issued to the King Bridge Company, and that plaintiff is now the owner and holder of the same, and that he is a citizen of the state of Pennsylvania, and the defendant is a municipal corporation of the state of Kansas. The answer sets up several matters of defense, and plaintiff replies thereto, and defendant demurs to this reply, assuming that the demurrer relates back to the petition. The first question presented is a question of jurisdiction: the question whether the averments in the petition make a case cognizable in this court. The defendant claims that, inasmuch as the King Bridge Company, the party to whom these warrants were issued, could not maintain this action, not being a citizen of another state, that the plaintiff who holds them by transfer cannot,

as this kind of paper does not come within the exception named in the first section of the act of March 3, 1875. The petition makes no averment as to the citizenship of the King Bridge Company, to whom the orders were issued, which is a material averment to be made, if this suit is founded on contract in favor of an assignee, unless this paper is held to come under the designation of promissory notes, negotiable by the law-merchant, or bills of exchange, in which case the citizenship of the original payee or assignor would become immaterial. It has been repeatedly decided by the supreme court that the bill or complaint must aver the facts necessary to confer the jurisdiction in the federal court. *Turner v. Bank*, 4 Dall. 8; *Dred Scott Case*, 19 How. 401; *Godfrey v. Terry*, 97 U. S. 171; *Robertson v. Cease*, Id. 646; *Grace v. Insurance Co.* 109 U. S. 278; S. C. 3 Sup. Ct. Rep. 207; *Corbin v. County of Black Hawk*, 105 U. S. 667.

The orders sued upon read as follows:

"No. —.
\$100.00

COUNTY CLERK'S OFFICE, REPUBLIC COUNTY,
BELLEVILLE, KAN., September 15, 1873.

"Treasurer Republic county pay to King Bridge Company, or bearer, the sum of one hundred dollars, on account of services erecting bridge at New Scandinavia, Kansas, as allowed by the board of county commissioners of Republic county.

J. H. FRINT, Chairman.

"Attest: SAMUEL W. SKEELS, County Clerk."

The act of March, 1875, § 1, provides as follows:

"Nor shall any circuit or district court have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon, if no assignment had been made, except in cases of promissory notes negotiable by the law-merchant, and bills of exchange."

The act of 1789 declares that no district or circuit court shall have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of any assignee, unless a suit might have been prosecuted in such court to recover the said contents, if no assignment had been made, except in cases of foreign bills of exchange. Section 629, Rev. St. 110.

Under this provision of the latter act it was repeatedly held by the supreme court that the restriction of jurisdiction did not apply to notes and other obligations that were payable to bearer and passed from hand to hand, but was limited to such notes and choses in action as passed by assignment or indorsement. *Bank of Kentucky v. Wister*, 2 Pet. 326; *Bushnell v. Kennedy*, 9 Wall. 391; *City of Lexington v. Butler*, 14 Wall. 293. Since the act of 1875 this rule has been adhered to and applied to that act. *Thompson v. Perrine*, 106 U. S. 592; S. C. 1 Sup. Ct. Rep. 564, 568; *Chickaming v. Carpenter*, 106 U. S. 666; S. C. 1 Sup. Ct. Rep. 620.

The later cases were suits upon municipal bonds and coupons, and the question remains whether these county warrants or orders come under the same rule. It is urged by the defendant that they are not

promises to pay; that the holder cannot bring a suit upon them; that they are in no sense negotiable paper; and that they can only pass by assignment, and not from hand to hand by delivery. Now, it so happens that the supreme court has given the negative to each of these propositions. In *Mayor v. Ray*, 19 Wall. 478, and *Wall v. Monroe Co.* 103 U. S. 77, the supreme court has clearly fixed and established the character of this kind of paper, and the rights of the holder thereof. And, *first*, it is decided that these warrants are negotiable and transferable by delivery or indorsement; when payable to bearer, they pass by delivery from hand to hand; *second*, that the holder may base an action on them in his own name to recover the amount; *third*, that they are *prima facie* evidence of the debt, but the holder takes them subject to all defenses existing against them in the hands of the original holder. In the case last cited, the court say:

"They establish *prima facie* the validity of the claims allowed, and authorize their payment. * * * The warrants being in form negotiable, are transferable by delivery so far as to authorize the holder to demand payment of them, and to maintain in his own name an action upon them. * * * The transferee takes them subject to all legal and equitable defenses which existed to them in the hands of the original payees."

The jurisdiction of the court was not challenged in these cases, although the facts as to the issue and transfer of the warrants were quite similar to those in the case at bar.

The supreme court having thus declared the rights of the holder of such paper, we need not examine any decisions of the state courts on that question. They are negotiable; they pass from hand to hand; they are *prima facie* evidence of the debt; and the holder may bring suit on them in his own name. It seems to me that this brings them very clearly within the rule of *Thompson v. Perrine* and *Chickaming v. Carpenter, supra*; and the plaintiff is not the assignee of a contract or chose in action within the acts of 1875 and 1789. It seems that the *bona fide* holder takes these warrants very much like a purchaser of a negotiable note after due,—subject to all defense. But it would hardly be claimed that the purchaser of a negotiable note after due could not sue in this court unless the payee could have done so. The act of 1875 speaks of promissory notes *negotiable by the law-merchant*. A simple note payable to a particular person, or bearer, or order, is negotiable by the law-merchant.

Now, supposing a citizen of Kansas makes to another citizen of Kansas such a negotiable note for \$501, and a citizen of Missouri becomes the *bona fide* owner and holder of it, and brings a suit against the maker in this court, could it be urged as a defense that he bought it after due, and therefore this court had no jurisdiction? Certainly not. If the fact pleaded was true, it would simply subject the plaintiff's claim to all legal and equitable defenses which could have been made had the suit been brought by the original payee. He would hold it just as the supreme court decides the holder of these warrants holds

them,—subject to all defenses; but that is not the test of jurisdiction of this court.

In this case the answer sets out certain matters of defense, and, among others, that the bridge built, for which these warrants were issued, was a private bridge, built and owned by said King Bridge Company, and not for the county. The reply is—*First*, a general denial; and, *second*, a special denial of the before-named averment in the answer, and the counter-allegation that the bridge was built for the county, and was accepted by it, and has been in the constant use and occupation of said defendant, etc. The plaintiff pleads this matter for the purpose of claiming an estoppel against the county; but as it is no more or less than a special denial and counter-allegation of matter set up in the answer, without passing upon the question of estoppel, it seems to me the reply is not demurrable for that cause.

BREWER, J., concurring.

NEW CASTLE NORTHERN R. Co. v. SIMPSON.

(Circuit Court, W. D. Pennsylvania. March 9, 1885.)

1. RAILROAD COMPANY—CONSTRUCTION CONTRACT *ULTRA VIRES*—COMPENSATION OF CONTRACTOR.

A court of equity, at the instance of a railroad company, having set aside a construction contract as *ultra vires*, held, that the corporation must account for benefits received from partial performance, and that the contractor was not to be put off with a bare reimbursement of his actual outlay, but was entitled to receive for what he had done such compensation as any other railroad contractor could recover therefor, in the absence of express agreement as to price.

2. SAME—INTEREST CHARGEABLE.

Held, further, that the corporation was justly chargeable with interest on the amount found to be due the contractor when the work was stopped.

In Equity. *Sur* exceptions to master's report.

J. B. Brawley and *R. B. McComb*, for exceptant.

D. B. Kurtz and *Marshall Brown*, *contra*.

ACHESON, J. The established rule in equity is that a corporation is accountable for benefits which it has received under an *ultra vires* transaction. Green's Brice, *Ultra Vires*, 717. Hence, in holding that the defendant's compensation for the materials furnished and work done by him should be measured by what it would have cost the plaintiff company to employ a responsible contractor to provide the same materials and perform the same work, the master, I think, adopted a just standard. While the defendant is not under any guise to receive damages for the loss of his bargain, yet he is not to be put off with a bare reimbursement of his actual outlay. He is entitled to be paid for what he has done fair rates, such as any other railroad

contractor might have recovered therefor, in the absence of express agreement as to compensation. The above rule excludes all the losses and expenses specified in the defendant's exception, and the master was clearly right in disallowing them.

I cannot say that the master erred in adopting, in the main, the estimate of Charles E. Fink, as to the values of the materials furnished and work done. The master had the advantage of seeing and hearing the witnesses, and every presumption is to be made in favor of the correctness of his conclusions upon questions of fact. Besides, compared with the estimates of the other witnesses, it is not evident that Mr. Fink's values are excessive. In so far as the exceptions allege mistakes committed by the master in respect to the quantities of materials furnished and amount of work done, they do not seem to me to be well founded. The plaintiff's fifth and sixth exceptions go to the allowance to the defendant of the *value* of that part of the work done by Weaver (a subcontractor under Reed) before the date of the defendant's contract, instead of what the defendant actually *paid* therefor. The fact is that the defendant took the Weaver contract off Reed's hands, and paid for all the work done by Weaver. Hence the master was of opinion that the defendant is entitled to receive the value of the whole of that work. Now, even if this view is a questionable one, still, it seems to me that there is another ground for sustaining the master in this particular. He was not furnished with any evidence whereby he could distinguish between the work done by Weaver before the date of the defendant's contract, and that done by him afterwards. He was therefore obliged to treat the work as a whole, under the proofs as submitted to him.

In fixing the value of the materials for the unfinished bridge, I am not convinced that the master has erred. But it is not so clear to me that Mr. Youtz may not have a claim thereon. The transaction was not a sale by him of bridge materials, but a contract whereby he undertook to build a bridge, furnishing the materials. Now, in the performance of the contract he has been interfered with; and it may be that his title to the unused materials was not extinguished. Hence the defendant should be required either to deliver to the plaintiff an acquittance from Mr. Youtz, or give security to indemnify the plaintiff from any claim he may have on account of said materials. This, however, can be provided for in the final decree.

Notwithstanding the few changes made by the master, the result shows that substantially he adopted Mr. Fink's estimate, the details of which appear in the defendant's Exhibit A. Now, in view of the friendly relation existing between the two, it is a reasonable conclusion that Mr. Fink's estimate does the defendant full justice. Beyond question that estimate includes a general contractor's profit. Indeed, the doubt in my mind is whether the profit thus allowed is not too liberal. In some particulars it strikes me as extreme. For example, Weaver was paid for earth excavation 23 cents, and for loose

rock and hard-pan 40 cents per cubic yard; yet for this identical work Mr. Fink allows the defendant 35 cents and 75 cents. For other earth excavation the defendant himself did, he is allowed 50 cents per cubic yard. If Mr. Fink thought the defendant was entitled to anything further, surely he would have set it forth in his carefully prepared estimate. When, under examination as to the rates fixed by him for work done and materials furnished, he recognizes such rates to be at a "fair market value," a "fair market contract price," a "fair contract price," etc. Nevertheless the master has added to his estimate of \$52,233.42, 10 per centum. Undoubtedly the witnesses generally do say that a percentage is to be added to their several estimates, and the master fell in with this current of testimony. Mr. Fink, however, speaks very guardedly of augmenting his estimate by any additional percentage. When pressed by the defendant's counsel he did finally express the opinion that there should be such allowance, but he put it on the ground of supposed injurious delays in the work, for which the railway company was responsible. But of such delays between October 8, 1883, when the defendant began work, and December 15, 1883, when the bill in this case was filed, I find no satisfactory evidence. When the bill was filed it amounted to an election on the part of the company to rescind the construction contract as *ultra vires*, and thereafter the company was not answerable for delays. Especially was it not responsible (as Mr. Fink evidently assumed) for any interruption of the work consequent upon the preliminary injunction granted by the court of common pleas. It is true, this court modified that injunction so as to leave the defendant free to go on with the work if he saw fit to take the risk; but this was done chiefly because it was represented that the unfinished work was in such a state as to require immediate attention on the part of the contractor. Upon the whole I feel constrained to sustain the plaintiff's exception (No. 24) to the master's allowance of 10 per centum upon his general estimate.

For the reasons stated by the master, the item of \$556.69, for engineering expenses, is, I think, a proper charge against the railway company.

Finally, I am of opinion that the plaintiff company is justly chargeable with interest on the amount found to be due to the defendant when the work was stopped. Green's Brice, *Ultra Vires*, 728. No equitable reason appears for denying interest. It is not shown or pretended that the company ever made a tender of money to the defendant, or set apart or kept on hand a fund to pay him. The result, then, reached by the court, after a very careful consideration of the case, is that the only exception to be sustained is the one relating to the allowance of 10 per centum upon the master's estimate.

And now, March 9, 1885, all the exceptions to the master's report are overruled, save the twenty-fourth exception filed by the plaintiff, which is sustained.

MORRISON v. PRICE, Receiver.

(Circuit Court, D. Massachusetts. March 14, 1885.)

NATIONAL BANKS—INDIVIDUAL LIABILITY OF STOCKHOLDERS—VOLUNTARY ASSESSMENT—INCREASE OF CAPITAL.

The Pacific National Bank of Boston was organized in October, 1877, with a capital of \$250,000, with the right to increase it to \$1,000,000. In November, 1879, its capital was raised to \$500,000; September 13, 1881, the directors voted to increase the capital to \$1,000,000. On November 18, 1881, the bank suspended. On December 13, 1881, the directors voted that as \$38,700 of the increase of capital stock had not been paid in, the capital be fixed at \$961,300, and the comptroller of currency was notified to that effect, and he notified the bank, under Rev. St. § 5205, to pay a deficiency on its capital stock by an assessment of 100 per cent. At the annual meeting the assessment was voted, and on March 18, 1882, with consent of the comptroller and the approval of the directors and the examiner, the bank resumed business, and continued until May 20, 1882, when it again suspended and was put in the hands of a receiver. Prior to May 20, 1882, \$742,800 of the voluntary assessment had been paid in. Complainant was the owner of 25 shares of stock on September 13, 1881, and after the vote to increase the stock, took 25 shares, for which he paid \$2,500, on October 1, 1881, and received a certificate. He voted for the assessment at the annual meeting, and in February, 1882, paid the assessment on the old and new stock, and subsequently sought to enjoin the suit at law against him by the receiver, to enforce his individual liability as a stockholder, under Rev. St. § 5151, on the ground that the increase of capital was illegal and void, and that the voluntary assessment under Rev. St. § 5205, relieved the stockholders of individual liability. *Held*, that he was not entitled to relief, and the bill should be dismissed.

In Equity.*A. P. Gould and B. N. Johnson*, for complainant.*A. A. Ranney*, for defendant.

COLT, J. This is a suit to restrain the further prosecution of an action at law brought by the defendant, as receiver of the Pacific National Bank, against the complainant, to recover an assessment made under the direction of the comptroller of currency, for the purpose of enforcing the individual liability of the stockholders under section 5151, Rev. St. The Pacific National Bank of Boston was organized in October, 1877, under the national banking law. Its capital was \$250,000, with the right of increase to \$1,000,000. In November, 1879, the capital was raised to \$500,000. On September 13, 1881, the directors voted to increase the capital to \$1,000,000. On November 18, 1881, the bank suspended, and Daniel Needham was appointed examiner. He took possession of the bank, and remained in charge until it reopened, March 18, 1882. On December 13, 1881, the directors passed the following vote:

Voted that whereas, it was voted by this board, on the thirteenth day of September last, that the capital of this bank be increased to one million dollars, and that stockholders of this date have the right to take the new stock at par in equal amount to that held by them;

And whereas, the stockholders were duly notified of said vote, and also that subscriptions to the new stock would be payable October 1st;

And whereas, \$461,300 of said new stock has been taken and paid in;

And whereas, \$38,700 thereof has not been taken and paid in;

Voted that said \$38,700 of said stock be and is hereby canceled and deducted from said capital stock of \$1,000,000, and that the paid-up capital stock of this association amounts to \$961,300.

Voted that the comptroller of the currency be notified that the capital of this association has been increased in the sum of \$461,300, and that the whole amount of said increase has been paid in as part of the capital of this association, and that he be requested to issue his certificate of said increase to this association, according to law.

The comptroller having received notice of the increase of the capital stock in the sum of \$461,300, and that the whole amount had been paid in, duly certified his approval of such increase on December 16, 1881. On the same day he notified the bank, under section 5205, Rev. St., to pay a deficiency on its capital stock by an assessment of 100 per cent., its entire capital stock having been lost; and in case the deficiency was not paid, and the bank refused to go into liquidation for three months after the notice was received, then a receiver would be appointed. At the annual meeting of the stockholders of the bank, on January 10, 1882, an assessment of 100 per cent. on the stock was voted. With consent of the comptroller, and the approval of the directors and examiner, the bank, on March 18, 1882, reopened its doors, and continued to do a general banking business until May 20, 1882, when it again suspended, and was thereupon put in charge of the defendant receiver. Prior to May 20, 1882, the sum of \$742,800 of the voluntary assessment voted by the stockholders at the January meeting had been paid.

The complainant, on September 13, 1881, was the owner of 25 shares of stock. After the vote of the directors on that day, to increase the capital to \$1,000,000, he took new stock to the amount of 25 shares, for which he paid \$2,500 on October 1, 1881, and soon after received a certificate. He was present at the stockholders' meeting, January 10, 1882, and voted for the assessment. In February, 1882, he paid the assessment of 100 per cent. on the old and new stock. He now seeks to enjoin the further prosecution of the suit at law, brought against him by the receiver, to enforce his individual liability as a stockholder under the statute, on several grounds. He claims that the increase of the capital stock from \$500,000 to \$961,300 was illegal and void. By its charter the capital of the bank might be increased to \$1,000,000. By section 5142, Rev. St., the whole amount of increase must be first paid in, and the certificate of the comptroller specifying the amount of increase, and his approval thereof, obtained. It appearing that the increase was not in excess of the limit imposed by the charter of the bank, and that it was paid in, and the proper certificate obtained from the comptroller, we see no valid ground for declaring that the increase was *ultra vires* or void. It was within the power of the corporation, and the statutory requirements were complied with.

The case of *Scovill v. Thayer*, 105 U. S. 143, does not apply, be-

cause there the corporation attempted to increase its capital beyond the amount prescribed by its charter, and the court held that there was no implied power in a corporation to change the amount of its capital stock as limited by its charter, and that all attempts to do so are void. The court then proceeded to affirm the well-settled distinction between an issue of stock which is clearly *ultra vires*, and an issue which is attended with informalities or irregularities as to the mode or manner of issue, but which is within the corporate powers. In the former case only is the stock void. In the latter case it is not. *Upton v. Tribilcock*, 91 U. S. 45; *Sanger v. Upton*, Id. 56; *Chubb v. Upton*, 95 U. S. 665.

Upon the facts here presented the most that can be claimed is that the proceedings in respect to the increase were not regular. The vote of the directors on September 13, 1881, was to increase the capital to \$1,000,000, and this notice was sent to each stockholder, and the privilege given, as the charter provides, of subscribing for the new shares in proportion to the amount of old stock owned by the stockholder. Subsequently it was found that \$38,700 of the new stock had not been taken, and so the directors, on December 13, 1881, voted to make the increase \$461,300, and to this increase the comptroller gave his consent. The point is taken that the vote of December 13th was a vote to reduce the capital stock from \$1,000,000 to \$961,300, and that to do this under the law required the consent of two-thirds of the stockholders, and the approval of the comptroller. Section 5143, Rev. St. If there had ever been a legal increase of the capital to \$1,000,000, there would be some force in this argument; but the capital stock of the bank never was \$1,000,000. The first step had been taken to make it that sum, but the amount had not been paid in, and the comptroller had not given his approval. In the absence of these necessary requirements the capital of the bank remained \$500,000, until it was increased to \$961,300. It cannot be said that the vote of December 13th was for a reduction, because you cannot reduce a capital which never existed. In our opinion, section 5143 has no application to the facts before us, since at no time was the capital of the bank \$1,000,000. The vote of September 13th, taken in connection with that of December 13th, followed by the action of the comptroller, established the legal capital of the bank at \$961,300.

But it is urged with more force that the stockholders, after the action by the directors on September 13th, subscribed to an increase of \$500,000, and that they paid for their new stock and received certificates on the basis of such an increase; in other words, that this was their contract with the corporation, and the only contract by which they are bound. But here, in view of what afterwards took place, comes in the principle of estoppel. It was clearly the duty of each stockholder, as soon as he discovered that the increase was less than what he subscribed for, to repudiate his contract and decline to hold

the new stock. But it surely would be contrary to every equitable principle to hold that a stockholder could retain his new stock without protest after notice, vote upon it at a stockholders' meeting, pay assessments upon it that the bank might reopen, allow the bank in reopening to hold itself out to the world as possessing a capital of \$961,800, such capital being a trust fund for the benefit of all creditors, and then, when the bank subsequently passed into the hands of a receiver, to seek for the first time to avoid his liability on the new stock, as against the general creditors of the corporation, on the ground that his contract with the corporation called for an increase of \$500,000, while the actual increase was only \$461,300. Supposing this new stock had proved profitable, undoubtedly the complainant would have reaped the benefit. Stockholders should not be permitted to deny their liability in case of loss, when they would have shared in the benefits in case of profit. *Sanger v. Upton, supra.*

It would seem that the supreme court take the view that it is not necessary to support an action against a stockholder by the corporation or its assignee; that there should have been a subscription for the whole number of shares named in the articles of association. *Chubb v. Upton, supra.* But where the doctrine prevails that a stockholder is not liable upon his subscription for stock unless the whole amount is subscribed, the principle is recognized that if, knowing the requisite subscription has not been made, he attends the meetings of the corporation, and co-operates in the votes for spending money and making contracts, he is estopped from setting up this defense. *Cabot & West Springfield Bridge v. Chapin*, 6 Cush. 50.

The objection is made that the stockholders were misled as to the condition of the bank when they subscribed for the new stock, and in their subsequent acts in relation thereto. Undoubtedly gross irregularities were committed by some of the officers of the bank before its first suspension in November, 1881. But the subsequent efforts of the directors to revive the bank seem to have been made with an honest intent. If the directors were mistaken as to what proved to be the real value of the assets, so were the examiner and comptroller, as well as the great body of stockholders who attended the meeting of January 10th; and, after considering an exhaustive report showing the condition of the bank, decided to vote an assessment of 100 per cent. on their stock, in the belief that this would make the bank solvent, and enable it to continue business. But whether or not misrepresentations were made by the directors, it cannot affect the liability of the stockholders upon their stock as against general creditors of the corporation. It is well settled that in an action by an assignee to recover unpaid subscription upon stock, the defense of false and fraudulent representations inducing such subscription cannot be set up; especially when the subscriber has not been vigilant in discovering such fraud and in repudiating the contract. And the same principle must be held to apply to a suit by a

receiver to enforce the individual liability of the shareholder, under section 5151. *Chubb v. Upton*, *Upton v. Tribilcock*, and *Sanger v. Upton*, *supra*; *Ogilvie v. Knox Ins. Co.* 22 How. 380.

In controversies between stockholders and third parties, it is well to bear in mind that a corporation is but the representative of its stockholders; that it exists mainly for their benefit, and is governed and controlled by them through the officers whom they elect; and when the interest of the public, or of strangers dealing with the corporation, is to be affected by any transaction between the stockholders who own the corporation and the corporation itself, such transaction should be subject to rigid scrutiny, and if found to be infected with anything unfair towards such third person, calculated to injure him, or designed intentionally or inequitably to screen the stockholder from loss at the expense of the general creditor, it should be disregarded or annulled, so far as it may inequitably affect him. *Sawyer v. Hoag*, 17 Wall. 610, 623.

But another ground of defense is taken, and carefully and thoroughly set out in complainant's brief. Upon the principle of equitable performance, or satisfaction, or set-off, it is maintained that the voluntary assessment of 100 per cent. by the stockholders to restore the impaired capital stock, under section 5205, should be held to relieve them of their individual liability as stockholders under section 5151. Hard as it is upon the stockholders to pay another 100 per cent., there is a fatal objection to the application of any of the equitable principles sought to be invoked. The capital stock of a corporation is a trust fund for the benefit of all creditors. It is pledged to those who deal with the corporation for their security. The individual liability of the stockholder, under the statute, is as much a part of this pledge, and a part of the assets of the company for the payment of debts, as the capital stock. *Sanger v. Upton*, *supra*. The statute says the shareholders are liable for "all contracts, debts, and engagements" of the association, to an extent equal to the amount of their stock at its par value. Admitting that the January assessment went to pay certain debts, yet that can in no proper sense be held to be a satisfaction of the lien which all the creditors have upon the capital stock, and the fund derived from the personal liability of the stockholders: There is no equitable principle by which one can fulfill his obligation to a class by the payment in any form of a part of that class to the exclusion of the rest. The double benefits which equity abhors must be to the same recipients, but we cannot conceive how the payment of some creditors in full can be an equitable satisfaction of the legal claims of other creditors who consented to an extension to save the bank, and of new creditors who made deposits after the bank resumed.

The purpose of the voluntary assessment was to restore the impaired capital stock, in order that the bank might reopen. The only alternative was for the bank to pass into the hands of a receiver. The

stockholders decided to levy the assessment. This may have been bad judgment, but general creditors cannot suffer for that reason. If the reorganization of the bank had proved successful, the stockholders might have saved their property. The assessment was voted, the greater part paid in, and the bank reopened. From this time new rights and equities intervened. It is no answer to the rightful claims of new creditors to enforce, through a receiver, the statutory liability of stockholders to say that the assessment went to pay old debts. Suppose the bank had continued business for 10 years, instead of two months, and had paid off all its old liabilities, and incurred new ones; surely the stockholders could not get rid of their individual liability by setting up that, 10 years before, there was paid an assessment of 100 per cent., which went to liquidate certain claims against the bank. If the bank had not reopened, and the assessment had passed into the hands of the receiver, the situation might be different. It might then be claimed with more reason, that, though the assessment was paid for the purpose of restoring the stock, and enabling the bank to continue, it had not been devoted to that purpose, but, having passed into the hands of the receiver, it could be used for the payment of general creditors, and it should therefore be regarded as an equitable performance of the statutory liability. But here the assessment was used for the very purpose for which it was made. It went to restore the impaired stock, and thus enable the bank to reopen. To be sure, it was used to pay some debts, because that was incidental to restoring the stock, but it did not go to pay all debts.

In our opinion, this assessment, made under another section of the statute, and for a different purpose, cannot, on any legal or equitable ground, be held to relieve a stockholder from his individual liability under section 5151. The question whether a bill in equity will lie to restrain a suit of this character was not pressed at the hearing; but, independent of this consideration, our conclusion is that the bill must be dismissed.

Bill dismissed.

McGRIFF, Trustee, etc., v. BALDWIN and others.¹

(Circuit Court, S. D. Georgia, W. D. January 23, 1885.)

EQUITY PRACTICE—EXECUTION ISSUED ON DECREE—POWER OF THE COURT TO PREVENT ABUSE OF PROCESS.

An execution was issued upon a decree. The defendant filed an affidavit of illegality, (a remedy permitted by the state law,) suggesting various grounds upon which the execution was alleged to have been illegally issued, levied, and advertised. Upon motion made by the plaintiff to the execution to dismiss the affidavit of illegality, *held*, that the same might be regarded as a statutory remedy adopted by the rule of this court, or as a motion or petition supported by the affidavit, and the same would be retained for a hearing.

¹ Reported by W. B. Hill, Esq., of the Macon bar.

In Equity.

Baldwin, Starr & Co. filed their bill in 1868 against McGriff, as trustee of Sarah M. Ryan, to subject her trust estate to a debt in their favor. The pleadings showed that her trust estate was created under a marriage settlement by which Mrs. Sarah M. Ryan was made tenant for life of certain property, with remainder to her children. The property was acquired by Mrs. Sarah M. Ryan (formerly Taylor) under will of her mother, by which, also, the property so acquired was charged with a certain debt in favor of William M. Snell, amounting to \$2,800. In 1874 the cause was referred to a master and he was directed to report what portion of the debt sued on was chargeable to, and to be paid out of the rents and income of, said Sarah M. Ryan's trust estate. Afterwards, and before any hearing was had before the master, Sarah M. Ryan, the life tenant, died. McGriff, the trustee, and also the remainder-men and said Snell, who had an interest in said land, regarded said bill as at end by reason of the death of said Sarah M. Ryan. None of them had any notice of the hearing by the master, or of his report, or of the final decree, which was taken against McGriff, as trustee of Sarah M. Ryan, several years after her death, and after the remainder-men and said Snell had effected a partition of said lands in the state court and were in possession of their respective shares. The decree was taken against the entire property, as the property of Sarah M. Ryan, and execution issued on said decree was levied on said land, and the entire fee therein advertised for sale.

The defendant, Thomas J. McGriff, trustee, filed an "affidavit of illegality" in accordance with the state statute, alleging substantially (1) that he and the parties at interest had no notice of the hearing of said case by the master, and was not there represented by counsel, nor did he have notice nor was he represented when said decree was taken; but well knowing that Sarah M. Ryan's death extinguished the trust estate against which the bill was proceeding, and having received no notice as aforesaid of said proceedings, he believed the whole case abandoned, and never heard of the master's report or decree until the execution was levied. He submitted that a decree taken against the trust estate of a deceased life-tenant was wholly void. (2) The affidavit alleged that the execution was proceeding illegally because the advertisement misdescribed the property, failed to follow the decree, no notice of the levy was given as required by law, the sale was advertised to occur at the wrong place, etc.

The case was heard upon a motion to dismiss the affidavit of illegality, the sole ground urged being that this remedy was inappropriate; that defendant had no remedy except a bill of review.

Bacon & Rutherford and E. F. Best, for Baldwin, Starr & Co.

Hill & Harris, for McGriff, trustee.

SETTLE, J., (orally.) I could find support for the conclusion I have reached in this case in the rule adopted by this court in reference to

the remedy known in the state laws as "an affidavit of illegality," this being a mode by which a defendant in an execution may set up grounds showing that an execution has issued or is proceeding illegally. Code, § 3664. The rule referred to is the forty-third rule of this court, and is as follows: "In cases of illegality, the marshal shall observe the rules applicable to sheriffs in like cases." It is conceded that the sheriff in a "like case" would be bound to accept an affidavit of illegality, and arrest the sale under the execution. Code, § 4215. But I do not think it necessary to place the decision upon this ground. The following considerations have most weight with me in leading to the conclusion reached, which is to refuse the motion to dismiss the paper filed as an affidavit of illegality.

Here is a writing, by whatever name it be called, by which it is shown to the court of equity that its own decree and process, issued upon its decree, are about to be abused, and injustice is about to result. The property of certain remainder-men, whose interest has now vested, and of a third party who claims under a paramount title, is about to be sold, as alleged, under an execution against the estate of a life-tenant in the said property, who was dead when the decree was issued, and whose estate perished with her death. Whether this pleading now before the court be treated as an affidavit of illegality, or as a motion supported by that affidavit, which is my inclination, I am satisfied that the court has such power over its own decree and its own process as to suspend the enforcement thereof until a hearing can be had on the case made. If the information that its process was about to be abused was brought to the knowledge of the court by its own officer, I am not sure but that it would even then be the right and duty of the court to check that abuse, and prevent injustice, *ex suo mero motu*.

It is said that the only remedy in a case like this is the bill of review. I do not think so. The supreme court have virtually held that in matters of this character the form of the proceeding is less important than the substance of the right; and that in some instances mere motions, supported by affidavit, are the most appropriate modes of relief. *Krippendorf v. Hyde*, 110 U. S. 276; S. C. 4 Sup. Ct. Rep. 27. If there were no remedy in a case of this kind, nor alleged to exist, it would be the right and duty of the court to frame one.

LEHIGH VALLEY COAL CO. v. HAMBLÉN and others.

(District Court, N. D. Illinois. March 9, 1885.)

1. TRADE NAME—FOREIGN CORPORATION—CORPORATION ASSUMING SAME NAME—INJUNCTION.

A United States circuit court cannot interfere by injunction, at the instance of a corporation organized under the laws of another state, and prevent any necessary step from being taken, under the statute of the state in which such court is located, in the creation of a corporation bearing the same name as the foreign corporation.

2. SAME—RELIEF, WHEN GRANTED.

Whether relief could be granted after the creation of the corporation, and use of the name of the foreign corporation in fraud of its rights, is not determined.

In Equity.

F. Ullmann, for complainant.

Beck & Roberts, for defendants.

GRESHAM, J. The complainant company was organized under the laws of Pennsylvania, in 1875, for the purpose of mining anthracite coal in that state, and selling the same there and elsewhere. It owns valuable coal mines in Pennsylvania, and does a large and lucrative business. For a number of years it has had an extensive and profitable business in the west and north-west; and for convenience in the management of that business it has maintained an agency at Chicago, where it owns real estate, including a dock worth \$200,000, and has on hand coal worth \$400,000. The defendants in this suit, wishing to create a corporation in Illinois bearing the same name as the complainant, to carry on the same business, filed their articles of association with the secretary of state on the twenty-sixth of December, 1884, under the general laws of Illinois authorizing the creation of corporations. The secretary of state thereupon issued to the defendants a license as commissioners to open books for subscription to the capital stock of the new corporation, to be known as the Lehigh Valley Coal Company. This suit was brought to prevent the defendants, by injunction, from receiving stock subscriptions, or taking any other steps necessary to be taken under the statute, in the creation of the new corporation.

The object of the defendants in causing an Illinois corporation to be created, bearing the same name as the complainant company, is obvious. They hope, by this means, to secure the benefit of part, at least, of the patronage which the complainant has acquired. Unwilling to engage in open, manly competition with the complainant and others carrying on the same business, the defendants resort to a trick or scheme whereby they hope to deceive the public, and obtain an unfair advantage of the complainant. Such conduct might be fairly characterized more harshly; and it is with extreme reluctance that I deny the complainant the relief prayed for.

The complainant is a foreign corporation, and it is only by comity

that it is doing business in Illinois at all. The state can say to it any day, "Go!" and it must go. That being so, I do not see that the complainant has a legal right to say a corporation shall not be created in Illinois bearing its (the complainant's) name. If the state of Illinois may create a corporation bearing the same name as the complainant,—and it certainly can,—this court has no right by injunction to prevent anything from being done under the state law which is necessary in the creation of such a corporation. The commissioners perform a function under the laws of the state in the formation of the corporation. If they are not officers of the state they are instrumentalities employed by the state. If they can be enjoined from receiving stock subscriptions under the license issued to them by the secretary of state, I do not see why the latter might not be enjoined from issuing a license, or doing anything else under the state statute. The general law authorizing the secretary of state to issue a license to commissioners to receive stock subscriptions provides that no license shall be issued to two or more companies having the same name. Before bringing this suit the complainant should have brought to the attention of the secretary of state the matters alleged in the bill. He might, on a proper application, have revoked the license to the defendants, unless they adopted another name for their company. I do not think this court can interfere by injunction, at the instance of a foreign corporation, and prevent any necessary step from being taken under the statute of this state in the creation of a corporation.

I do not say what may be done if the defendants succeed in creating their corporation bearing the complainant's name, and a suit shall be brought by the complainant to prevent individuals claiming to be officers or managers of such corporation from interfering with the complainant's business, as already stated.

The temporary injunction heretofore granted is dissolved, and the bill is dismissed.

PENNSYLVANIA COAL Co. v. DOUGLAS and others.

(*District Court, N. D. Illinois.* March 9, 1885.)

This case is in all respects similar to *Lehigh Valley Coal Co. v. Hamblen*, ante, 225, and the bill is dismissed for the reasons already given.

RICHARDSON and others v. DAY and others.

(Circuit Court, N. D. Illinois. February 16, 1885.)

INSOLVENCY — ILLINOIS STATUTE — FRAUDULENT PREFERENCE — ACTION TO SET ASIDE.

No suit can be brought against the assignee of an insolvent, and a creditor to whom he has made a conveyance in fraud of his other creditors, until a demand has been made upon the assignee to sue, and he has refused so to do.

In Equity.

Flower, Remy & Gregory, for complainants.

S. D. Puterbaugh and H. B. Hopkins, for defendants.

GRESHAM, J. The demurrer to the bill in this case was argued last Monday. Day Bros. & Co. were wholesale and retail dry-goods merchants at Peoria, Illinois. On the twenty-eighth of September, 1884, this firm was indebted to the defendant Charles B. Day, late a member of the firm, and a brother of one of the partners of the firm, in the sum of \$200,000, and he was liable on the firm's paper for \$500,000 more. On this date the firm transferred to Charles B. Day its entire stock of goods, worth \$300,000, in discharge of the amount due him, and to secure him against loss on account of his liability upon the firm's paper. Charles B. Day at once took possession of the property transferred to him by bill of sale, which was the entire stock of goods, and the firm at once suspended and ceased to do business. On the ninth day of October following, the insolvent firm made an assignment of their remaining property, under the statute of Illinois, to the defendants Jack and Puterbaugh, for the benefit of the rest of their creditors. The transfer to C. B. Day included the entire assets of the firm, except some bills receivable, the face value of which was \$40,000, but the actual value of which was less than \$20,000. The bill avers that in order to evade the statute of Illinois governing assignments by insolvent debtors, and prohibiting preferences, it was agreed between the firm and Charles B. Day that the former should, by a bill of sale, transfer to the latter their entire stock of goods by way of preference over the other creditors.

The bill also alleges that Jack and Puterbaugh, the assignees, have neglected to take any measures for the recovery of the property transferred to C. B. Day, and that they do not intend to impeach the transaction between him and the assignors. The complainants, who have a claim against the insolvent estate amounting to \$7,700, bring the suit to recover the property transferred to C. B. Day, and have the proceeds thereof equally divided among all the creditors.

If it was true that the insolvent firm had determined to make an assignment under the state law, and that C. B. Day knew of the insolvency and of this disposition, and, for the purpose of evading the provisions of the law and preferring C. B. Day, it was agreed that the transfer should be made to him first in pretended payment of his debt,

and that a formal assignment should be made subsequently, such a palpable evasion of the statute might not be sustained. But that question is not presented for decision. It is clear that no suit can be brought by the creditors against the assignees and Dav until a demand has been made upon the assignees to sue, and they have refused to do so. The bill does not allege that before this suit was brought the creditors requested the assignees to sue, and they refused to comply. The assignees are the proper parties to bring all suits to recover property belonging to the estate.

Without expressing an opinion upon any of the other questions presented by the demurrer, it was sustained solely on the ground that the suit was brought by a creditor without a demand being first made upon the assignees to bring the suit.

BROWN v. FISK.¹

(Circuit Court, E. D. Missouri. March 20, 1885.)

1. JURISDICTION—LIABILITY OF STOCKHOLDERS—REV. ST. MO. §§ 736, 745.

A creditor who recovers judgment in a state court against a corporation cannot, under the Missouri Statutes, while the corporation remains undissolved, maintain an action at law in this court against a stockholder in the corporation to recover an amount due from him on unpaid stock.

2. SAME—EQUITY.

In the absence of any statutory proceedings such matters are only cognizable in equity.

Demurrer to Petition.

Fred. T. Ledergerber, for plaintiff.

Geo. D. Reynolds, for defendant.

TREAT, J., (orally.) This is an action brought by a judgment creditor of a railroad corporation against the defendant, as a stockholder, for the amount due from him on unpaid stock. The original judgment was had in the circuit court of Cape Girardeau county. This suit is an independent action brought by the judgment creditor against this stockholder in the St. Louis circuit court,—an ordinary action at law. Matters of this nature are cognizable in equity, and only in equity, unless there is some statutory proceeding with respect thereto. That has been fully determined, notably in a case in 106 U. S. *Patterson v. Lynde*, 106 U. S. 519; S. C. 1 Sup. Ct. Rep. 432.

Now, the Missouri statute has two provisions:

(1) Execution having been returned *nulla bona*, to cite in a stockholder and award what is in the nature of a judgment, that is a new execution against him for the portion of the stock unpaid. But that must be done in the court where the original judgment was rendered. (2) There is another provision

¹Reported by Benj. F. Rex, Esq., of the St. Louis bar.

that, where the corporation is dissolved, you may proceed by an independent suit.

Now, nothing of the kind has occurred in this case. The party has no standing under the statute at all, nor has he pursued the remedy which the statute prescribes. So far, then, as this court is concerned, a common-law action cannot be tried in this way against a stockholder of an undissolved corporation.

Demurrer sustained, and judgment entered for defendant.

WILSON v. VAUGHN and others.

(Circuit Court, D. Kansas. March 4, 1885.)

EXEMPLARY DAMAGES—WILLFUL REFUSAL OF COUNTY COMMISSIONERS TO LEVY TAX TO PAY JUDGMENT.

In an action against county commissioners to recover damages for a willful refusal on their part to levy a tax on taxable property in a township to pay off a judgment held by plaintiff against such township, in obedience to a peremptory writ of *mandamus* from the United States circuit court, plaintiff will be entitled to recover exemplary or punitive damages, although the actual damage sustained by him was merely nominal.

Motion for New Trial.

Botsford & Williams, for plaintiff.

Ritter & Anderson, for defendants.

FOSTER, J. This action was brought by the plaintiff against the defendants, who are the commissioners of the county of Cherokee, to recover damages for a willful refusal on the part of the said commissioners to levy a tax on the taxable property of Salamanca township, in said county, to pay off a judgment held by plaintiff against said township, in obedience to a peremptory writ of *mandamus* from this court. The recovery of the judgment, the issue and service of the writ commanding the levy of the tax, and the willful disobedience thereof by the defendants, were admitted on the trial, and two of the defendants on the witness stand testified that it was not their purpose to levy the tax hereafter. The plaintiff claimed as his damages the full amount for which the writ was issued,—about \$19,000.

On the trial the court instructed the jury as follows:

"Gentlemen of the Jury" In this case, under the pleadings and evidence, the plaintiff is entitled to recover against the defendants, as it was clearly the duty of the defendants to have levied the tax as commanded in the peremptory *mandamus*, and which they willfully refused to do. The plaintiff is entitled to recover his actual damages sustained by reason of such failure and refusal on the part of defendants. But inasmuch as he has not lost his debt or judgment, or any part thereof, and as there is evidence to show that the debtor township is fully able to respond to his debt, and that the refusal of the defendants to levy the tax has only delayed the collection of his debt and the

accruing interest, his damages are consequently presumed to be but nominal, and you will so find in your verdict.

"In this case there is also another element of damages under which the plaintiff may also recover, and that is exemplary or punitive damages. The action of the defendants, to say nothing of being a contemptuous disregard of the mandate of this court, was oppressive of the plaintiff, and a clear and willful violation of his legal rights, and, in my opinion, presents a case for consideration of exemplary damages on the part of the plaintiff against the defendants. I cannot lay down any definite rule to govern you in fixing these damages. They are given by the law as a punishment of an aggravated violation of plaintiff's rights, and they should be such as, under all the circumstances and facts shown, are commensurate with the offense; and this you, gentlemen, in the exercise of your sound judgment, are to fix and determine under the evidence produced in the case.

"The court instructs the jury that this, being an action of tort, in which defendants' refusal was willful, continuous, and unlawful, you are at liberty to award plaintiff exemplary damages against defendants, in addition to the damages awarded, as and by way of compensation to plaintiff. The court instructs the jury that on the issues made by the pleadings, and on the uncontradicted evidence in the case, your verdict must be for plaintiff, finding the issues in his favor."

The jury returned a verdict for plaintiff for \$500, and the defendants now move the court to set aside the verdict and grant a new trial, for error of law in the said instructions to the jury.

The particular matter excepted to is that part of the charge in reference to exemplary or punitive damages. The defendants claim that, as the compensatory or actual damages sustained by the plaintiff were but nominal, he cannot recover exemplary damages. In support of this rule counsel have cited two cases,—*Stacy v. Portland Publishing Co.* 68 Me. 387, and *Maxwell v. Kennedy*, 50 Wis. 647; S. C. 7 N. W. Rep. 657. The former was an action for libel, and the latter for slander. In the action for libel the trial court refused to instruct for plaintiff for exemplary damages *eo nomine*, but told the jury they might add as actual damages for any aggravation of the elements of injury occasioned by the express malice of the person who published the article complained of. The jury gave the plaintiff one dollar damages; and the court refused to reverse the case, and remarked, among other things, as follows:

"Taking the case as it resulted, we are satisfied that the plaintiff has sustained no injury in this respect. The legal signification of the verdict is either that there was no actual and express malice entertained towards plaintiff by the defendant's agent, or that, if there was, it did the plaintiff no injury."

In the slander case the trial court instructed the jury that certain mitigating circumstances shown by defendant should be considered by them in reduction of compensatory damages only, and not exemplary damages. The appellate court held this to be error; that no distinction should have been made between the two classes of damages in respect to mitigation. Both cases support the rule contended for by these defendants in cases of that kind. Whether that doctrine

may be generally regarded as accepted law in such cases, I have not sufficiently examined the books to form an opinion. But, if such is the fact, I do not think the rule can be applicable to a case of this kind.

In *Day v. Woodworth*, 13 How. 371, the supreme court lay down the law as follows:

"It is a well-established principle of the common law that in actions of trespass, and all actions on the case for tort, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offense, rather than the measure of compensation to the plaintiff. * * * By the common as well as by statute law men are often punished for aggravated misconduct, or lawless acts, by means of a civil action, and the damages inflicted, by way of penalty or punishment, given to the party injured."

In *Milwaukee R. Co. v. Arms*, 91 U. S. 493, the court, speaking of damages, say:

"In ascertaining its extent, the jury may consider all the facts which relate to the wrongful act of the defendant, and its consequences to the plaintiff; but they are not at liberty to go further unless it was done willfully, or was the result of that reckless indifference to the rights of others which is equivalent to an intentional violation of them. In that case the jury are authorized, for the sake of public example, to give such additional damages as the circumstances require. The tort is aggravated by the evil motive, and on this rests the rule of exemplary damages."

The supreme court of Kansas has held, in a case of trespass *quare clausum fregit*, that exemplary damages may be recovered where the compensatory damages are but nominal. *Hejley v. Baker*, 19 Kan. 9.

1 Suth. Dam. 724, 748, states the rule in the following language:

"If a wrong is done willfully,—that is, if a tort is committed deliberately, recklessly, or by willful negligence, with a present consciousness of invading another's rights or of exposing him to injury,—an undoubted case is presented for exemplary damages. One who does an act maliciously must be careful to see that the act is lawful, otherwise, though the actual injury may be slight, the exemplary damages may be considerable."

In the case at bar the plaintiff is deprived of a clear legal right through the wrongful and willful conduct of the defendants. They alone have the power to levy the tax, and it is their duty, under the law and the command of the court, to levy it. By no other means can the plaintiff obtain his rights, and it cannot be denied that the action of the defendants is wrongful and oppressive. It was held by the court that the plaintiff's compensatory damages are but nominal, as he has not lost his debt, but has only suffered delay in its collection; but it is in the power of these defendants and their successors in office, by defying the law, to delay him indefinitely in its collection. It is said that defendants can be, and have been, punished for contempt in refusing to obey the writ of *mandamus*. That is true; but that punishment is not to redress the wrong done the plaintiff, but rather to vindicate the authority and dignity of the court. The defendants have been committed to the custody of the marshal

for imprisonment until they comply with the commands of the writ; but in a community where the popular sentiment is all adverse to levying the tax, it is likely the imprisonment of defendants, like the plaintiff's compensatory damages, is but *nominal*. A tax-ridden people are deserving of sympathy, especially when the burden has been fraudulently imposed, though it was done by the dishonesty of their own agent; but neither courts nor communities can afford to deny to any orator the exact letter of his legal rights; and it is not a pleasant or consistent thing to inveigle against nullification of the laws, and cry out "law and order," and in the same breath applaud nullification, lawlessness, and disorder.

The motion to set aside the verdict and for a new trial must be overruled.

OREGONIAN RY. CO., Limited, v. OREGON RY. & NAV. CO.

(Circuit Court, D. Oregon. March 18, 1885.)

1. CORPORATION—ESTOPPEL TO DENY CORPORATE EXISTENCE OR POWER.

A person contracting with an ostensible corporation to do an act not prohibited by law, is estopped, in an action by said corporation on said contract, to deny the existence of the corporation, or its power to enter into such contract.

2. SAME—IN ABATEMENT OR BAR.

The want of corporate existence may be pleaded in abatement or bar; but the want of capacity to sue in a particular case must be pleaded in abatement.

3. SAME—FOREIGN RAILWAY CORPORATIONS.

By the act of October 21, 1878, (Sess. Laws, 95,) foreign railway corporations, for the purpose of constructing and operating railways in this state, are placed on the footing of domestic corporations.

4. SAME—THE OREGONIAN RAILWAY COMPANY.

By the act of October 22, 1880, (Sess. Laws, 56,) this body was recognized as an existing corporation, lawfully engaged in the construction and operation of a railway in this state, from Portland to the head of the Willamette valley, with the power to dispose of the same by lease or otherwise.

5. SAME—ULTRA VIRES.

In an action against a corporation on a contract made by it, the corporation is not estopped to show that such contract was beyond its power to make.

6. SAME—OREGON CORPORATIONS, POWER OF.

The Oregon corporation act of October 11, 1862, (Laws Or. 524,) authorizes three or more persons to form a corporation to engage "in any lawful enterprise, business, pursuit, or occupation;" and this includes the power to buy and sell or lease a railway.

7. SAME—ESTOPPEL—EXECUTED CONTRACT.

The contract of a corporation, though invalid for want of power in the corporation to make it, may, if not illegal, be enforced against such corporation, where it has had the benefit of the consideration therefor; but a covenant to pay the rent reserved on a lease six months in advance, is not such a case. The consideration for such a promise is the future use and occupation of the property, and not the past one.

8. SAME—POWER OF DIRECTORS AND SHAREHOLDERS.

The corporate powers of a corporation, formed under the law of this state, are vested in the directors; and the validity of their acts is not affected by the assent or dissent of the shareholders; and the powers of the latter are limited to the matters which concern the internal organization of the corporation.

9. SAME—SUBSCRIPTION TO CAPITAL STOCK.

A subscription to the capital stock of a corporation is thereby pledged to the use or maintenance of the purposes of its organization, as specified in its articles, and may be applied to such of them as the directors shall determine.

Action on Covenant in Lease to Recover Rent.

John W. Whalley and William B. Gilbert, for plaintiff.

Cyrus Dolph and Charles B. Bellinger, for defendant.

James C. Carter also submitted a *written* brief for defendant.

DEADY, J. This action is brought by the plaintiff, a corporation alleged to have been formed in Great Britain under the "Companies Act of 1862," against the defendant, a corporation formed under the Oregon corporation act of 1862, to recover the sum of \$68,131, alleged to be due the plaintiff on a lease of its railway, in Oregon, commonly called the "Narrow Gauge" road, for the half year commencing May 15, 1884. The case was before this court in December last, on a motion to strike out the second amended answer of the defendant as "frivolous and immaterial," and for judgment on the complaint, which was denied, for the reasons then given. 22 F.R.D. 245. At the same time the defendant had leave to file a third amended answer, containing two additional defenses.

It appears from the amended complaint, filed on August 15, 1884, that the plaintiff became a corporation on April 30, 1880, by certain persons making and delivering for registry, under the companies act aforesaid, a "Memorandum of Association" and "Articles of Association," as therein alleged and set forth, with a registered office at Dundee, in Scotland, and power, among other things, to own, purchase, construct, operate, lease, and sell any railway in Oregon; that the defendant became a corporation under the Oregon act aforesaid on June 13, 1879, by certain persons making and filing articles of incorporation as therein alleged and set forth, with its principal place of business at Portland, in Oregon, and power, among other things, "to purchase or consolidate with, or lease or operate and maintain, on such terms as may be agreed upon," any railway in Oregon; that on August 1, 1881, the plaintiff was the owner of a certain railway in Oregon, and then demised the same to the defendant, by an instrument in writing, for the term of 96 years, for and upon a yearly rent of 28,000 pounds sterling, which rent the defendant thereby expressly agreed to pay the plaintiff in half-yearly installments in advance, and that the defendant, by its proper officers, duly executed said instrument,—they being first thereunto duly authorized by a vote of the directors; and that the defendant thereupon entered into the possession of said railway and operated the same, but has failed and refused to pay the installment of rent falling due on May 15, 1884.

It is also stated in the complaint that on said last-mentioned date the defendant, pretending that neither party to said lease was authorized to execute the same, offered to restore the demised property to the plaintiff, but not in as good a condition as when received by the

defendant, which offer the plaintiff refused to accept; and thereupon, to prevent the loss and injury that might result from suddenly discontinuing the operation of the road, it was agreed between the plaintiff and defendant that the latter should retain the possession thereof, and continue to operate the same, for a period of six months thereafter, during which time this action was commenced, to-wit, on June 28th; but neither such agreement, nor the action of either party thereunder, was to in any way prejudice its claim or contention as to the validity of said lease, or affect its rights in the premises. By the amended answer now filed, as well as in the former one, the defendant admits that it is a corporation, formed under the laws of Oregon, and that its president and assistant secretary signed the writing aforesaid, and affixed thereto the corporate seal, in pursuance of a resolution of its directors, as alleged in the complaint; that in pursuance of said writing it entered into the possession of said railway, and operated the same and paid the rent therefor, as therein provided, until May 15, 1884, when it offered to return the same to the plaintiff, which offer was declined, and that it has since retained the possession thereof only under a special agreement with the plaintiff, as above stated; that the said companies act of 1862 is correctly set forth in the amended complaint, and that it comprises all the law of Great Britain touching the power and authority of corporations created or existing under the laws thereof; and denies—

(1) That the defendant is or ever was a corporation formed or existing under the companies act of 1862, or otherwise, or at all; (2) that neither said companies act, nor any other law of Great Britain, confers on the plaintiff the power to lease said railway; (3) knowledge or information sufficient to form a belief, (a) as to whether a memorandum or articles of association were made and delivered for registry in pursuance of said companies act or at all, (b) or as to whether the plaintiff has a registered office at Dundee, in Scotland; (4) that the plaintiff is or ever was authorized to own, purchase, construct, operate, lease, or sell any railway in Oregon; (5) that either the plaintiff or defendant ever had the power or authority to execute said instrument in writing or any indenture for the leasing of said railway, or that the stockholders of the defendant ever authorized or assented thereto, and that said "pretended lease was and is unauthorized and void," and that any sum of money is due the plaintiff from the defendant; and avers "that it has fully paid the rental provided for in said pretended lease" for the period during which it held possession of said railway thereunder, to-wit, for the term ending May 14, 1884.

The further defenses contained in the answer are briefly these:

(1) The railways which "the defendant was and is organized to construct and operate, and the *termini* of which were specified in its articles of association," are east of Portland, and do not embrace the railway alleged to have been demised to the defendant, nor any one to the south of said city, and that said railway forms no part of and has no "near connection" with the said roads of the defendant. (2) That prior to the execution of said pretended lease "the capital of the defendant had been contributed and applied in the construction and equipment" of railways, the *termini* of which are specified in its articles of association, and which have "no near connection" with the one mentioned in said lease; and that said lease was never authorized or as-

sented to by the stockholders of the defendant, and was a wholly unauthorized attempt by the officers thereof "to divert and subject the capital of defendant to a wholly new object and enterprise not contemplated when said capital was contributed and expended."

The plaintiff demurs to this answer:

(1) To so much thereof as denies the corporate existence or due organization of the plaintiff, or its power to make the contract herein sued on, for that the defendant ought not to be allowed or heard to say or allege the same contrary to its deed of August 1, 1881, as aforesaid; (2) to so much thereof as denies the power and authority of the defendant to make said contract, for that the same does not constitute a defense; and (3) to the first and second special defenses therein, for that "the new matter therein set up" does not constitute a defense.

The plaintiff also moves to strike out certain portions of the answer, as follows:

(1) The admission that the defendant is and was a corporation under the laws of Oregon, coupled with the denial that it ever had the power to purchase or lease a railway in Oregon, because the admission is redundant, and the denial sham and frivolous; (2) the admission that the defendant entered into possession of the railway under the alleged lease, coupled with the denial that the possession has been held thereunder since May 15, 1884; (3) the denial that at the time the defendant offered to restore the road to the plaintiff, it was not in as good condition as when received by the defendant, because the same are frivolous and irrelevant; and (4) "the rest and residue" thereof, not hereinbefore asked to be stricken out or included in the demurrer thereto, because the same is irrelevant.

The demurrer and motion were argued by counsel and submitted together.

This is substantially an action on the covenant of the defendant, contained in the lease, to pay the rent therein reserved, and its liability thereon does not depend on its use or occupation of the property. *Mills v. Auriol*, 1 Smith, Lead. Cas. 910. Therefore the allegations in the pleadings concerning the special agreement under which the defendant has operated the road since May 15, 1884, are immaterial and not relevant to the controversy involved in the action. And the same may be said of the allegations concerning the plaintiff's compliance with the laws of this state concerning foreign corporations doing business herein, as there are no laws on the subject applicable to the plaintiff. *Oregon & W. T. & I. Co. v. Rathbun*, 5 Sawy. 32.

When the case was before the court on the motion to strike out the answer, counsel for the plaintiff made the point that the denial of the plaintiff's corporate existence was a plea in abatement, and therefore waived by being pleaded with matter to the merits. But the court, admitting the rule, held that the matter was pleaded in bar, as it might be, and refused to strike it out. 22 FED. REP. 248. In the brief now filed in the case, counsel returns to the argument, and insists that this denial of the corporate existence is a plea in abatement; citing *Conrad v. Atlantic Ins. Co.* 1 Pet. 450, where it is said

that a plea to the merits admits the capacity of the plaintiff to sue, and that a want of corporate capacity should be taken advantage of by a plea in abatement. But the capacity of the plaintiff to sue is not all that is involved in a denial of its corporate existence.

In *Society, etc., v. Pawlet*, 4 Pet. 501, the court, in considering the question whether the plaintiffs had a right to hold land, and therefore to maintain an action for the possession thereof, says:

"No plea in abatement has been filed, denying the capacity of the plaintiff to sue, and no special plea in abatement or bar that there is no such corporation as stated in the writ. * * * If the defendant meant to have insisted on the want of corporate capacity in the plaintiffs to sue, it should have been insisted upon by a special plea in abatement or bar."

A corporation may exist for many purposes and yet not have capacity to sue in a particular case, and a plea in abatement is the proper mode of taking advantage of that fact; but the defense of a want of corporate existence goes further, and may be pleaded either in abatement or bar. But the latter is the most effective, and unless the matter is specially pleaded, as in abatement, it will be considered in bar or to the merits.

The demurrer to the answer raises three questions:

(1) Is the defendant estopped to deny the corporate existence and due organization of the plaintiff, or its power to enter into the contract sued on? (2) was the defendant authorized to enter into this contract? and (3) is the new matter contained in the two special defenses, or either of them, a bar to the action?

For the plaintiff it is contended that the first two of these questions must be answered in the affirmative, and the last one in the negative. The argument is that the defendant, having contracted with the plaintiff, as a corporation existing under the laws of Great Britain, by the corporate name of "The Oregonian Railway Company, Limited," for the lease of its railway, is now estopped to deny such corporate existence, or the power to make the contract in question.

When this case was under consideration before, it was said by the court, (22 Fed. Rep. 249:)

"The law is well settled that a person who contracts with an *apparent* corporation, as such, is estopped, when sued on such contract, to say that the plaintiff had no corporate existence or power to make such contract. A corporation, like an individual, when sued on a contract, may set up as a defense to the action its want of power or capacity to make such contract; but the party with whom it contracts cannot set up such want of power or capacity as a defense to an action by the corporation for a breach thereof. And the reason of the distinction is that legal disability, as in the case of a minor, is a defense personal to the party who is under it, and cannot be taken advantage of by another." Citing *Cowell v. Springs Co.* 100 U. S. 61; *Bigelow, Estop.* (3d Ed.) 464, 465.

But counsel for the defendant now question the soundness of the rule laid down in *Bigelow, supra*, that legal disability can only be availed of by the party who labors under it, and cites *Bank of Mich-*

igan v. Niles, Walk. Ch. (Mich.) 99; *Ogdensburg, etc., Co. v. Vermont, etc., Co.* 6 Thomp. & C. (N. Y.) 488; and *Middlesex R. Co. v. Boston, etc., Co.* 115 Mass. 347, to the contrary. The first case is not produced, but only a citation from it, in *Mor. Corp.*, where it is cited (section 87) in support of the proposition, "A corporation cannot be compelled by legal process to do an act unauthorized by its charter," which is a very different thing from the purpose for which it is cited here. The case appears to have been a suit for specific performance of a contract for the sale of real property, which was probably not merely void as being *ultra vires* the plaintiff corporation, but actually illegal, because prohibited by its charter.

The second is not in point, for the plaintiff corporation brought the suit to determine the validity of its lease to the defendant, and invoked the judgment of the court thereon. The demurrer to the complaint was sustained at the special term of the supreme court; and the decision of the court at the general term, which is cited, is only to the effect that the plaintiff had not ratified the lease by accepting rent thereon pending the appeal from the order sustaining the demurrer to its complaint; and for the very good reason that if the lease was *ultra vires* because the corporation had no power to make it, it could not be ratified. And the last case is wider still of the mark. A horse railway was leased by a corporation, and an action was brought by the assignee of the lessee against the lessor for money for repairs; claiming that, by the terms of the lease, the latter was bound for one-half of such expense. The defendant corporation set up the invalidity of the lease, because of its want of power to make it, and the court sustained the objection, and gave judgment accordingly.

Two cases decided in this court (*In re Comstock*, 3 Sawy. 218, and *Semple v. Bank*, 5 Sawy. 88) are also cited to show that the legal disability of a corporation to make a contract may be set up as a defense in bar of an action thereon by such corporation. But the act or contract of the foreign corporation, the validity of which was contested in these cases, was not only unauthorized in this state, but was absolutely prohibited therein, and therefore illegal; and this, without any reference to the power or capacity of the corporation in the country of its formation and domicile. The same may be said of the cases *Rochester Ins. Co. v. Martin*, 13 Minn. 59, (Gil. 54;) *Farmers', etc., Bank v. Baldwin*, 23 Minn. 198; and *Bank v. Pierson*, 24 Minn. 140, cited by counsel for the defendant for the same purpose.

When it appears that the existence of a corporation, or the exercise of a particular power by it, is prohibited by statute or the common law, in my judgment any one who has entered into a contract with such corporation may plead the fact of the prohibition to exist or make the contract in question as a defense to an action thereon. In such case the contract is not only unauthorized, but is illegal and contrary to public policy. As was said by this court in *Re Comstock*, 3 Sawy. 218:

"No one is estopped to show that an act upon which a party claims a right is illegal simply because he was a party to it, even *in pari delicto*. If the matter concerned the parties to the transaction alone, the rule might be otherwise. But the interest of society, in whose behalf the act is prohibited, is paramount to private equities."

But where the law authorizes the formation and existence of the alleged corporation, with power to make the contract in question, then a party thereto ought not and cannot be heard, in an action thereon by such corporation, to deny its due formation or legal existence, with the power to make said contract.

Now, in this case, it appears by section 6 of the law of Great Britain, called the "Companies Act of 1862," that "any seven or more persons, associated for any lawful purpose, may, by subscribing their names to a memorandum of association, and otherwise complying with the requisitions of the act in respect of registration, form an incorporated company, with or without limited liability." Under this law the plaintiff might have been incorporated for "any lawful purpose." Nothing appearing to the contrary, a purpose to construct, purchase, own, operate, or lease a railway is as lawful as a purpose to engage in the manufacture or sale of any of the common necessities of life. And it was and is at liberty, under the comity of nations, and until the legislature shall prohibit it, to pursue such purpose or exercise such powers in Oregon. True, it could not acquire the right of way over another's property by appropriation or condemnation, as a domestic corporation may do, unless specially authorized by the legislature. But it might do so with the consent of the owner, and the result would be the same. There is no mystery or monopoly in the railway business in Oregon. Any natural person, or corporation formed for that purpose, may, if he or it has or can obtain the right of way, construct and operate a railway between any points in this state and dispose of the same as freely and absolutely as if it were a steam-boat or mill.

It follows that the defendant, having taken a lease of this railway from the plaintiff, by its corporate name of "The Oregonian Railway Company, Limited," is estopped, in this action on its covenant in such lease to pay the rent reserved therein, to deny the corporate existence or due organization of the plaintiff, or its power to make such lease. After not a little confusion and uncertainty on the subject, this, in my judgment, is the final conclusion reached by the courts and text writers; and the justice and expediency of the rule has secured it a place in the draught of that well known and considered work, "The Civil Code of the State of New York," in these apt and plain words:

"Sec. 382. One who assumes an obligation to an *ostensible* corporation, as such, cannot resist the obligation on the ground that there was in fact no such corporation, until that fact has been adjudged in a direct proceeding for that purpose."

But by the act of October 21, 1878, (Sess. Laws, 95,) this corporation was placed on the footing of a domestic corporation in Oregon. That act provides "that any foreign corporation incorporated for the purpose of constructing, or constructing and operating, or for the purpose of or with the power of acquiring and operating, any railway, * * * shall, on compliance with the laws of this state for the regulation of foreign corporations transacting business therein, have the same rights, powers, and privileges" as a domestic corporation formed for such purpose, and no more. The effect of this act is to make the plaintiff in some respects an Oregon corporation. Its existence, power, and capacity are still derived from and may be measured by the law of Great Britain, and the terms of its organization thereunder. But in the exercise of this capacity and power as owner, builder, or operator of a railway in this state, it comes under and is subject to the regulations and limitations of the Oregon corporation act, in the case of domestic corporations of like character and purpose. It may be admitted, then, that if by the law of this state a domestic railway corporation is prohibited from leasing its road, a foreign corporation owning a railway herein would be under the same disability.

However, by the act of October 22, 1880, (Sess. Laws, 56,) entitled "An act to grant the Oregonian Railway Company, Limited, the right of way and station grounds over the state lands, and terminal facilities upon the public grounds at the city of Portland," the plaintiff was directly recognized as an existing corporation lawfully engaged in the construction and operation of a railway in Oregon, from "Portland to the head of the Wallamet valley," and as such there was granted to it "and to its assigns, the owners and operators" of said railway, certain valuable "rights, privileges, easements, and property," as suggested in the title thereof. The effect of this act is clearly to establish, so far as this state and this court is concerned, the legal right of the plaintiff to construct, own, and operate this road, and in my judgment to dispose of it, either absolutely or for a term of years. *Society, etc., v. Pawlet*, 4 Pet. 501. The grant therein contained is made to the plaintiff and its "assigns;" while a proviso in section 1 declares—

"That the said Oregonian Railway Company, Limited, or its assigns, shall have no power to sell, convey, or assign the premises or rights hereby granted, or any part or parcel thereof, to any person, persons, firm, or corporation, save only with and as a part and parcel of and as appurtenant to the railway now built and owned by said company, and now in process of construction by it."

Plainly this implies that the plaintiff had the power to assign its road,—dispose of it,—and might also assign or dispose of "the premises and rights" then granted to it, in connection therewith, but not otherwise.

Had the defendant the power to make this contract? is the next question raised on this demurrer, though it should properly have been

made by a demurrer to the complaint. The denial in the answer, of the power of the defendant in this respect, does not controvert any fact in the complaint, and is nothing but a conclusion of law or a denial of one. But the question, however raised, is to be tried by the constitution and laws of the state, and the defendant's articles of incorporation thereunder. The constitution (art. 11, § 2) provides:

"Corporations may be formed under general laws, but shall not be created by special laws, except for municipal purposes. All laws passed pursuant to this section may be altered, amended, or repealed, but not so as to impair or destroy any vested or corporate rights."

On October 11, 1862, the legislature passed the first act in pursuance of this provision of the constitution, (Laws Or. 524,) which, with some comparatively unimportant amendments, has continued in force ever since. So far as I know, it is the next one in point of time to the British companies act of August of the same year, in which the subject of the formation and purpose of corporations is substantially divested of all exclusiveness and restraint, and put on the practical plane that a corporation is essentially nothing but a partnership, endowed with the capacity of acting as a single person under a particular name, and therefore that any and all persons should be allowed to incorporate themselves for the prosecution or transaction of any enterprise, business, pursuit, or occupation, not prohibited to individuals or partnerships. Accordingly, this act provides (section 1) that any three or more persons may incorporate themselves "for the purpose of engaging in any lawful enterprise, business, pursuit, or occupation," in the manner provided therein. All that is required is to make and file articles of incorporation specifying, (1) the name and duration of the corporation; (2) the enterprise, business, pursuit, or occupation in which it proposes to engage; (3) the place of its principal office; (4) the amount of its stock and the value of each share thereof; and, (5) if it is formed for the purpose of navigating any water, or building a bridge, canal, or road, the *termini* of such navigation, canal, or road, or the site of said bridge.

Subject to the provisions and limitations of the act, these articles of association are the charter of the corporation, and in the prosecution of its undertaking, and the management and disposition of its property, it is not subject to any other restraint than that which the law may impose in the case of natural persons in like circumstances. Whatever is not generally forbidden by the law of the land may be undertaken by a corporation thus formed for the purpose. Exclusive privileges are not allowed to any one; and the only policy indicated by the act is to promote the transaction of all kinds of business by means of corporations to be formed and dissolved at the pleasure of those particularly interested. Any number of corporations may be formed for the same purpose and at the same place; for instance, to keep a school, a store, a tavern, or to build and operate a steam-boat or railway between the same points. Nor is a corporation formed

under this act under any obligation to the public to maintain its existence, or carry on its corporate enterprise or business, any longer than the shareholders or a majority of them may think desirable. Whenever a majority of these, for any reason, vote to disincorporate, the life of the corporation is at an end, except that it may continue to exist, for the period of five years thereafter, for the purpose of winding up its affairs, including a final disposition of its corporate property, be the same a railway or a fish-wheel. Laws Or. p. 528, § 19; Sess. Laws, 1878, p. 91, § 2. In short, as was lately said by a distinguished jurist, in a brief for this defendant, in a case pending in the United States circuit court for the southern district of New York: "The Oregon system may be succinctly defined as free trade in corporations and free corporations."

In the consideration of the question as to the validity of a lease of corporate property made by a corporation formed under this system, the case of *Thomas v. Railroad Co.* 101 U. S. 71, so much relied on by the defendant, is in some respects altogether inapplicable. That was a case of a corporation created by a special act of the legislature of New Jersey, to build and operate a certain railway. The court held that the power to lease the road, not being specially given by the act of incorporation, nor fairly implied from anything contained therein, the contract of the corporation to that effect was *ultra vires* and void. In delivering the opinion of the court Mr. Justice MILLER says:

"Conceding the rule applicable to all statutes, that what is fairly implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers, and that the enumeration of these powers implies the exclusion of all others."

This rule is of universal application, and applies to a corporation formed under the law of Oregon as well as New Jersey. The articles of association, together with the corporation act under which they are made, constitute the charter of an Oregon corporation, and any act done by such corporation, not expressly or by fair implication authorized thereby, is *ultra vires* and void. It was also said, in the course of the opinion, that the contract of the New Jersey corporation was one "forbidden by public policy," and therefore beyond its power to make.

Whatever a corporation is "forbidden" to do, either directly by statute, or by a public policy fairly indicated by or deducible from the legislation of a state or country or the decisions of its courts, or both, is, of course, beyond its power to do. In such case the act is not only beyond the power of the corporation, and therefore invalid, but it is prohibited, and therefore illegal, and incapable of ratification, and any one dealing with the corporation is not estopped to allege and show such illegality. But the public policy on the subject of leasing railways in a state where corporations are not permitted for the purpose of constructing or operating them, except when created by a special act of the legislature for the construction or operation of a road be-

tween certain points, may be and manifestly is very different from that of a state like Oregon, where any number of corporations may be formed by the voluntary association of individuals, to build and operate railways when and where they think best, with power to disincorporate and dispose of their property at their own pleasure. And so, on this point, I do not regard the case of *Thomas v. Railroad Co.* applicable here.

The right of the defendant to make the defense of *ultra vires* as against the plaintiff, notwithstanding the express provision in its articles authorizing it to lease and operate any railway in Oregon, is already conceded in this opinion, upon the authority of *Bigelow, Estop.* (3d Ed.) 466. But the authorities are not uniform on the subject. And see *Field, Corp.* § 386. Here, it is admitted that the defendant held itself out to the world as a corporation organized to lease and operate any railway in Oregon. Such was the specification in its articles of the power and purpose, among others, of its organization. By this defense of *ultra vires* the defendant does not question the legality of an act done by its directors without apparent authority, or upon a doubtful or questionable construction of its articles, but it seeks to repudiate an act done by them within the plain letter and purpose of a particular power deliberately asserted and assumed by its corporators in the execution of its articles, and to which every one of its shareholders, it must be presumed, thereafter gave his unqualified assent. It must be admitted that a sense of justice cannot be invoked in favor of such a defense. It must therefore stand or fall on the decision of the naked legal question, whether the defendant was authorized in its formation to assume as it did the power to lease this or any other railway in Oregon.

The decision of this question involves the inquiry whether the taking a lease of a railway and a covenant to pay the rent reserved therein was an unlawful act in this state at the formation of the defendant corporation and at the date of this lease. Whatever "enterprise, business, pursuit, or occupation" was then lawful, the defendant might undertake in its articles to accomplish or engage in. There never was any legislative or judicial action in this state, except in one particular, to be hereafter noticed, indicating that such a transaction is unlawful or contrary to public policy. To take a lease of a railway and operate it, is in itself as lawful and meritorious an act as to construct one. No one would question the right of a natural person to do such an act. And whatever any one may do as an individual, any three or more persons may do as a corporation, unless restrained by some provision of law applicable to corporations only.

The corporation act of this state, as originally passed, contained a clause, (section 20,) inserted on its passage through the senate at the instance of interested parties, declaring that no corporation formed or created under it or other statute of the state for the purpose of navigating any water of this state, should ever "purchase, lease, or

in any way control" any road built by any other corporation formed under such act. This prohibition, it was well understood, was aimed at the Oregon Steam Navigation Company, a corporation then existing under a special act of the territorial legislature, and soon afterwards incorporated under the corporation act, in pursuance of section 18 thereof, and the predecessor of the defendant herein, and intended to prevent it from controlling any road that might be built on the bank of the Columbia, between Portland and the Dalles, and particularly around the Cascades of the Columbia, for the purpose of preventing competition with its steam-boats. This is the only restraint on the power of corporations in this respect that ever crept into the legislation of Oregon; and the rational and legal inference from the premises is that all leases of roads taken by a corporation formed under the act, except the kind thereby specially prohibited, are permitted.

But this is not all. By the act of October 18, 1878, (Sess. Laws, 59,) said section 20 was repealed and re-enacted, so as to omit the restraining clause; and since then there has been no indication of any purpose on the part of the state to restrain or limit the power of corporations in this respect. The idea of such restraint is also incompatible with the provision of the corporation act (section 17) that, in effect, authorizes a railway corporation to terminate its existence at its option, and dispose of its road. No natural persons, unless incorporated, are likely to purchase such property, and if there was any implied prohibition against the one corporation from becoming a purchaser, the right given to the other to sell would be so far rendered nugatory. The power to dispose of a road must include the power to lease; and the power to buy, the power to take a lease. So, by the act of October 22, 1880, *supra*, the right of the plaintiff herein to assign its road—to dispose of the same by sale or lease—is recognized; but if a corporation could not be formed or exist under the law of Oregon with power to buy the same or take a lease thereof, the *jus disponendi* of the former would be comparatively worthless.

Counsel for the plaintiff also makes the further point that this is an executed contract, and therefore the defendant is estopped to allege its invalidity in this action. It is well established that a contract, not tainted with illegality, but merely invalid for want of power in the corporation making it, may be enforced against such corporation when it has received or had the benefit of the consideration therefor. Bigelow, Estop. (3d Ed.) 574, 575; Field, Corp. § 263. But this contract does not come within that category. The defendant corporation could not set up the invalidity of this contract as a defense to an action for the rent of the property during a period that it had the use and benefit of the same. But this action is brought on a contract to pay rent in advance, and not for past use and occupation. The consideration for the covenant or promise to pay this installment of rent is not the past but the future use of the property. The contract to pay is therefore executory; and the same may

be said of every other installment of rent provided for in the contract. The liability to pay it arises out of the covenant to do so, and the consideration for this is the future use and occupation of the property for a corresponding period. The case of *Thomas v. Railroad Co.*, *supra*, 86, is exactly in point on this question.

The effect of the two special defenses will now be considered. They deserve but little attention, for they are both utterly bad. It makes no sort of difference whether the railway leased from the plaintiff had any "near connection" with the roads whose *termini* are specified in the defendant's articles or not. Those roads it took the power to construct and own; but it also took the power to lease any other railway in Oregon, whether "so near or yet so far" from such roads. As between the plaintiff and the defendant, the directors of the latter were the sole judges of the propriety or expediency of taking this lease, and the assent or the dissent of the shareholders was altogether immaterial. They were powerless in the premises, and could neither prevent, authorize, nor ratify it. This does not, of course, question the right of the shareholders to invoke the aid of a court to *prevent* the directors from making a contract which, though legal, may be improvident or considered an abuse of their trust.

But the power of a corporation formed under the corporation act of this state, as to its relations with third persons, is vested in and exercised by the directors. The power of the shareholders is limited to a few matters concerning its internal affairs, namely, the election of directors, the increasing of the capital stock, the adding to the powers and purposes of the corporation, and the authorizing its dissolution. Nor is it true in any legal sense, even if material, that "the capital of the defendant" was contributed for the construction and equipment of the roads it was formed to build and own, rather than the leasing of the plaintiff's road. Nothing is clearer than that every dollar subscribed to the capital stock of the defendant was thereby pledged for any and all of the purposes specified in its articles, and may be applied and used, at least so far as third persons are concerned, to such of them as the directors shall determine.

In conclusion, the directors of the defendant corporation, in pursuance of the express power given them by the corporation act and the articles of incorporation, determined to take a lease of the plaintiff's road, yielding and paying a certain rent therefor, and to that end duly directed and authorized their president and secretary to sign said lease and affix the corporate seal thereto, which was done. By this means the defendant became legally bound to pay the plaintiff the rent reserved, and in default thereof the latter may maintain this action to recover the installment now due; and therefore the demurrer is overruled, and the motion to strike out is allowed, and judgment is given for the plaintiff for the sum sued for,—\$68,131,—together with legal interest thereon from May 15, 1884, and the costs and disbursements of the action.

MERRILL v. INSURANCE CO. OF NORTH AMERICA.¹

(Circuit Court, D. Minnesota. March, 1885.)

1. FIRE INSURANCE—INCREASE OF HAZARD—TENANT MAKING ALTERATIONS.

Where a fire insurance policy provides that any change increasing the hazard, either within the premises or adjacent thereto, within the control of or known to the assured, and not reported to the company and agreed to by indorsement thereon, will render the policy null and void, to defeat a recovery in action for loss, the company must affirmatively prove that changes made by a tenant, which increased the hazard, were made by the consent of the owner or his agent.

2. SAME—PROOFS OF LOSS—FALSE STATEMENTS.

A false statement in the proofs of loss, to defeat a recovery, must be false to the knowledge of the assured, and made for the purpose of defrauding the company.

At Law.

Secombe & Sutherland, for plaintiff.

W. D. Cornish, for defendant.

NELSON, J. This suit is brought to recover on a fire insurance policy. A jury is waived. Plaintiff introduced in evidence the policy, offered proof of the fire and value of the property, and introduced proofs of loss, and is entitled to a judgment unless the defendant sustains one or more of the defenses urged, which are, (1) that there was a change of risk, which rendered the policy void; (2) fraud in proofs of loss. The policy contained these conditions and stipulations:

"Any change increasing the hazard, either within the premises or adjacent thereto, within the control of or known to the assured and not reported to this company, and agreed to by indorsement thereon, will render this policy null and void. An attempt to defraud the company in the matter of a claim for loss, by false swearing or otherwise, shall cause a forfeiture of this policy, and all claim for loss thereunder."

The stipulation in reference to change of risk must be kept in good faith by the assured, and information of any change in the hazard, and thereby increasing the rate of premium, must be agreed to by the insurer. However, any change increasing the hazard, and rendering the policy void, must be by the act, authority, consent, or cognizance of the assured, or by the consent of her agent.

The building insured was built of stone, with frame office in the rear, and located in the city of Minneapolis, and described in the policy as a store-house. It was insured for one year from June 19, 1883, and burned February 13, 1884.

The principal testimony relied upon by defendant to defeat a recovery is that of Stevens, the tenant, and Trumbell, the defendant's agent; and it is also urged that the evidence of Merrill, the agent of the assured, indicates that he was aware of the improvements which were made. The changes and alterations in the building, and adja-

¹ Reported by Robertson Howard, Esq., of the St. Paul bar.

cent thereto, undoubtedly increased the risk, and would render the policy void if known to the agent, Merrill; for no information of them was furnished the company, and its assent thereto was not obtained. It is in proof that they were commenced during the last of December, 1883, by Stevens, the tenant. He had temporarily leased the building in the fall of 1882, and on June 19, 1883, had made a definite arrangement for continuing his lease for a year, at which time the insurance policy was written. The property was owned by the plaintiff, who lived in Boston, Massachusetts, and was in charge of the agent, D. B. Merrill, who lived in St. Paul, Minnesota.

The agent visited the tenant, Stevens, in December, 1883, or January, 1884, and had a conversation with him, and the effect of it was, as Stevens testifies, that he was about to make changes, and wanted Merrill, before he went south, to come down and see him. Stevens wished to get a lease of the building or an understanding about it, and that was the reason given why he wished Merrill to come down before he went south. He is not certain that it was in a conversation or on a postal card sent to St. Paul that this request was made; but he does testify that Merrill came to Minneapolis, and a conversation took place in front of the building, in which Stevens stated that he was making changes which he considered improvements, and wanted Merrill to lease him the building for another year at \$30 per month, —the same rent as the previous year,—in consideration of his fixing it up and putting the improvements on it. The improvements talked about "were putting on a shed at the rear,—a roofed shed,—and putting on a new front, and fixing up the windows, and making general improvements." The changes thus indicated would not necessarily increase the risk, and Stevens is careful to say in his testimony that he don't recollect whether he spoke definitely about occupying it for any other purpose than he had previously, which was for storage. He never saw Merrill again until after the fire. Some correspondence between the parties is introduced in evidence, but there is nothing in it indicating that Merrill knew of or consented to the changes which were made. He went south soon after.

The conversation in December or January was brief. They were together only about 10 or 15 minutes, and did not go into the building; and at that time the office had been moved up from the rear of the stone building to the front, but it does not appear that such change increased the risk, and upon the shed in the rear only the roof had been put on. It does not appear that this was visible to Merrill, or that he knew that it was being built, and Stevens said nothing about it. Merrill denies knowledge of the changes made, except the moving of the office and putting in the window, and that is about all Stevens' testimony shows he had knowledge of. Trumbell, the company's agent, fails to show that Merrill knew about the change made by the tenant. It is claimed that Merrill, after the fire, in conversation with Trumbell, admitted that he knew that Stevens was going to

make changes, and only refused to allow a reduction of rent in consideration of any alterations made; but he does not admit he knew the character of the changes, and Trumbell is particularly careful to testify that Merrill, the agent, never said that Stevens informed him that he was going to make the changes which he finally did. Stevens had indicated to Merrill what changes he would like to make, which would not necessarily increase the hazard, and are not shown to be of that character. He specified the kind of alterations he was about to make, and, though he spoke of general improvements, it was in connection with the others mentioned. The owner of the building is not liable for the acts of the tenant which would forfeit this policy, unless he has assented thereto.

The tenant could make general changes and repairs, or improvements which did not enhance the risk; and in order to defeat a recovery the defendant must affirmatively prove that these changes, which the evidence shows did increase the hazard, were made by the consent of the owner, or his agent, Merrill. I think the testimony fails to prove this; for if it is conceded that he knew that general improvements were to be made, the rule invoked by counsel, that a general assent to make improvements implies authority to make such as would increase the hazard, does not apply. The defendant, to sustain this defense, must show that Merrill knew the character of the improvements; for it is only "changes increasing the hazard" that must be reported and agreed to.

2. Did the plaintiff make out and swear fraudulent proof of loss? It is urged that in the proofs of loss, the assured should have stated that the tenant had made alterations, increasing the hazard, without her knowledge, and given the situation and position of the property at the time of the loss, and in not doing so she committed a fraud which defeats a recovery. There is no evidence that the assured knew anything about the alterations. She lives in Boston, Massachusetts, and managed the property through an agent. And although she made the proofs of loss, the company do not object on that account. Unless the assured had personal knowledge of the change of risk, and made the proofs of loss for the purpose of defrauding the company, knowing their falsity, there is no fraud. The proofs must comply with the contract obligations of the assured, and fairly state the situation of the property at the time of the loss, within her knowledge; and in so stating, the policy does not require that facts communicated by some one else, about the situation of the property at the time of loss not within her knowledge, should be set forth. A false statement, to defeat a recovery, must be false to the knowledge of the assured, and made for the purpose of defrauding the company. This defense is not sustained by the evidence.

The plaintiff is entitled to judgment for the sum of \$1,578.75; and it is so ordered.

RUSSELL and others v. WORTHINGTON, Collector.

(Circuit Court, D. Massachusetts. March 13, 1885.)

CUSTOMS DUTIES—TIN CANS CONTAINING LOBSTERS—ACT OF FEBRUARY 8, 1875.

Tin cans containing lobsters imported from Prince Edward's island and from Halifax, Nova Scotia, are subject to duty under the act of congress of February 8, 1875.

At Law.

L. S. Dabney, for plaintiff.

Geo. P. Sanger, U. S. Atty., for defendant.

COLT, J. The plaintiffs imported in July and September, 1883, from Prince Edward's island, and from Halifax, Nova Scotia, several thousand cases of tin cans containing canned lobsters. Each case contained 75 cans. On each can the defendant collector assessed a duty of one cent and a half, amounting to \$1,877.04. The plaintiffs contend that under the present law tin cans containing lobsters are not subject to any duty. A protest against the exaction of the duty was duly filed. The secretary of the treasury having on appeal affirmed the decision of the collector assessing the duty, the plaintiffs have brought this suit to recover back the amount of duty paid.

By the act of February 8, 1875, (Supp. Rev. St. 130,) anchovies and sardines packed in oil, or otherwise in tin boxes, are subject to certain duties; and then follows this provision:

"Provided, that cans or packages made of tin, or other material, containing fish of any kind, admitted free of duty under any existing law or treaty, not exceeding one quart in contents, shall be subject to a duty of one cent and a half on each can or package; and when exceeding one quart, shall be subject to an additional duty of one cent and a half for each additional quart, or fractional part thereof."

At the time this law was passed we find that a treaty, duly ratified, existed between the United States and Great Britain, (17 St. 863, 870,) by which "fish oil and fish of all kinds, (except fish of the inland lakes and of the rivers falling into them, and except fish preserved in oil,) being the produce of the fisheries of the United States, or of the Dominion of Canada, or of Prince Edward's island, shall be admitted into each country, respectively, free of duty."

The act of February 8, 1875, imposes a duty on tin cans containing fish of any kind, admitted free of duty under any existing law or treaty; and, there being an existing treaty by which fish of all kinds from Great Britain, Canada, and Prince Edward's island were admitted free of duty, and this importation coming from some of those countries, it is clear that, unless the law has since been changed, the duty in the case before us was properly assessed.

In the tariff act of March 3, 1883, (22 St. 488,) new and different duties are imposed on anchovies and sardines, and shrimps, or other shell-fish, are admitted free. It is contended by the plaintiffs that congress having established new and different duties on anchovies

and sardines, and having omitted the proviso as to cans containing fish, the latter is repealed by implication. But this can hardly be true, because the proviso is general in its terms, and applies to all kinds of fish. By changing the duties on anchovies and sardines, there is no reason to suppose that congress intended to repeal a general law imposing a duty on tin cans containing fish of any kind. While the law is in the form of a proviso, it appears to be in no way dependent on what precedes.

But it is claimed that the present importation was made under the act of March 3, 1883, which admits shrimps, or other shell-fish, free of duty, and that, therefore, it was not made under any existing law or treaty within the meaning of the act of February 9, 1875. These cans of lobsters were imported from Prince Edward's island, and from Nova Scotia. These countries are named in the treaty of 1871 between the United States and Great Britain as those from which fish of all kinds are to be admitted free of duty, with certain exceptions. The act of February 9, 1875, was plainly designed by congress to assess a duty on the cans containing fish imported from these countries under the treaty. In the act of March 3, 1883, section 11, we find it expressly provided that nothing in the act shall in any way change or impair the force or effect of any existing treaty between the United States and any other government. With this treaty still in force, we do not see how the plaintiffs can escape payment of the duty exacted. Nor can it be said that cans, being the usual and necessary box or covering for lobsters, are exempt from duty under section 7 of the act of March 3, 1883. Section 7 refers, in express terms, to sections 2907, 2908, Rev. St., and 18 St. 189, § 14, and repeals them. In our opinion, section 7 has no reference to the specific duty imposed on tin cans containing any kind of fish, and it in no way, expressly or by implication, repeals the act of February 9, 1875.

Judgment for defendant.

PHILLIPS and others v. CARROLL and others.

(Circuit Court, W. D. Pennsylvania. March 2, 1885.)

1. PATENTS FOR INVENTIONS—PATENT No. 227,061—INFRINGEMENT.

The first claim of complainants' patent, viz., in a flanging-machine the extension of the lower roll beyond the end of the upper roll for the support of the plate at the point of bend and to prevent the formation of a ridge or head, *held* to be infringed by a machine which, before set to work, has the outer faces of the two rolls flush, but is so organized that, as the table upon which lies the plate to be flanged is raised to a perpendicular, the upper roll is pushed back the thickness of the plate.

2. SAME—ANTICIPATION.

The defense of anticipation considered, and *held* that the evidence shows a failure to reduce the conception to practical use and its abandonment, thus leaving the field of invention open to others.

3. SAME—INVENTION.

Held, further, that the patented improvement here involved more than the employment of mere mechanical skill, and may fairly be ascribed to the exercise of the inventive faculty.

4. SAME—DEFENSE OF WANT OF UTILITY.

Parties who employ a patented device ought not to expect a defense resting upon an alleged want of utility to find much favor with the court.

In Equity.

George H. Christy and Bakewell & Kerr, for complainants.

D. F. Patterson, John Barton & Son, Jas. T. Kay, and Burleigh & Harbison, for respondents.

ACHESON, J. This suit is upon letters patent No. 227,061, granted April 27, 1880, to the complainants (as assignees of Russell and McDonald, the inventors) for an improvement in flanging-machines. The invention, the specification declares, relates to the class of machines referred to in letters patent No. 166,715, issued August 17, 1875, to R. C. Nugent and others, and is designed to obviate an obstacle to the successful use of such machines arising from the tendency of the plate, while being flanged, especially if very heavy and very hot, to sag down a little, so as to form just outside the end of the lower roll an annular bead, bulge, or projection on the exterior base of the flange. To overcome this practical difficulty, and prevent the sagging action and bulging effect, the inventors lengthen the lower roll so that its outer end will extend beyond the outer end of the upper roll a distance equal, or nearly equal, to the thickness of the plate to be flanged, thus affording a proper support to the plate.

The first claim of the patent reads thus:

"(1) In a flanging-machine of the kind herein described, the extension of the lower roll beyond the end of the upper roll, in order to the better support of the plate at the point of bend, and prevent the formation of a ridge or bend, substantially as set forth."

The infringing machine, (which undoubtedly is of the same general kind described in the patent,) when at rest and before set to work, has the outer faces of the two rolls flush, or even, but the shaft of the upper roll is provided with a spiral spring, and as the table upon which lies the plate to be flanged is raised to a perpendicular, the upper roll is pushed back the thickness of the plate. Obviously, by means of this yielding spring the two rolls of the defendant's machine, during the operation of flanging, assume in respect to each other the relationship specified in the complainant's patent, and the practical result thereby contemplated is thus secured. It is therefore plain that the defendant's machine, as an operative apparatus, embodies the Russell and McDonald invention as embraced in their first claim. It indeed may be (although under the proofs this is an open question) that an automatic upper roll has an advantage over a rigid roll; but it is hardly necessary to say that the defendants are none the less infringers because of added improvements to the patented device. *De Flores v. Reynolds*, 3 Ban. & A. 292.

The defendants, however, maintain that Russell and McDonald were not the original and first inventors of the improvement here in question. To sustain this defense, reliance is placed upon the testimony of R. C. Nugent, as to his prior use of a lower roll having a supporting extension. The only instance of the use of a machine thus organized, of which he speaks with any degree of certainty, was the case of a small machine which he exhibited at the Cincinnati exposition. He says he had an idea the lower roll should project for the plate to rest on, and in that machine he allowed it to stick out he thinks about three-quarters of an inch beyond the top roll; but finding the extension of no use, and indeed an impediment, he had it cut off. This machine, it must be remembered, was not flanging for the market, but was merely on exhibition. Moreover, such light work as it did was cold flanging. It had nothing to do with the treatment of heavy hot plates. If, then, we should accept all that Mr. Nugent says on this subject as strictly true, it still follows, from his own account of the matter, that he not only failed to reduce his idea to practical use, but after an unsuccessful experiment abandoned his conception. Hence this field of invention was left open to others to enter. *Whitely v. Swayne*, 7 Wall. 685.

Again, it is contended that the supporting extension of the lower roll is within the scope of the prior Nugent patent, (No. 166,715,) and that, at the most, this improvement involved merely the exercise of ordinary mechanical skill. We search, however, the Nugent patent in vain to discover any suggestion or hint that the lower roll is to be extended beyond the end of the upper one, or that any useful purpose would thereby be subserved. On the contrary, the drawing shows the two rolls to be so arranged that their outer ends are in the same vertical plane, and the specification describes them as projecting an equal distance beyond the outside of the frame-work. The complainants, who had acquired the Nugent patent, in operating a flanging-machine built under it, experienced the practical difficulty already mentioned from the formation of a bead or ridge around the outside of the flanged plate. The solution of the problem, how to obviate this defect, involved—*First*, the discovery of the cause thereof; and then the application of an appropriate remedy. Now, the evidence indicates that neither the one nor the other was obvious. Indeed, the expert witnesses in this case yet differ as to the cause; and it is shown that it was not until after an experimental use of the complainants' original machine, extending over a period of perhaps several months, that the difficulty was met by the arrangement of the rolls devised by Russell and McDonald. I think, then, the improvement may fairly be ascribed to the exercise of the inventive faculty, and that it is the subject of letters patent within the general rule laid down in *Loom Co. v. Higgins*, 105 U. S. 580.

It is, however, strenuously urged that the organization of the rolls, as specified in Russell and McDonald's first claim, does not in fact

prevent the formation of the objectionable bead or ridge. But surely such allegation comes with ill grace from parties who have seen fit to copy this arrangement. If it is inefficacious, why do they use it? To this searching query no satisfactory answer has been given. The defendants' witnesses say the admitted difficulty arising from the formation of the bead or ridge can be and is obviated by placing the pivotal point of the table which holds the plate in a certain position with reference to the flanging rolls. I am by no means persuaded that in this they are correct. But if they are right, the defendants are at liberty to resort to that mechanical arrangement. So long, however, as they employ the patented improvement they ought not to expect a defense resting upon an alleged want of utility to find much favor with the court. But I may add that upon the question of utility the weight of the evidence, in my judgment, is clearly with the complainants.

Having reached the foregoing conclusions as respects the first claim of the patent in suit, I deem it unnecessary to determine whether or not there has been infringement of the second claim.

Let a decree be drawn in favor of the complainants.

PARKER, Trustee, and others v. Stow.

(Circuit Court, D. Connecticut. March 23, 1885.)

PATENTS FOR INVENTIONS—PATENTABILITY—ANTICIPATION—BABY CARRIAGES—MOVABLE TOPS—INFRINGEMENT.

Reissued patent No. 10,363, granted to Horatio G. Parker, trustee, August 7, 1883, for an improvement in children's carriages, compared with the patent issued February 11, 1868, to Bein & Ulrich, and the patent issued June 9, 1868, to Eliphalet S. Scripture, and the first claim of said reissue held valid, and infringed by sales by defendant of carriages having a canopy top, rigidly secured to two rigid arms, one depending on each side of the carriage, and pivoted at their lower ends to standards rigidly fastened on each side of the carriage body by means of friction-plates and a thumb-screw, which causes the plate to which it is attached to relax or renew its grasp, so that the top can be moved in any position, and may drop in front of the seat or behind it, or may be held in an upright or intermediate position.

In Equity.

Strawbridge & Taylor and Benj. F. Thurston, for plaintiffs.

John W. Konvalinka, for defendant.

SHIPMAN, J. This is a bill in equity to prevent the infringement of reissued letters patent No. 10,363, granted to Horatio G. Parker, trustee, August 7, 1883, for an improvement in children's carriages. The nature and distinctive features of the invention are described in the specification of the reissue as follows:

"This invention relates to that class of carriages having a square or canopy top, and its object is to enable the child to be seen and taken from the carriage by the attendant without leaving the position she must occupy for propelling it by the handle at the back; and also to enable the child's face to be protected from the sun or wind when they are in the direction in which the carriage is pushed; and it consists in such an arrangement and construction that

the top may be dropped in front of the seat as well as behind it, or fixed in an upright position over the carriage, or inclined at various angles; and also in the mechanism by which the same is accomplished, consisting of a pair of rigid arms secured rigidly to the carriage top and jointed to the recessed arcs attached to the body, the arms being provided with spring-bolts, or their equivalent, which engage with the recesses on the said arcs to retain the top in the desired position."

The first claim of the reissue is as follows:

"In a child's carriage, a rigid top or canopy, C, fixed upon the arms, A, pivoted to the sides of the body, so that said canopy may drop in front of the seat or behind it, or be held in an upright or intermediate position, substantially as and for the purposes set forth."

In order to ascertain the validity of the patent, the extent of the invention, if any was made, and the construction of the recited claim, a knowledge of the state of the art is necessary, and is obtained from two patents: one to Bein & Ulrich, of February 11, 1868, and the other to Eliphalet S. Scripture, of June 9, 1868.

The features of the Bein & Ulrich carriage were twofold: *First*, its seat and calash top were reversible, so that both could be placed at the different ends of the carriage body; and, *second*, the top "could be supported above the middle of the carriage to act as a sun umbrella." The first was the principal object of the carriage, and the mechanism which was apparently necessary to carry into effect that part of the invention could not accomplish the second object. In order to make the top reversible, its bows were pivoted to narrow iron plates, one depending upon each side of the carriage. The lower ends of these plates were pivoted to stiff bars or links, which also were pivoted at their lower ends to the sides of the carriage, so that there were three loose joints between the top and the sides of the carriage. Each of these links or bars rests upon a pin on the side of the carriage. In order to make the changes from one end to the other, the joints must move easily. To have the top stand vertically, a friction plate and screw are applied to the uppermost joint, and when so applied the top is rigid; but, as the middle joint is loose, it would tumble down if the carriage should be wheeled over a rough place, and if the middle joint was also provided with a friction contrivance, the top would swing from side to side, unless the joint at which the bar was pivoted to the carriage should be made firm.

The Scripture device is an ordinary buggy top, having three bows which are kept apart or brought together "by means of a substitute for the ordinary side brace, lettered E, F, H', in the patent. All these bows are pivoted upon a common pivot at each side of the seat, as in ordinary buggies, and to the place where they are pivoted there is applied a friction clamp, substantially the same as that shown in the carriage of defendants herein, by means of which the rearmost bow, called in the patent the back or main bow, *a*, can be held in any position between its lowermost position behind the driver and a position vertically above the back of the seat, and when it is in either

of these positions, or those intermediate between them, the other bows can be held in various positions with respect to it, by means of the contrivance, E, F, H'." The top cannot be placed at an angle in front of the seat.

The Bein & Ulrich carriage contained the germ of the invention of the plaintiff's patent. It had a top which, by means of a friction plate and screw, could be placed in a vertical position, and could be inclined to some extent either forward or backward, but could not be held in any position except against the end of the carriage, because the other joints were loose, and the top must tumble down when the carriage was used. The invention of Richardson, the plaintiffs' assignor, consisted in discarding the reversible seat and the reversible character of the top, and in changing the mechanism which supported the top so as to have a pair of rigid arms, one on each side of the carriage, rigidly fixed to a canopy top at their upper ends, and their lower ends pivoted to the sides of the carriage body, by either the described or equivalent means, so that the top can drop in front of the seat or behind it, or be held in an upright or intermediate position. The plate or arm or casting, by means of which it is pivoted to the sides of the body, is firmly attached to the body. In the patented device, the arms were jointed to recessed arcs attached to the body. The first claim is for the combination of the rigid top, the rigid arms pivoted at their lower ends to the sides of the body, by either the described or equivalent means, so that the specified result is produced.

The first question is whether the invention is patentable. The defendant insists that, in view of the Bein & Ulrich and the Scripture patents, it is without patentability. It cannot be successfully claimed that Bein & Ulrich anticipated the Richardson invention in the sense that their patent was infringed thereby, because the Bein & Ulrich arms were constructed upon a wrong principle and were a failure; but it is said that it would require no invention to attach the friction clamp of the Scripture patent to their middle joint. It is true that the described alteration would require no invention, but the device would still be a useless one, for the lower joint at the side of the carriage would be a fatal defect. All the joints must be furnished with friction plates, and even then the support of the top would be cumbersome and insecure. It is also said that no invention would be required to permanently secure the lower section of the Bein & Ulrich arm to the body of the carriage. The leading idea of the carriage, the reversible top, would then be abandoned, and to create a new device from an old one, by altering the structure so as to abandon the principal thing which the old was created to do, and so as to change the principle of the mechanism in order to accomplish what the old structure did not undertake to do, viz., hold the top in an intermediate position, seems to require invention.

The Scripture patent is not important upon the question of patentability. It used a friction-plate and thumb-screws to hold the rear-

most bow of a buggy top in any desired point. The other bows were held in the desired point by means of another contrivance.

The defendant sells children's carriages having a canopy top, rigidly secured to two rigid arms, one depending on each side of the carriage. These arms are pivoted at their lower ends to standards, rigidly fastened on each side of the carriage body. The arms are pivoted by means of friction-plates and a thumb-screw, which causes the plate to which it is attached to relax or renew its grasp so that the top can be moved in any position, and may drop in front of the seat or behind it, or may be held in an upright or intermediate position. This friction device was known to be a substitute for the spring-latch and notches of the plaintiff's patent before its date. The difference between the plaintiff's and the defendant's carriage is that the former has a longer arm than the latter has, and is jointed to a metal casting, which is attached to the body, and which consists in part of a piece of metal in the shape of an arc of a circle, the periphery being provided with a series of notches, and each arm being provided with spring-bolts. The arms of the defendant's carriage are pivoted, by means of friction-plates and thumb-screws, to standards or castings firmly attached to each side of the carriage body. As the patented invention did not consist in the form of the pivoting device, but was broad enough to include equivalents of the described form, infringement is proved.

There should be a decree for an injunction against the infringement of the first claim, and for an accounting.

THE EDWIN, etc.¹

(District Court, S. D. New York. February 18, 1885.)

1. SEAMEN—COMPLETION OF VOYAGE—SHIPPING ARTICLES.

Libelants shipped as seamen on board the bark *E.*, and signed articles for "a voyage from Iquiqui, So. Am., to Hampton Roads, for orders, and to any port or ports wherever the master may direct in the U. S. of America * * *; the voyage not to exceed eight calendar months." At Hampton Roads the vessel received orders for New York, where, on arrival, she discharged all her cargo. The libelants then left the vessel, and were entered in the log as deserters by the captain, who refused in consequence to pay the balance of wages up to the time they left. *Held*, that had there been other parts of cargo to be delivered at other ports, under orders received at Hampton Roads, the voyage would not have terminated until the delivery of the residue of the cargo. As it was, the voyage provided for by the shipping articles terminated at New York; the libelants were there entitled to their discharge, and could not be treated as deserters.

2. SAME—RATE OF WAGES.

One of the libelants shipped as second mate, but was afterwards justifiably distrated. *Held*, that he was entitled only to the same wages as the other able seamen for the remainder of the voyage.

3. ARTICLES SOLD TO SEAMEN.

Articles sold to seamen by the master during the voyage are allowed as an

¹Reported by R. D. & Edward Benedict, Esqs., of the New York bar.

offset to wages, at a rate not above 10 per cent. over the cost to the master. A charge in excess of that held unreasonable and oppressive. Act June 26, 1884.

In Admiralty.

Alexander & Ash, for libelants.

John R. Walker, for claimants.

BROWN, J. In January, 1884, the libelants shipped as seamen on board the bark Edwin, and signed shipping articles for "a voyage from Iquiqui, So. Am., to Hampton Roads for orders, and to any port or ports wherever the master may direct in the U. S. of America or Dominion of Canada; the voyage not to exceed eight calendar months." The vessel proceeded to Hampton Roads, and there received orders to deliver the cargo in New York, where she arrived in June, 1884, and there discharged all her cargo. The libelants thereupon quitted the ship, taking their clothes with them. The master, claiming that the shipping articles bound them to the ship for eight months, entered them in the log as deserters, and refused to pay the balance of wages up to the time they left. The articles provided for only one voyage; not for one or more voyages during eight calendar months. In my judgment the one voyage stipulated for was ended at New York. New York was the destination fixed by the orders at Hampton Roads; and by the delivery of all the cargo at New York the voyage became ended there. There remained nothing more for the ship to do to complete that voyage. Thenceforward the ship had to seek new employment and a new voyage. Had there been other parts of the cargo to be delivered at other ports, under the orders received at Hampton Roads, the voyage would not have been terminated at New York, nor until the delivery of the residue of the cargo at the various ports designated. The libelants were entitled to their discharge in New York, and cannot, therefore, be treated as deserters.

Hendricks shipped as second mate at the rate of £6-6s. per month. He entered upon his duties January 25th. The testimony satisfies me that he was not competent for the proper discharge of the duties of second mate, and that he was justifiably disrated by the captain, according to the entry in the log on the eighteenth of February. After that date he is entitled to wages at the rate only of £3-10s., the wages of the other able seamen on the voyage. The articles sold to the seamen during the voyage, and charged against them in the master's account, are allowed at the prices charged, so far as these charges do not exceed an advance of 10 per cent. over the prices actually paid for them by the master. Ten per cent. is a reasonable compensation for his trouble, and the charges in excess of that are disallowed as unreasonable and oppressive. See Act June 26, 1884. The parties will probably be able to compute the amount due to the libelants upon the basis of this decision; if not, a reference may be taken for that purpose.

The libelants are entitled to costs.

BARTLETT and others v. HIS IMPERIAL MAJESTY THE SULTAN, etc.

(Circuit Court, S. D. New York. March 27, 1885.)

WAREHOUSEMAN—ADVERSE CLAIMANTS OF GOODS—INTERPLEADER.

A warehouseman whose lien for storage is not disputed cannot maintain a bill of interpleader to protect himself against the claim of his bailor and that of a third person who asserts an adverse title to goods stored with him as against the bailor, but must defend himself at law.

Motion for Injunction *pendente lite*.

W. W. Goodrich, of counsel, for complainants.

Butler, Stillman & Hubbard, for defendants.

Thos. E. Stillman and Adrian H. Joline, of counsel.

WALLACE, J. Complainants' motion for an injunction *pendente lite* is resisted mainly upon the ground that the complainants' bill is demurrable for want of equity. The bill shows that the complainants, as warehousemen, have in their possession a large quantity of arms, of the value of about \$900,000, which were deposited with them by the firm of Drexel, Morgan & Co., and for which, in July, 1882, complainants, at the request of Drexel, Morgan & Co., issued negotiable warehouse receipts; that shortly thereafter the defendant, the sultan of Turkey, claiming to be the owner of the arms, demanded them of complainants, and upon their refusal to give them up brought an action at law in this court for trover; that thereafter the American National Bank of Providence, claiming to be the holder of the warehouse receipts issued by complainants, demanded the arms, and upon complainants' refusal to deliver them brought an action against them in this court. The bill also alleges that the Providence Tool Company and one Hunt claim some interest in the arms. The sultan, the American National Bank of Providence, the Providence Tool Company, and Hunt are made defendants in the bill, and the prayer is for an injunction restraining all proceedings on the part of the defendants in relation to the arms, and that they be required to interplead.

So far as appears by the bill, none of the parties claiming the property in complainants' possession dispute complainants' lien for storage and charges. The complainants, therefore, have no interests of their own to assert or protect further than to be relieved from liability to two or more different claimants of the property. None of the defendants claim title derived from the complainants. The American National Bank derives title from the bailors of the complainants, and the other defendants assert a paramount title.

The bill is a pure bill of interpleader, and presents the common case of a bailee who seeks to protect himself against the claim of his bailor and that of a third person who asserts an adverse title to the bailor. The authorities are decisive against his right to maintain an interpleader. It is sufficient to refer to *Crawshaw v. Thornton*, 2

Mylne & C. 1; *Marvin v. Ellwood*, 11 Paige, 365; *First Nat. Bank v. Bining*, 26 N. J. Eq. 345. The hardship of the case has frequently been adverted to by the authorities; and in England a remedy has been given by statute. Common Law Proc. Act 1860, § 12. See *Attenborough v. St. Katharine's Dock Co.* L. R. 3 U. P. Div. 373, 377; Id. 450.

As is said by Judge STORY: "The party holding the property must defend himself as well as he can at law, and he is not entitled to the assistance of a court of equity, for that would be to assume the right to try merely legal titles upon a controversy between different parties where there is no privity of contract between them and the third person who calls for an interpleader." STORY, Eq. § 820.

The motion must be denied.

PIONEER GOLD MINING CO. v. BAKER.

(Circuit Court, D. California. February 9, 1885.)

1. MORTGAGE—MINING CORPORATION—CONTRACTS OF DIRECTORS—SHERIFF'S SALE.

In view of the facts clearly established by the testimony in this case, *held*, that the sheriff's sales set out in the complaint, had and brought about as they were, and the contract made by the directors, were, in effect, a mortgage for the purposes set out in the contract.

2. SAME—PAROL EVIDENCE.

Equity, to determine whether a written instrument is, in effect, a mortgage, hears parol evidence, not to contradict or vary the terms of the instrument, but to raise an equity superior to it, and give it effect according to the true intent and purpose of the parties.

3. SAME—PERSONAL OBLIGATION OF MORTGAGOR.

A mortgage may be created as well without as with an accompanying personal obligation of the mortgagor to pay the debt secured or attempted to be secured thereby. In the one case the property alone is charged with the lien,—is looked to solely by the mortgagee out of which to make his lien; in the other, he has the additional security of the personal obligation of the mortgagor.

4. SAME—DEBT CHARGEABLE ONLY AGAINST CERTAIN PROPERTY—MEASURE OF SECURITY.

A debt chargeable only against certain property is, in effect, simply a debt with limited means of satisfaction or enforcement; the value of the property charged with the indebtedness is the measure of the security afforded.

5. SAME—CONDITIONAL SALE OR MORTGAGE.

In cases of doubt whether a transaction was a conditional sale or a mortgage, equity will hold it to be a mortgage, as by so doing the rights of each party are preserved; the mortgagor is permitted, upon fulfillment of his contract, to save his property, and the mortgagee receives his just dues.

6. SAME—TENDER.

Under the circumstances of this case, considering the whole transaction as a mortgage, a tender upon the exact day was not strictly necessary to preserve the rights of the parties under the contract.

7. SAME—DECISIONS OF STATE COURT—STATE STATUTE.

Where, under the statutes of a state, a contract would be considered a mortgage, a United States court, in such state, in carrying such contract into effect, will be guided by the decisions of the supreme court of such state.

In Equity.

Stewart & Herrin, for complainant.

Van Clief & Gear and *John N. Pomeroy*, for defendant.

SABIN, J. This suit is brought by plaintiff to establish its right to redeem the Pioneer mine, situated in Sierra county, California, from defendant, under an asserted mortgage, alleged to have been created and effected by virtue of certain contracts and sheriff's sales set forth in the complaint. The suit was commenced on the twenty-second day of November, 1883, in the superior court of Sierra county, and was removed to this court for trial. It is difficult to epitomize or abridge the pleadings, and, at the same time, fully and clearly state the case of either party, plaintiff or defendant. I therefore refer to the complaint and answer at large, in this opinion. Plaintiff is the successor in interest to the Pioneer Mining Company, a corporation organized in 1874. It is necessary, *in limine*, to determine the legal effect of the contracts set out in the complaint, executed by Chapman and Baker, and by Chapman and Sayre and Baker. Were they made for the sole use and benefit of Chapman, or Chapman and Sayre, or were they made as and for the benefit of the Pioneer Mining Company? And if made for the sole benefit of Chapman and Sayre, is there any legal objection to their transfer by them to said company, and by said company to plaintiff? The complaint alleges that all of those contracts were made for the use and benefit of said company; that they were assumed and ratified by said company and duly transferred, with all rights of action thereunder, to plaintiff, prior to the commencement of this suit. As to their ratification and adoption by said company, and transfer to plaintiff, the testimony is ample, and the allegations of the complaint in this respect are fully sustained. The answer controverts the allegations of the complaint, now under consideration, and alleges that said contracts were made for the sole use and benefit of Chapman and Sayre, and denies their adoption or ratification by the Pioneer Mining Company, or their transfer by said company to plaintiff. The execution or delivery of Contract B is denied. This contract and its execution will be considered hereafter.

Upon the argument of the demurrer to the complaint, heard in this court, it was held that sufficient appeared upon the face of the complaint to entitle plaintiff to maintain this suit. 20 FED. REP. 4. The demurrer, of course, confessed the allegations of the complaint, and the ruling of the court was predicated upon the matters so pleaded and confessed. Are those allegations sustained by the proofs submitted?

We shall hardly understand and fully appreciate much of the testimony in this case, its value and significance, unless we constantly bear in mind the relations which existed between these parties—Chapman and Sayre, and defendant—from December, 1874, to June, 1883. During all of this time the testimony abundantly shows that their re-

lations were intimate, confidential, and trustful, and involving the expenditure of large sums of money. Prior to 1874, defendant, Baker, was the owner of a portion of the placer mining claims, which now constitute the Pioneer mine. He had been working some of these claims in the years 1872, 1873, and 1874, at a profit; taking out, perhaps, \$60,000 in the year 1874. In December, 1874, Baker effected a sale of the Pioneer mine to the Pioneer Mining Company, at a valuation of \$255,000. He received at the time of sale, in money, \$112,500; the obligations of the company for \$125,000 more, payable out of the proceeds of the mine, after \$100,000 had been realized therefrom; and 1,600 shares of the stock of the company. The Pioneer Mining Company commenced to develop the property, and carried it on at great expense until some time in the early part of 1876. The expense of opening the mine properly had been far beyond the estimates made at the time of purchase, and the receipts from the mine were probably far less than the company had expected. Fortuitous events had thrown the burden of the expense largely upon Chapman, he owning then three-fourths of the stock of the company.

Chapman, Sayre, and F. W. Hadley constituted the board of trustees of the company from its organization to the present time. Baker was familiar with all of the affairs of the company; knew who were its officers, and the interest which Chapman and Sayre had in the company. He lived near the mine and saw the work thereon as it was being done. He states in his testimony that this work was necessary to open the mine properly, and generally was well done. In 1876 the company was embarrassed for means to carry on its work, and probably discouraged at the results attained. Under these circumstances Contract A was executed, and the company resumed work, and continued it until some time in the year of 1877, when it became again embarrassed, and practically suspended work on the mine during the year. It did but little work in 1878. I am not certain that Baker at this time knew the extent of Hadley's interest in the company. I think he did not. Hadley's interest (100 shares of stock) was so small that it was not considered. Chapman and Sayre then, in 1878, owned all of the stock of the company, except the 100 shares held by Hadley, who was Chapman's clerk, and probably held this stock for the purpose of qualifying him to be a trustee in the company.

The Pioneer Mining Company was capitalized at \$640,000, divided into 6,400 shares, of the par value of \$100 per share. Chapman was the president of the company; was its controlling spirit, and had furnished by far the greatest portion of money expended on the mine. Baker knew these facts. Chapman and Sayre were considered to be, and virtually were, the Pioneer Mining Company; and all of these so dealt with each other from 1876 to 1883. Contract A was executed formally by the Pioneer Mining Company and Baker; Contract B, (if executed at all,) between Baker and Chapman. The lease of November 1, 1878, to Baker was executed by the Pioneer

Mining Company, formally. The contract of the same date, (Defendant's Exhibit 9,) drawn by defendant's attorney, is executed by Baker and Chapman, and the final agreement of December 20, 1878, drawn by Baker's attorney, is executed by Baker, of the first part, and Chapman and Sayre, of the second part.

It will be seen from these contracts that the parties executed them in various forms, attaching no importance to the mere matter of form, or the persons by whom executed. Each and all of these contracts, so executed, have reference to the property and to the indebtedness of the Pioneer Mining Company in terms, and that property and indebtedness only. Not a word appears in any of them as to any other property or indebtedness, or to any individual property or indebtedness of Chapman, or Chapman and Sayre. And in the correspondence, in evidence, extending from 1878 to 1883, between Baker and Chapman, and Baker and Sayre, Baker makes frequent reference to his desire to work out his claim against the mine and save it for "you,"—for the "old owners," for the "company." These terms are used interchangeably, and without the slightest obscurity as to his meaning. Baker secured important rights by these contracts, as will be seen hereafter. It is not possible that Baker, or his attorney, in drawing these contracts, for a moment considered them as the mere personal contracts of Chapman, or Chapman and Sayre. There was nothing upon which these contracts could act except the property of the Pioneer Mining Company, and nothing upon which they were intended to act except upon that property. There was no obligation resting upon the company to pay to Baker the \$125,000, or the \$100,000, as agreed upon in Contract A, except as it should be taken from the mine. That payment was a charge, a lien, *in rem*, solely upon the mine. The contract of December 20, 1878, was first drawn by Titus, Baker's attorney, to be executed only by Baker and Chapman. When the contract was shown to Sayre he suggested that he also ought to be a party to it, and it was redrawn accordingly by Titus, and so executed. I have no doubt that if that contract had been drawn to be executed by Baker, as the first party, and the Pioneer Mining Company, as the party of the second part, it would have been just as readily so executed by all of the parties.

In his verified answer to a suit brought by Hadley and Brown, growing out of this contract, in which suit they charged fraud in the execution of this contract, Baker says "he did not realize or think of any difference or conflict of interest between said corporation on the one part, and Chapman and Sayre on the other," and that "at the time of signing said agreement he would just as readily and willingly have signed a like agreement with said corporation, had he been requested to do so by said Chapman and Sayre." I have no doubt it was a mere inadvertence that it was not so drawn, instead of being drawn in the form as executed. I am aware of the danger

in attempting to explain contracts long after their execution. I think no such danger is to be feared in this case. The various contracts set out in the complaint must be considered together. They are interdependent, and have but one object and purpose running through them all, to-wit, the payment of the indebtedness of the Pioneer Mining Company, therein mentioned, in the manner and within the time therein specified, and then to surrender the property to its lawful owners. Baker was not making, nor was his attorney draughting for him, mere barren, idle contracts, to be executed by Chapman, or by Chapman and Sayre, which could be of no use to him,—which could give him no substantial rights. These contracts having reference only to the property and indebtedness of the Pioneer Mining Company, reciting in terms that it was the property of that company, were executed by Baker with Chapman, and with Chapman and Sayre, because he knew they were trustees of that company—were a majority thereof—and owned in 1878, as the answer admits, forty-seven forty-eighths of the capital stock of the company. They were carried into effect as though they were the contracts of the company, and Baker at all times derived the same advantage and benefit from them that he would or could have obtained under them had they been formally executed by the company, instead of being executed as they were.

The objects sought and the results attained were the same, in whatever form the contracts were executed. There is no charge of fraud in this case against any of the parties, in reference to the execution of any of these contracts; and the testimony raises no suspicion of fraud in the execution thereof. I doubt not they were executed in the utmost good faith by all of the parties thereto, and the testimony submitted establishes, beyond question or doubt, the fact that these contracts, whether signed by Chapman, or by Chapman and Sayre, were made on behalf of the Pioneer Mining Company, which they then represented and now represent, and were so intended at the time of their execution; and as such they were so considered and carried into effect by all of the parties thereto. Give these contracts this force and effect, and they are clear and unambiguous, and the subsequent conduct and action of these parties, Baker, and Chapman and Sayre, extending through five years and involving outlays of many thousands of dollars, is intelligible, reasonable, and logical. Considered as the mere personal contracts of Chapman, or Chapman and Sayre, and it is impossible to explain or understand them, or their object, or the subsequent action of the parties under them. Baker certainly cannot now complain of this construction being placed upon these contracts, after having enjoyed all of the benefits derivable therefrom during all of this time, while they were by him and all parties actually carried into effect as the contracts of the Pioneer Mining Company.

If recovery can be had in this suit as prayed for, it is immaterial

to Baker whether it be had by plaintiff, by the Pioneer Mining Company, or by Chapman and Sayre. The effect, as to him, is the same in any event. But were these contracts, any and all, the mere personal contracts of Chapman, or Chapman and Sayre, is there any legal objection why they might not transfer them to the company which they then represented, and now represent, whose property, in terms, these contracts solely dealt with, and for whose benefit they were made? I am not aware of any such legal objection. Nothing in any of the contracts forbids such action on their part; and the company which they represented might assume, ratify, and adopt them, if deemed advisable to do so.

Under the pleadings and testimony in this case, it is clear, upon the most familiar principles of law, that the Pioneer Mining Company could compel, if desirable, the transfer by Chapman and Sayre of these contracts to itself, made by its trustees, and dealing solely with its property, and could compel them to account scrupulously for all gains by them derived thereby. Clearly, Chapman and Sayre may do voluntarily what the law would compel them to do upon suit brought for that purpose. They are forever estopped under the record in this case from asserting any personal rights under those contracts, unless they shall first be retransferred to them by the plaintiff in this action.

As already observed, the evidence shows that these contracts were adopted, assumed, and ratified by the Pioneer Mining Company, and by it transferred to plaintiff. I may observe that I do not doubt the legal capacity of Chapman, Sayre, and Hadley to act as the trustees of the Pioneer Mining Company. They were its first duly-constituted trustees. No others have ever succeeded them; and it is not shown that any escheat or forfeiture of its corporate rights and franchises has ever arisen or been declared against that company. It may be further observed that the action of the board of trustees of said company, in assuming and ratifying these contracts, was duly ratified and approved by all of the stockholders of said company, prior to the commencement of this suit. There can be no doubt as to plaintiff's right of action.

A large amount of testimony is submitted in regard to the execution of Contract B, and this testimony is somewhat conflicting. The preponderance of evidence is that this contract was executed and delivered on about the ninth or tenth of August, 1878. In 1877 the Pioneer Mining Company had become embarrassed. The Bank of La Porte had obtained a judgment against the company, November 10, 1877, for about \$4,777; and on April 15, 1878, the California Powder Works recovered a judgment against the company for \$16,522.85. There was other outstanding indebtedness of the company, estimated at from eight to ten thousand dollars. Baker also held his claim against the mine for \$100,000 under Contract A. Baker, naturally, was solicitous about his claim, and more so as these judg-

ments were a lien upon the mine, and the other indebtedness of the company might at any time be put into judgment. Baker conferred with Daniel Titus, his attorney, in regard to his contract, A, with the company. He was anxious, if possible, to secure a lien on the mine which would take precedence of the two judgments above mentioned. It is evident that he and Chapman often conferred on this subject.

In the purchase of the Pioneer mine, and in developing the same, the Pioneer Mining Company had expended probably \$250,000,—perhaps more. Chapman had borne the greater part of the expense of developing the mine. He then, August, 1878, owned three-fourths of the stock of the company. Baker was fully aware of Chapman's heavy investments in the mine, and their personal relations were harmonious; and both were anxious to save themselves from loss, and to aid each other. On the twelfth day of August, 1878, Baker commenced a suit to foreclose Contract A. Titus testifies that he had the subject of bringing this suit under consideration for some months before it was brought; that he had a good deal of anxiety about it, and especially as to whether or not the suit could be maintained; and that he had no knowledge that it would not be defended. Such anxiety would be very natural on his part, considering the contract, and the judgment sought and obtained. The suit was brought, was not defended, and judgment for \$102,610 obtained, with interest at 7 per cent. per annum, and the same adjudged to be a lien on the mine, sale ordered, and a personal judgment decreed against the company for any deficiency arising on sale of the property. Prior to the commencement of this suit, John C. Hall had been the attorney of Chapman in sundry matters, not connected with this suit. At his request, Hall prepared the original draught of Contract B for Chapman. It was submitted to Titus, as Baker's attorney, for examination and correction, if desired. Titus examined it, changed it in several respects, and it was returned to Hall for engrossment, as corrected by Titus. It was so engrossed, as changed and amended by Titus, and as it now appears in the complaint. In the original draught, Hall, under a misapprehension, recited the fact that Baker *had* obtained a judgment, etc. As amended by Titus, it reads as we have it in the complaint: that Baker has a claim, etc., and is *about* to obtain judgment, etc.

In his direct examination, Titus is positive that this contract was not executed until after he had obtained this judgment for Baker, August 26, 1878, and that he would not have permitted Baker to execute the same as it now appears in the complaint, because it would have contained a false recital, to-wit, that he was "*about* to obtain a judgment," when in fact he had already obtained the judgment. But on cross-examination he admits that some of the changes suggested by him, as they appear on the slip now attached to the draught of this contract, are in his own handwriting, and, as before stated, this contract is set out in the complaint as it was corrected by Titus. I do

not think that he wrote any "false recital" to be engrossed into the contract. He, as Baker's attorney, wrote or suggested the recital that Baker "was about to obtain judgment," etc., and this would clearly have been false were not the contract to have been executed prior to the date of obtaining the judgment for Baker. If the contract was not intended to be, and was not in fact, executed by Baker until October 30, 1878, nearly three months from the time it was first draughted, it is certain that Titus then permitted him to sign it, containing a false recital of an important matter, and that Titus knew that such recital was false. Now I do not think that Titus did any such thing. Six years had elapsed from the date of that contract to the time when his testimony thereon was taken. I think he was mistaken in his recollection of the matter. August 9th, Hall charges Chapman \$50 for drawing this contract, and saw it no more thereafter. His account-book, containing this charge, was submitted to and examined by the court. The entry seems to be regular in all respects, and above suspicion. The testimony of Titus and Chapman as to the date of execution of this contract is conflicting. I cannot but think that, considering the deep interest which Chapman had in this matter, his recollection is the clearest and most accurate. From all of the testimony, I have little, if any, doubt that this contract was executed prior to August 13, 1878, the date of the commencement of Baker's suit on Contract A. But, whatever the fact may be on this point, it is morally certain that Baker and Chapman had a perfect understanding and agreement as to Baker's suit, and that no defense thereto would be made by the Pioneer Mining Company. Chapman's investment and interest in the mine at that time was nearly equal to, and perhaps greater than, the amount due Baker under Contract A. They wanted further time to make the money from the mine to pay these judgments and other debts, if possible. They had a common interest in the property, and they labored for a common object and result. If, as alleged in the answer, Contract B was never executed, it is most singular that Baker and Chapman, by mere accident and unwittingly, should have carried it into full and complete effect, of which there is no dispute, and should also have so fully embodied many of its important provisions into the contract of December 20th, following. These things could not have occurred by accident or chance; they did not so occur in this case.

I may have given this contract greater attention than its merits demand, as it is supplemented by the contract of November 1, 1878, (Defendant's Exhibit 9,) and is finally merged in the agreement of December 20th, following. I cannot think that these parties executed Contract B on the thirtieth of October, and only two days thereafter executed the contract of November 1, (Defendant's Exhibit 9.) On the twelfth of October, 1878, Baker entered into the contract with Baird and the California Powder Works, set out in the complaint. The objects of that contract are apparent. It gave precedence to the

judgment of the Bank of La Porte, then held by Baird, and to the judgment held by the California Powder Works. Sheriff's sales were to be made on those judgments, and also upon the Baker judgment; the legal title to the mine was to vest ultimately in Baker, and he was given 30 months from the date of obtaining title within which to pay off the two first-named judgments. These sheriff's sales were made accordingly, Baird bidding in the mine for the amount due on the first two judgments, and Baker bidding it in at \$60,000, on sheriff's sale a few days thereafter on his judgment. The sheriff's costs and commissions on the Baker sale amounted to about \$3,000. This sum Baker could not conveniently raise, and he settled with the sheriff for his costs, waived the sale, and took no certificate of sale from the sheriff on his judgment. This led to a modification of this contract, executed October 25th, as appears in the complaint. By this modification Baker was to assign his judgment to Baird, and the title was to be placed in Titus, who was to join with Baker in a mortgage on the mine to secure the payment of Baker's note for the amount due the California Powder Works, payable 30 months from date. These contracts were carried into effect when the title became vested in Titus, in April, 1879.

When Baker's note became due he was unable to pay it, and he naturally went to Chapman for aid. Chapman then advanced \$10,000 of his own money, paid it on Baker's note, and obtained an extension of one year on the balance. When this extension of time had expired, Baker was still unable to make any payment upon his note. He then, with the written consent of Chapman, mortgaged the mine to Morgan & Donahue, and Chapman took the money so obtained and paid the balance due the California Powder Works. There was a surplus of some \$1,400 in Chapman's hands of the money received from Morgan & Donahue, after paying the balance due the California Powder Works. This surplus Chapman retained, to apply on his advance of \$10,000, which is all that has been repaid to him on said advance.

After the clean-up of the mine for the season of 1883, Baker paid Morgan and Donahue the amount borrowed from them. It is insisted by defendant's attorneys that this Baker judgment was and is wholly void, and was of no advantage to Baker. I shall not discuss this point. It is sufficient that it served its purpose; and that it did prove advantageous to Baker, and Chapman and Sayre, there can be question. Its ultimate result was to gain for them, by means of the contract of October 12, 1878, more than three years' time within which to pay off the amounts due the California Powder Works, during which time Baker had the continuous and undisturbed possession of the mine; and the holders of the eight or ten thousand dollars of claims and demands against the Pioneer Mining Company, probably seeing no hope of realizing on their claims, forebore pressing the same against the company, with the exception of Ah Leen, mentioned in the com-

plaint. Baker states that he promised to pay this floating indebtedness, but has not done so. It is evident that Baker and his attorney, Mr. Titus, did not consider the judgment as void, nor did Chapman so consider it. Mr. Greathouse, the attorney for the California Powder Works at the time this judgment was rendered, had no doubt that it was collusively obtained. And he so charged Baker and Chapman, who appear not to have admitted the charge and yet not to have denied it. Chapman, however, insisted that no wrong was intended; that the California Powder Works would be fully paid; that he had made arrangements with Baker to that end. Chapman was the man to whom Greathouse principally looked for payment of these demands. He had guaranteed their payment. Mr. Greathouse says that finally he consented to make the claims out of the property, and the contract of October 12th was accordingly executed. Chapman's active controlling influence and agency in procuring the execution of this contract cannot be doubted. The testimony of Mr. Greathouse puts this beyond question, and need not be reviewed. And the same is true of the contract made October 25th, modifying the one of October 12th.

Greathouse says that Baker and Chapman both asked him to permit the substitution of Titus in place of Baker, as the person to whom Baird should deed the mine, and that he consented thereto. Titus confirms this in his testimony. He says that Baker and Chapman both came to him and asked him to consent that the property be deeded to him by Baird, and that he so consented; that he did not remember that they assigned any reason, beyond their wish, for the change. It is needless now to inquire what that reason was. Baker and Chapman differ in their testimony on this point. March 26, 1880, Baker, in a letter to Chapman, says, "I would have held the deed myself if allowed." Again, on the twenty-seventh of the same month, he writes Chapman: "You must not forget that your objections, and fear to trust me to carry out this programme, produced the necessity to put it, the legal title to the mine, in other hands, where we could not control the situation." The controlling agency of Chapman in all these matters is too apparent to be denied. The contract of November 1, 1878, (Defendant's Exhibit 9,) executed by Baker and Chapman, followed. It is a supplement to Contract B, having the same general purpose and object, and is merged in the final contract of December 20th. On November 1st was executed the lease giving Baker possession of the mine for six months thereafter. On December 20, 1878, was executed the contract, called in the complaint the final or mortgage contract. Its object is apparent. It was to secure to Baker the payment of the sums therein mentioned and provided for, in the manner and within the time therein specified, and when this was accomplished to surrender the mine to its lawful owners. This and the other contracts set forth in the complaint had this one purpose. All tended to the same result. They dealt only with the property of the Pioneer

Mining Company,—could act on nothing else; sought only to discharge its debts and obligations as therein provided; were executed by Baker with Chapman, and with Chapman and Sayre, because they were the trustees of that company, and because Baker knew them to be such trustees; because he knew they owned nearly all of the stock of that company, and had always been the sole managers of its affairs. And from the dates of the several contracts to June, 1883, they were treated, considered, and acted upon by all parties thereto as the contracts of that company for its use and benefit, and not as the individual contracts merely of Chapman, or Chapman and Sayre. If this be not so, how has it occurred that Baker has had the undisturbed possession of this mine from November 1, 1878, to July 1, 1883? His only formal lease with the Pioneer Mining Company gave him possession of the mine for six months only, from November 1, 1878. Did he continue in possession under that lease, or under the contract of December 20th? If under the latter, then clearly it was treated and considered by all parties thereto as the contract of the company. The lease provided nothing about Baker's keeping accurate accounts of his expenses upon and receipts from the mine, and rendering such accounts to Chapman and Sayre. The contract of December 20th did so provide, and Baker, in his answer, alleges that he always has kept such accounts, and rendered them to Chapman and Sayre.

In view of the facts clearly established by the testimony, I cannot but hold that these sheriff's sales set out in the complaint, had and brought about as they were, and this final contract of December 20th, 1878, were and are in effect a mortgage—no more and no less—for the purposes set out in that contract. It will be conceded that a mortgage may be created in many ways. We are to consider, not so much the means used to that end, as we are to consider the legal effect,—the purpose and intention of the parties in the use of those means.

Equity often looks beyond the mere written instrument, hears parol evidence in regard to the same, not to contradict or vary its terms, but to raise an equity superior to it, and to give it effect according to the true intent and purpose of the parties. And a mortgage may be created as well without as with an accompanying personal obligation of the mortgagor to pay the debt secured, or attempted to be secured, thereby. In the one case the property alone is charged with the lien,—is looked to solely by the mortgagee out of which to make his lien; in the other, he has the additional security of the personal obligation of the mortgagor. A debt chargeable only against certain property is, in effect, simply a debt with limited means of satisfaction or enforcement; the value of the property charged with the indebtedness is the measure of the security afforded. And this is exactly the security taken by Baker in 1874, when he sold this mine for the balance of the purchase money, \$125,000. This arrangement was then sat-

isfactory to Baker,—was his voluntary contract,—and neither reason nor authority is suggested why this agreement is not legal and binding upon the parties thereto, and upon the property impressed with that lien. This agreement could have been acknowledged and recorded and made notice to all persons dealing with that property. It is evident that the stockholders of the Pioneer Mining Company did not wish to subject themselves to the possible personal liability of paying the whole purchase price of the mine, should it prove to be of little or no value. And this security was still acceptable to Baker, and by him accepted in Contract A. This arrangement was manifestly intended to give each party an opportunity of getting out of the mine the large amount of money which they respectively had invested in it; giving Baker the preference, and to Chapman and Sayre, or, which is substantially the same thing, the Pioneer Mining Company, the benefit of any surplus, and the mine itself, after the payment of Baker's claim against the mine.

It is urged by defendant that there is no valuable consideration for any of these contracts, and especially for the final contract of December 20, 1878. I cannot agree with counsel in this view. It may not be so important to inquire into the consideration of the contracts preceding the final contract of December 20th, as the others are merged therein. But I think, on examination of all of the contracts, we shall not fail to find them based on good and valuable considerations.

At the date of Contract A the Pioneer Mining Company had suspended work on the mine. Its outlays had been large, the returns small. It was under no obligation to go on forever, spending large sums of money upon the mine, with no returns. Baker held his claim against the mine for \$125,000, payable from the proceeds thereof. If the mine could not be made to pay this amount, Baker's only remedy was upon his contract. Hence the Contract A. Baker surrendered his stock in the company, reduced his claim to \$100,000, payable as before, and he and the company surrendered all liabilities and obligations held by the one against the other, and the company promised to resume work on the mine. It did so, but probably not as effectively as was expected when the contract was executed. The complaint alleges that the company expended more than \$120,000 on the mine after the date of that contract. I am not able, from the testimony, to say what that amount was, but it was many thousands of dollars.

All of this, to a certain extent, inured to Baker's benefit. I cannot think there was lack of valuable consideration from either party in this contract. And this remark applies also to Contract B, and the contract of November 1st, (Defendant's Exhibit 9.) It can hardly be claimed that the contract of December 20, 1878, is without a valuable consideration. Without specifying others, it will be sufficient to observe that it gave Baker continuous possession of the mine for

four years, a thing he greatly desired, and the right to work it as he saw fit; and this has resulted, as he admits in his answer, in a clear profit to him of \$47,000 above all expenses. It is true that he has done this by making at times large advances; but this is what he contemplated, and knew he must do, when the contract was made. It has not been any the less valuable to him on this account,—the advances have been repaid,—and it is not denied that Baker has been in possession of this mine all this time under this contract, or certainly since the expiration of the lease of November 1, 1878, for six months. Its want of mutuality is hardly apparent, and would have found little support had Chapman and Sayre attempted to dispossess Baker of the mine without first complying with the terms of that contract. It is only by complying with those terms that plaintiff seeks to establish a right of action in this case. It may be further observed that by this contract Baker was to be paid interest on all of his advances at the rate of 1 per cent. per month. I am not certain, and do not now decide, whether or not, under this contract, this rate of interest is to apply to his judgment of \$102,610. If it does, it is an advantage to him of more than \$5,000 per annum, as his judgment drew only 7 per cent. per annum.

Baker testifies, in effect, that his understanding is that his judgment draws interest under the contract at the increased rate, and he so computes interest thereon in a partial statement of his account rendered to Sayre, (Plaintiff's Exhibit N.) If, however, this judgment is void, as insisted by defendant's counsel, it, of course, can draw no interest. And the same consideration extends, in a measure, to the agreement of December 16, 1882, extending this contract of December 20, 1878. Possession of the mine was to continue in Baker. This extension was granted for one of two purposes: either to be carried out in good faith by all parties thereto, or it was designed as a trap, a device, by which Chapman and Sayre, or the Pioneer Mining Company, should be induced unwittingly to allow the time for redemption to expire without offering to perform on their or its part. Nothing in the record supports the suggestion that the latter was the purpose of its execution; but were it fully established that such was its purpose, it would receive no countenance from the court; and no laches have arisen thereby, on the part of plaintiff, that would preclude recovery on that ground.

It is asserted and maintained with great earnestness that Baker now holds an absolute, indefeasible title to this mine, by virtue of the sheriff's sales on the judgments mentioned, free and clear of all equities arising from this contract of December 20, 1878; that in procuring such title he acted independently of, at arms-length, and adversely to, Chapman and Sayre, and all parties interested in the Pioneer mine. I must say that this assertion is not supported by a line or word of testimony in the case. The sales were made nearly as outlined in Contract B, and exactly as provided in the contract of Oc-

tober 12, 1878, executed by Baker, Baird, and the California Powder Works. This contract, as I have held, and as is abundantly shown by the testimony, was procured mainly by Chapman's influence, effort, and solicitation. His personal investment in the mine was then equal to, or greater than, the amount then due Baker. It is rather a play upon terms than a statement of fact to say that the debt of the Pioneer Mining Company to the California Powder Works was paid by means of these execution sales made by the California Powder Works. Those sales were merely a means to an end. The California Powder Works did not want the mine, and it agreed by this contract of October 12, 1878, to acquire and transfer the title thereto for a specific purpose only. Its demand was not paid until years after it acquired and transferred this title, as I have already shown.

The legal title to the mine passed to Titus about April 29, 1879, and was held by him until September 15, 1882, when he deeded the property to Baker, subject to certain mortgages, and subject to the rights of Chapman and Sayre, as set forth in the complaint. There can be no doubt, under the evidence, as to the perfect understanding and agreement of all of these men—Baker, Chapman, Sayre, and Titus—as to their rights in this property, under these sales, and the contract of December 20th. And there is no disagreement among them on this point. Titus held the title to the property as the trustee of both parties. He testifies that he understood that he had full power to sell the mine, but that he would not have sold it at any price without the consent of Baker and Chapman. Titus had long been the confidential attorney of Baker. He had also been the attorney for Chapman in some matters. Both reposed confidence in him. He drew this contract of December 20th, and the one of November 1st, and had carefully examined and amended Contract B before its execution. He knew all about the contract of October 12th, between Baker and Baird and the California Powder Works, knew its object and purpose, and had joined with Baker in the mortgage to secure Baker's note to the powder works. And he seems to have executed his trust honestly and faithfully. While Titus held this title, he and Baker and Chapman were all trying to effect a sale of the mine. Titus received two or more offers for the mine. These offers he reported to Baker and Chapman for their approval. When requested by Baker and Chapman he transferred the title to Baker, subject to *the conditions mentioned*, and Baker voluntarily so accepted it. His testimony on all of these matters is clear. The title passed to Baker, not as a purchaser, nor by operation of law, but simply at the request of Baker and Chapman to carry out their wishes and purpose in regard to the mine. Baker testifies that he always intended to carry out faithfully the contract of December 20th; that he never sought to avoid it. And his correspondence with Chapman and Sayre from 1878 to 1882, in evidence, is to the same effect. On March 26, 1880, Baker writes to Chapman: "You know how the title

came to be put in Titus' hands. I have made no definite arrangement with him." In the same letter, referring to certain services rendered by Titus in regard to the property, which Baker deemed advantageous, he says: "All of which was of as much to your advantage as mine in saving the property. * * * I have repeatedly urged upon you to make a definite arrangement with him, [Titus,] as it belonged more to you than to me to do it, as a certain amount of the proceeds of a sale comes to me and the balance to yourself and Sayre, as Titus fully understands. * * * I leave it between you to settle as you can. I would have held the title myself, if allowed; then all would have been easy." He urges Chapman to accept an offer of \$450,000 for the mine, and says, "I leave it in your hands." The following day, March 27th, he again writes Chapman: "With regard to what the Pioneer could be sold for at the very lowest, I can only say the matter rests wholly with you. I have made the last reduction on my claim that I ever shall, and the final contract defines what I am to have out of the property; whatever more is got out of it I freely yield as the contract specifies. * * * You must not forget that your objections and fear to trust me to carry out this programme produced the necessity to put it [the title] in other hands, where we could not control the situation, and therefore, if loss comes from it, you are the one on whom that loss justly falls and not on me." On September 24, 1882, after the title had passed from Titus to himself, Baker writes to Sayre: "I am now able to report that I hold the deed to the property, as contemplated in our original contract of redemption." November 25, 1882, he writes Sayre asking him to join in a bond, executed by himself and Chapman, to sell the mine for \$400,000, and says: "If we do not sell this mine I would rather have my money in sight than the mine clear of all incumbrances, with the risks which attend it. Hence I say I will never clear up the mine again without I do it for myself, and at the end of this extension I must have my money or be the sole owner of the mine, untrammelled by any redemption contracts."

There are many letters in evidence from Baker to these parties, and all to the same effect on this matter. His answer alleges that annually, after each clean-up, prior to June 23, 1883, he rendered to Chapman and Sayre a full, true, and correct statement of the amount and value of such clean-up, and of all proceeds and receipts from said mine, and of his disbursements in opening, developing, and working the same. He was under no obligation to do these except by that contract. Every act of Baker, in all this business, from the date of this contract of December 20, 1878, to the twenty-third of June, 1883, shows that he considered the contract to be in full force, and that he did not hold the title to the mine freed from its obligations. And his testimony is to the same effect. I cannot, therefore, give any weight to this assertion, now set up, as to Baker's title to the mine; that he holds it free and clear from the equities arising from the contracts

set forth in the complaint, and especially the contract of December 20, 1878. The assertion is not true, in fact, unless the testimony of every witness on this point is false.

It is further insisted that Baker gave the full market value of this property in the amount for which it was bid in on the execution sales made by the California Powder Works. And this is urged as evidence that the sales were, and were intended to be, absolute, with no resulting trust in favor of Chapman and Sayre, or the Pioneer Mining Company. We have shown, from the testimony, how these sales came to be made. I cannot but think that this inquiry is somewhat irrelevant. But the fact is shown, by every witness examined on this point, that this mine at that time had no market value, in the usual acceptation of that term. It was simply bid in for the amount of those judgments, interest, and costs. Baker testifies that he thinks its fair value at that date was about \$25,000 or \$30,000. And yet, a day or two thereafter, he bids, on his own execution sale, \$60,000 more for the mine, when clearly it had not enhanced \$1 in value. This seems inconsistent. The evidence submitted on this point, if it proves anything, proves too much. Some of the witnesses testify that they would not give four bits for the mine, while the aggregate of Baker's bids for it were nearly \$90,000. And we are to remember that Baker did not pay the amount for which the mine was struck off on the first execution sales. Chapman paid the first \$10,000, which was paid thereon in September, 1881, and the balance was not really paid until it was paid from the clean-up of the mine for the season of 1883, as testified to by Baker. Whatever may have been the opinion of various persons as to the real or speculative value of the mine in October, 1878, it is clear that Baker, and Chapman and Sayre, all considered it to be of great value, far beyond \$25,000 or \$30,000. In 1880 Baker urges Chapman to consent to a sale of the property at \$450,000. In 1882 Baker asks Sayre, by letter, to join with himself and Chapman in a bond to sell the mine for \$400,000. While Titus held the title to the mine, from April, 1879, to September, 1882, he, Baker, Chapman, and Sayre were all trying to effect a sale. Titus seems to have had at least two offers for the property: one at about three hundred or three hundred and fifty thousand dollars, and the other at a larger sum. I cannot but think that Baker, Chapman, and Sayre were the best judges of the value of that mine, and their judgment in this respect is best shown by their actions relative to its sale, and the price asked therefor. But in this case it makes no difference if Baker's purchase on the execution sales was at the then full value of the mine; the whole transaction was still in effect only a mortgage. In cases of doubt whether a transaction was a conditional sale or a mortgage, equity will hold it to be a mortgage. By so doing, the rights of each party are preserved; the mortgagor is permitted, upon fulfillment of his contract, to save his property, and the mortgagee receives his just dues, and is entitled to no more.

We pass to the alleged tender made by Chapman, in compliance with this final contract of December 20, 1878. Prior to June, 1883, there had been correspondence between these parties, and especially between Baker and Sayre, in reference to the redemption of the mine, the amount required therefor, etc. About June 19, 1883, Chapman applied to Baker for a further extension of time to redeem under the contract of December 20th. He wished it extended until after the clean-up of the mine for that year. This would give Baker the benefit of that season's products, then supposed to be large, and, as shown by Baker, was in excess of \$87,000. This request Baker refused, and he then informed Chapman that redemption must be made by June 22d, or the right to redeem would cease on that date. Baker then thought that the extension of time on this contract of December 20, 1878, made December 16, 1882, expired June 22, instead of July 1, 1883. Chapman then made arrangements by which he was to obtain \$100,000, and whatever more might be required, with which to redeem the property. On the twenty-eighth of June, following, Chapman applied to Baker for a statement of his accounts, and to know the amount required for redemption. He had, prior to this, written Baker to have such accounts prepared.

This statement Baker did not and could not furnish. His books were not there, at the mine, when the request was made, and he states in his testimony that he had not made up his accounts since October, 1882. The bills were not in, and expenses not known. It is evident from the testimony, and chiefly that of Baker, that Baker could not have furnished a true or correct statement of his accounts, or the amount justly due him on July 1, 1883, if he had wanted to do so, and it is equally evident that he did not want to do so. He then thought the time for redemption had expired, and, as he states, he "stood upon his legal rights." By his neglect to have his accounts ready he put it out of the power of Chapman and Sayre to comply with the exact terms of the contract. It was not their fault that they did not know what amount to tender Baker on the first of July, 1883, in redemption of the property. Chapman had prepared the means, in good faith, with which to redeem, but Baker could not tell him the amount required. It is true that Chapman did not then have the money with him to make an actual tender of a definite sum, but if he had produced an unlimited sum it would in no way have aided the matter. Neither he nor Baker could tell the amount due the latter. I consider that there was a substantial compliance with the contract in this respect on the part of Chapman and Sayre, as Chapman's purpose was to pay the full amount due Baker under the contract. Baker's refusal to allow redemption was based solely upon the fact, as he understood it, that the time for redemption under the contract of December 20, 1878, and the extension thereof, had then expired. He did not object that no tender of the amount due under the contract had been made. He stood upon his legal rights, independently of

any tender. It may further be observed that, considering this whole transaction as a mortgage, as I do, a tender upon the exact day was not strictly necessary to preserve the right of the parties under that contract. The right of a mortgagee to redeem is not limited to a strict performance on his part upon the very day his mortgage becomes due.

I have thus endeavored to review this case upon its merits, as established by the testimony. It is seldom that a bill, in a contested case, is so fully sustained by the evidence. I am aware that Chapman and Sayre commenced a suit June 29, 1883, on this contract, seeking its enforcement. Whether or not that suit was well or ill advised I am not called upon to say. This, however, is true, under the evidence in this case: that if they had recovered in that suit in their own names, it would have inured to the use and benefit of the Pioneer Mining Company. A recovery therein would not have changed the facts established in this case, nor would it have precluded the Pioneer Mining Company from asserting its rights. It is of little moment to Baker what party, as plaintiff, holds the equity of redemption under that contract of December 20, 1878, since his rights thereunder will be fully protected, and performance decreed and executed, before he will be called upon to convey the property. The court has determined, in this suit, that plaintiff now holds that equity of redemption, and may enforce it against the defendant. Hadley and Brown also commenced a suit upon this contract, in July, 1883, charging fraud in its execution. Both of these suits were dismissed by the parties who brought them, and were never heard upon their merits. They have but little bearing in this case, which is heard upon the issues raised by the pleadings, and must be decided upon the facts established by the testimony, and the law applicable thereto.

I do not deem it necessary to discuss at length the doctrine of mortgages as applied to this case. These contracts were made under the Code of California, and are subject to its provisions. And this court, in carrying the contracts into effect, will be guided by the decisions of the supreme court of California in construing the provisions of the Code applicable thereto. Under the Code of California, and under the generally recognized doctrine of mortgages, this transaction, as a whole, can only be deemed a mortgage. It is of little consequence whether we consider Baker as a mortgagee, in possession by consent, or as a trustee, holding the title to this mine in trust. When the conditions upon which he holds that trust are fully complied with, he may, at any time, be called upon to surrender that trust.

I deeply regret the necessity which compelled the bringing of this suit. It is most unfortunate that these parties, after years of hearty co-operation, constant courage, struggle, and labor, involving great expenditures of money, and at the last moment, when their long-deferred hopes were almost realized, should have come to this painful

and costly disagreement, and so have thwarted their common understanding and enterprise. I cannot but think that it never would have so happened had not Baker become so erroneously impressed with the idea that the extension of the contract of December 20, 1878, expired June 22, instead of July 1, 1883. He testifies, over and over again, that it was always his intention and purpose at all times faithfully to carry out that contract, and his every act done under it confirms his testimony in this respect. I find the following numbered allegations of the complaint, as numbered therein, sustained by the testimony submitted, to-wit: Nos. 1 and following to and including No. 16, with the exception of the last sentence thereof, in the words, "but the mortgage to Messrs. Morgan & Donahue still remains unpaid, and a lien upon the mine." Baker testifies that he has paid this mortgage. Also, Nos. 17 and following to and including No. 22. The allegations in subdivision 23 as to Baker's secretly retorting amalgam, and his insolvency, are not sustained. His possession of the mine and working the same are conceded.

Let a preliminary decree be entered in favor of plaintiff, if desired, in accordance with this opinion, and the case be referred to the standing master in chancery of this court to take an account between the parties and report the same to the court.

LECLANCHE BATTERY CO. v. WESTERN ELECTRIC CO.

(Circuit Court, S. D. New York. March 27, 1885.)

1. TRADE-MARK—NAME OF NEW ARTICLE—RIGHT TO USE OF.

When an article is made that was theretofore unknown, it must be christened with a name by which it can be recognized and dealt in; and the name thus given to it becomes public property, and all who deal in the article have the right to designate it by the name by which alone it is recognizable.

2. SAME—NAME, WHEN NOT A TRADE-MARK.

A name alone is not a trade-mark when it is applied to designate, not the article of a particular maker or seller, but the kind or description of things sold.

3. SAME—IMITATION OF LABELS—INJUNCTION.

Although the name applied by a complainant to his goods may not afford protection as a trade-mark, where others are guilty of imitating the labels used by him in making sales thereof, they will be enjoined.

In Equity.

Dickerson & Dickerson, for complainants.

Geo. P. Barton, for defendant.

WALLACE, J. The complainants cannot maintain their claim to the exclusive right to use either the word "Disque" or "Pile-Leclanche" as a trade-mark, when applied to the batteries manufactured and sold by them. As owners of the right to manufacture and sell the Leclanche batteries until the expiration of the patent granted to the

assignee of Leclanche, they have been accustomed to use the word "Disque" on the labels pasted on the glass jar which forms part of the battery, and the word "Pile-Leclanche" blown in the glass. Neither of these words are arbitrary names, selected to denote the article as the production of a particular proprietor. They are appropriate, and are intended to indicate that the batteries are of a specified form, and are made according to the patent of Leclanche. "Disque" describes the form of the battery, and is used to distinguish it from the prism and other forms of porous-cup batteries. "Pile" is synonymous with battery, and "Pile-Leclanche" is the designation in French of Leclanche's battery.

When an article is made that was theretofore unknown, it must be christened with a name by which it can be recognized and dealt in; and the name thus given to it becomes public property, and all who deal in the article have the right to designate it by the name by which alone it is recognizable. *Hostetter v. Fries*, 17 FED. REP. 620; *Singer Manuf'g Co. v. Stanage*, 6 FED. REP. 279. As soon as Leclanche invented his battery in France, it was necessarily given the name "Pile-Leclanche," and that name could never again be appropriated exclusively as a trade-mark even by the inventor himself.

A name alone is not a trade-mark, when it is applied to designate, not the article of a particular maker or seller, but the kind or description of thing which is being sold. *Singer Manuf'g Co. v. Loog*, 15 Reporter, 538; *Wheeler & Wilson Manuf'g Co. v. Shakespear*, 39 Law J. Ch. 36; *Young v. Macrae*, 9 Jur. (N. S.) 322; *Canal Co. v. Clark*, 13 Wall. 311.

The defendants have imitated the label of the complainant to the minutest details, except the signature at the bottom. The complainant is entitled to protection against the unlawful competition in trade thus engendered by the simulation of its label; and upon this ground a decree is ordered in its favor.

• See *Wilcox & Gibbs Sewing-Machine Co. v. The Gibbens Frame*, 17 FED. REP. 623; *Burton v. Stratton*, 12 FED. REP. 696, and note, 704, and *Shaw Stocking Co. v. Mack*, Id. 707, and note, 717.—[ED.]

RANDOLPH v. QUIDNICK Co. and others.

(Circuit Court, D. Rhode Island. March 20, 1885.)

EVIDENCE—COMMUNICATIONS MADE TO COUNSELOR—WHEN PRIVILEGED.

Communications made to a counselor in the course of his professional employment, by persons other than the client or his agents, are not privileged. The rule extends only to communications made by or on behalf of the client.

In Equity. Opinion of court on request of the examiner for instructions.

W. H. Baker, for complainant.

C. H. Parkhurst, for respondent.

CARPENTER, J. This is a bill brought to determine the title to certain shares of the capital stock of the Quidnick Company. In the taking of the testimony before the examiner, Richard B. Comstock, Esq., a counselor at law, was called as a witness by the respondent. Having testified that he was of counsel for the complainant from some time in 1879 up to about December, 1883, he was asked the following questions:

"Interrogatory 3. Did you have any interview while you were counsel for Evan Randolph with Ex-Governor Sprague, with reference to 4,022 shares of the capital stock of the Quidnick Company, to which Evan Randolph claimed title? If so, please state fully what took place at these interviews, and when those interviews took place."

Counsel for the complainant objected to the questions on the ground that it called for the disclosure of a communication which was privileged; whereupon the witness declined to answer unless so instructed by the court. Having further stated that he received into his possession a certain certificate of stock in August, 1883, the witness was asked as follows:

"Interrogatory 6. Had you, previous to the delivery of said certificate to you, had any interviews with Ex-Governor William Sprague, or with Benjamin F. Butler, his counsel, or with Andrew B. Patton, also his counsel, concerning said certificate or the transfer of said shares? If so, please state what those interviews were, and where they took place."

Counsel for the complainant objected on the same ground as before, and the witness declined to answer. The witness further testified that he caused an attachment to be made on a judgment held by Evan Randolph against William Sprague and Amasa Sprague, upon funds in the hands of one Jenks, and that the information on which he acted in making the attachment did not come to him from the complainant or from any person claiming to act for him. He was then asked as follows:

"Interrogatory 13. Did said information come to you from William Sprague or Amasa Sprague, or any one claiming to act for them or either of them?"

Counsel for the complainant objected on the same ground as before, and the witness declined to answer. The examiner reports

these facts, and he, together with the respondent, prays the instructions of the court.

The question in this matter is whether communications made to a counselor in the course of his professional employment by persons other than the client or his agent are privileged. I find no sufficient authority for the proposition that they are so privileged. The rule extends only to communications made by or on behalf of the client. *Crosby v. Berger*, 11 Paige, 377, and cases cited; Steph. Dig. Ev. art. 115; Best, Ev. p. 567, § 581.

Two cases are cited by the complainant in support of his view. *Greenough v. Gaskell*, 1 Mylne & K. 98, decided by Lord BROUGHAM in 1833, "does indeed appear," to use the words of Chancellor WALWORTH, "to extend the privilege further than the previous cases would warrant, and beyond the principle upon which the privilege is founded." That case appears to me, however, to be contrary to the current of decision and opinion, both before and since it was decided. The case of *Whiting v. Barney*, 30 N. Y. 330, also cited by complainant, does not appear to me to have any bearing on this question.

An order will therefore be made requiring the witness to answer the interrogatories.

UNITED STATES v. SAN JACINTO TIN Co.¹

(Circuit Court, D. California. March 23, 1885.)

1. PUBLIC LANDS—MEXICAN GRANTS—CONFIRMATION AND PATENT.

The confirmation and final location of a Mexican grant is conclusive against the United States, in the absence of fraud, and to set aside a patent the fraud must be extrinsic and collateral to the matter determined, and not matter upon which the decree was rendered.

2. SAME—FRAUD—EVIDENCE.

The evidence to sustain charges of fraud against a number of government officers must be conclusive. Evidence *held* insufficient.

3. SAME—REVIEW BY COURT.

The courts cannot review mere errors in location of Mexican grants by the proper officers.

4. SAME—UNITED STATES AS SUITOR.

When the United States enters a court as a litigant, it waives its exemption from legal proceedings and stands upon the same footing with private individuals, and if, on a consideration of all the circumstances of the case, it be inequitable to grant the relief prayed against a citizen, such relief will be refused.

5. SAME—LACHES AS DEFENSE.

Although, on grounds of public policy, no statute of limitations runs against the United States, and no laches in bringing a suit can be imputed to them, yet the facility with which the truth could originally have been shown by them, if different from the finding made, the changed condition of the parties and the property from lapse of time, the difficulty from this cause of meeting objections which might, perhaps, at the time have been readily explained, and the acquisition of interests by third parties upon faith of the decree, — are elements which will be considered by the court in determining whether it be equitable

¹Affirmed. See 8 Sup. Ct. Rep. 850.

to grant the relief prayed. All the attending circumstances of each case will be weighed, that no wrong be done to the citizen, though the government be the suitor against him.

6. SAME—PATENT SUSTAINED.

As, under the circumstances of this case, it would be inequitable to vacate the patent, and impossible to place the parties *in statu quo*, the patent should not be annulled.

7. SAME—RIGHTS OF STOCKHOLDERS.

After a great lapse of time strangers purchasing stock in a corporation without actual notice of frauds committed before the creation of the corporation, and to which the corporation, as such, was no party, affecting title to lands held by the corporation, ought to be entitled to rely on the decrees of the United States tribunals affirming such titles.

In Equity.

M., G. Cobb and G. Wiley Wells, for complainant.

Stewart & Herrin, for defendant.

Before SAWYER and HOFFMAN, JJ.

SAWYER, J. This suit is brought by the United States, at the instance of, and upon an indemnity against costs given by, R. S. Baker, to accomplish in another form, in favor of the same and similar interests, the objects sought in *Manning v. San Jacinto Tin Co.* 7 Sawy. 422; S. C. 9 FED. REP. 726. In the cases, in many respects similar, of *U. S. v. Flint*, *U. S. v. Throckmorton*, and *U. S. v. Carpenter*, 4 Sawy. 42, affirmed in *U. S. v. Throckmorton*, 98 U. S. 61 and in other cases, it has been settled that the action of the proper authorities of the United States in confirming and finally locating Mexican grants in California is conclusive, unless there was fraud in the proceedings; and that the frauds authorizing the vacation of a patent must be frauds extrinsic or collateral to the matter tried by the first court or other tribunal, and not frauds in the matter upon which the decree was rendered or patent issued. The only allegations of fraud upon which the United States rely to take this case out of the established rule, relate to the location of the grant, and are found fully stated in paragraph 13 of the bill. The charges are that at the date of the location of the grant Edward Conway was chief clerk in the office of the United States surveyor general of California, and performed in relation to the location all the duties of the surveyor general; that George H. Thompson was the deputy surveyor who made the survey and location; that R. C. Hopkins, who made a report on the subject for the information of the surveyor general, was keeper of the archives in the office of the surveyor general; that B. C. Whiting was United States attorney for the district, representing the United States; that Joseph S. Wilson was commissioner of the general land-office at Washington, and the party who approved the location as such commissioner; that they all, at the time of the performance of their official duties in the premises, and at the time of the location of the grant and issue of the patent, owned interests in the *rancho* located and patented, the legal title being held by Conway in trust for himself and them, and other associates; that Conway, acting for the surveyor

general, in his official capacity directed the operations of the office, and in what manner the grant should be located, and that all these officers fraudulently conspired together to locate the land, and have the location finally approved by the commissioner and the secretary of the interior, on lands not within the exterior limits of the grant, and that this was done in order to fraudulently cover certain valuable tin mines, and that by this fraudulent conspiracy of government officers the grant was so wrongfully located and patented wholly without the boundaries of the grant. If these charges are not satisfactorily proved, there is no ground upon which this bill can be sustained.

The first peculiarity of the allegations that strikes the mind is the surprising and seemingly reckless charges made against so many prominent government officials,—all, indeed, from and including the commissioner of the general land-office himself at Washington down to the bluntest officer who could have possibly had anything to do with the matter; and some of them personally well known for many years to every judge in the circuit as men having unblemished reputations for probity and honor. The charges are carefully made on information and belief, and not verified by any oath, 16 years after the issue of the patent. But every fact and implication of a fraudulent character, and not wholly consistent with honesty, entire good faith, and innocence, is categorically and distinctly denied in the sworn answer to the bill; and the burden of proof is thrown entirely upon the United States.

In our opinion, the proofs utterly fail to establish the fraudulent combination, or any of the acts of fraud charged. The direct proofs are all the other way. The uncontradicted, direct evidence is to the effect that no one of the parties charged, who was in a position to commit the fraud, except Conway, had any interest whatever in the grant at the time of the survey and location of the grant, or of the issue of the patent. Conway had purchased the grant and owned it in his own right, or for parties other than the persons charged with the frauds. His title was on record and known, or should have been known, to everybody. He called the attention of the surveyor general to his interest, and, owing to the delicacy of his position, offered to resign, but was retained in the office. For this reason, however, he refrained from acting in the matter, and had nothing to do officially with the location. This is the direct testimony, and it is uncontradicted.

The bill was, evidently, drawn with the decisions of the supreme court in similar defeated cases before the pleader, who, it would seem, was more solicitous to draught a bill that would be proof against a demurrer than to make it conform to the evidence under his control, to sustain the vital allegations of fraud. It is true that some time after the issue of the patent, upon the organization of the San Jacinto Tin Company, the other parties named, with many other prominent citizens in California, Pennsylvania, Washington, and elsewhere, took stock in the corporation. But at that time there was no reason why

they should not do so. The location was commenced under Surveyor General Beale, and completed and confirmed under Surveyor General Upson; some modifications having been made from time to time to accommodate the location to the demands of claimants of the adjacent lands; every step of the location having been contested by parties having their own adverse interests to protect, and these parties, too, the predecessors in interest of the real parties in this suit. The testimony fails to show that any of the parties charged with fraud had any interest in the lands before or at the time of the location and issue of the patent, except Conway, and fails to show any act of fraud on the part of any party alleged, while the direct testimony is to the contrary. Certainly, gross frauds should not be inferred alone from facts that are as consistent with innocence as with guilt, against a large number of distinguished men in high official positions, enjoying excellent reputations for honor and integrity, or regarded as established without the most convincing proofs. The evidence being wholly insufficient to establish any of the frauds charged, the only equitable or available ground upon which the bill rests utterly fails. We cannot review any mere errors of location. Says Mr. Justice FIELD in *U. S. v. Flint*, 4 Sawy. 61, affirmed in 98 U. S. 61:

"As to the alleged error in the survey of the claim, it need only be observed that the whole subject of surveys upon confirmed grants, except as provided by the act of 1860, which did not embrace this case, was under the control of the land department, and was not subject to the supervision of the courts. Whether the survey conforms to the claim confirmed, or varies from it, is a matter with which the courts have nothing to do. That belongs to a department whose action is not the subject of review of the judiciary in any case, however erroneous. The courts can only examine into the correctness of a survey, when, in a controversy between the parties, it is alleged that the survey made infringes upon the prior rights of one of them, and can then look into it only so far as may be necessary to protect such rights. They cannot order a new survey or change that already made."

Upon the question of fraud we state the result of our examination of the testimony without going into details. It would be an unprofitable task to discuss the vast mass of testimony, relevant, and irrelevant, in detail. But it may be well to refer to the great central fact upon which the other charges of fraud are based, and around which they are sought to be grouped, and upon which they rest for inferential support. It is confidently assumed on the part of complainants that the location of the land as patented is, palpably, wholly outside of the exterior limits described in the original petition, Mexican grant, and the decree of confirmation; that this is so obvious that the grant must have been willfully and fraudulently located where it is. This is an assumption that in our judgment is wholly without justification in the documentary and other evidence in the case. Upon a careful consideration of the subject we are of the opinion that the most that can be reasonably said against the location is that the record presents a fair case for an honest difference of opinion; that a

plausible argument can be honestly made in support of either side of the proposition. An erroneous location is certainly not so obvious as to necessarily stamp it as a fraud. The petition filed in February, 1846, asks a grant of land "within the limits of the known *ranch*o of San Jacinto, whose *general desino* is in the office of the secretary of the governor, and shows in its *total extension* to be coterminous with the *ranch*os of Jurupa and San Bernardino towards the north, Temecula on the south, Huapa on the west, and San Gorgonio on the east."

The sub-prefect reports the land as being "the *remainder* which has been left untitled of the tract of San Jacinto Viejo and Nuevo, and which is *coterminous with the lands expressed in the petition*, and is shown by the *desino*, which I have before me." And the governor, upon said report, grants the "surplus land in San Jacinto Viejo and Nuevo as shown in the *general desino*, which appears in the foregoing." And in the final grant it is stated to be "that which results as a surplus in the *ranch*os San Jacinto Viejo and Nuevo, as shown by the *general desino* of both *ranch*os, which appears in the *expediente*." The language of the decree of confirmation in the United States district court, which is controlling, is: "The lands hereby confirmed are the '*sobrante*,' or surplus, remaining within the boundaries of the *tract of land called 'San Jacinto,'* as the same is represented and described in the map of said tract contained in the *expediente* of Miguel Pedrorena, filed in this case and referred to in the grant, over and above certain lands granted to Jose Antonio Estudillo, and certain other lands granted to Miguel Pedrorena, *within the aforesaid boundaries*, [that is, the boundaries of the *whole tract called 'San Jacinto,'*] to the extent of eleven square leagues of land; and if the said *sobrante*, or surplus, within the *said boundaries*, should be less than eleven square leagues, then confirmation is hereby made to such less quantity." There was no juridical possession given of the grant, as the country passed to the United States before the performance of this act. The external boundaries were therefore left indefinite, and to be determined by the boundaries of the surrounding "coterminous" *ranch*os.

There had been two prior grants out of the tract known as "San Jacinto,"—one called "San Jacinto Viejo," or "Old San Jacinto," and the other "San Jacinto Nuevo," or "New San Jacinto,"—and the grant in question was out of the surplus, after satisfying the two former grants. There was a *desino* attached to the *expediente* in the new San Jacinto grant, prepared with special reference to the petition for that grant, and this was referred to in the several steps in the *expediente* of the *sobrante* grant in question. This is a rough proximate sketch made by O'Farrell without an instrumental survey, and, like most of the *desinos* appended to the petitions for Mexican grants, indefinite, but much better, more particular, and artistic than usual. This *desino* has a dotted line drawn around a tract, which is also divided by a dotted line to represent the two tracts of old and new San Jacinto,

which is represented as bounded by the Jurupa, San Bernardino, San Gorgonio, Temecula, and Huapa *ranchos*. The name of each outlying *ranch*o is located in its supposed proper place, and all the *ranchos* together inclose the land supposed to be the whole tract known as San Jacinto. Any one reading the *expediente* and decree of confirmation, and looking at the *desino*, would say at once that the tract known as "San Jacinto," out of which the three tracts, Old San Jacinto, New San Jacinto, and El Sobrante San Jacinto were to be satisfied, included all the land, be it more or less, lying within the boundaries of the surrounding *ranchos* named. This was evidently the idea of the judge who confirmed the grant, which by the decree was to be satisfied out of the "surplus remaining within the boundaries of the tract of land called 'San Jacinto;'" not out of the tract called "Old and New San Jacinto," but out of the whole tract including those. For the purpose of construing the grant, the petition and all the papers in the *expediente* must be considered together. Looking at the petition, we find it stated that the "San Jacinto" referred to is described as lying between the *ranchos* named, and as actually shown on the "*general*" *desino* referred to; and it is expressly stated to be shown "in its total extension to be coterminous with the *ranchos* of Jurupa and San Bernardino towards the north, Temecula on the south, Huapa on the west, and San Gorgonio on the east." That is to say, it is expressly declared that the lands out of which the grant is to be made takes up all the space between those *ranchos*, and the sub-prefect's report states it to be "coterminous" with the lands expressed in the petition and shown by the copy of the *desino*." The grant refers expressly to the petition and the sub-prefect's report, and then grants the land "as shown in the *general desino*." The *desino* is in all these documents designated as the "*general desino*," showing that it was only intended to indicate in a "*general*" way the location and extent of the lands out of which the grants were to be satisfied, and the general proximate location within that tract of the lands already granted, and was not intended to locate it with mathematical accuracy.

Upon looking at the *desino* it is plain to the eye that the boundary of this tract and of the surrounding *ranchos* was intended to be coincident or "coterminous," as is expressly declared in the petition and report. Now, if the boundaries were intended to be coincident, or the tract known as San Jacinto was intended to be "coterminous" with the surrounding *ranchos* mentioned, then the *sobrante rancho* is clearly located, and properly located, upon lands within the exterior boundaries of the grant. But it is claimed on the part of the United States that by taking the dotted line drawn around the old and new San Jacinto *ranchos* and applying the scale at the bottom of the *desino*, and running by courses and distances, although no courses and distances are stated in the *desino*, as indicated by the rough sketch in accordance with the scale, the lands included would not extend to the boundaries of the surrounding *ranchos* indicated, and that that line so as-

certained must be taken as the limit of the lands out of which these three *ranchos* must be satisfied; and that this dotted line thus located on the ground must govern, notwithstanding the express statement in the *expediente* that these boundaries are to be "coterminous," and notwithstanding the fact that they are shown on the "*general desino*" to be "coterminous." By this construction and mode of location, the *sobrante* grant is located outside the dotted lines and of the exterior bounds of the grant.

The surveyor general adopted the view that the exterior boundaries of the grant were "coterminous" with the surrounding grants, and located the *sobrante* grant on that theory, within those boundaries. Under the practice, the grantee was entitled to select the location in a compact form anywhere within the exterior boundaries where it would not conflict with any prior grant, and in this case there is no other valid or confirmed prior grant with which the location conflicts. Although, under the decisions of the supreme court of the United States cited, we are not called upon to determine this question, we are by no means satisfied that the surveyor general was not entirely correct in the view he took of the case. That is the view which would naturally and at first sight strike an ordinarily intelligent person, familiar with these Mexican grants, upon reading the *expediente* and decree of the court, and comparing them by the eye with the *desino*. Even a considerable portion, perhaps one-half, of the *old San Jacinto rancho*, as now in fact patented, is located outside the dotted lines on the *desino* drawn, as is claimed it should be, by complainants. But if the location in accordance with the view of the surveyor general be erroneous, the error certainly is not so obvious or palpable as to create a presumption of fraud or of a willfully unauthorized location, and however erroneous, in the absence of actual conspiracy or fraud on the part of the officials taking part in the location and approval, it is conclusive in this case. They were the officers or tribunals appointed by law to determine the location, and that determination, under the decisions already cited, is final and conclusive. The location was contested step by step till the issue of the patent, as will be seen by the communication of the commissioner of the general land-office addressed to the secretary of the interior, a copy of which is annexed to and made part of the answer. The survey was ordered by Surveyor General Beale on April 1, 1864, but in consequence of exceptions and appeals it was not finally completed and approved till December 10, 1866, after Mr. Upson succeeded to the office of surveyor general. In August, 1866, Abel Stearns filed in the surveyor general's office objections to the survey, and in his affidavit he sets up the same charges as to the interest of Hancock and Conway, and their unlawful and alleged fraudulent connection with the survey, as are now alleged in this bill as constituting the fraud and conspiracy upon which the patent should be set aside, and the questions arising upon these charges were necessarily examined and decided by the surveyor general.

Both the correctness of the location and the alleged frauds were again fully considered by the commissioner of the general land-office; other evidence as to the alleged frauds having been produced before him. Able counsel of the opposing parties were heard, and the location was fully confirmed by him, as appears by his letter to the secretary of the interior of May 22, 1867, a copy of which is annexed to and made a part of the answer. In this letter the commissioner gives a full history of the case, and of his action on it, and especially calls the attention of the secretary of the interior to the charges of fraud which are now set out in this bill, and to the documentary evidence on the subject, and requests the direction of the secretary of the interior as to what further proceedings should be had, and as to the issue of the patent. After holding the matter under advisement from May 22 till October 29, 1867, Secretary Browning rendered his final decision, affirming the location of the grant, and ordering the patent to issue, as appears from the letter of the secretary of the interior to the commissioner of the general land-office of October 19, 1867, a copy of which is also annexed to and made a part of the answer. Thus it appears that not only was the proper location of the grant fully considered by all departments of the government having jurisdiction, but these very frauds, now set up as grounds for vacating the patent, were fully considered and determined; and, if fraud there was, in fact, it is a fraud that was fully investigated in the proceeding, and adjudged, and it will not now authorize the canceling of the patent. It is true that in this bill the surveyor general and commissioner of the general land-office, as well as all their subordinates, are charged by the attorney general with participating in the fraud; but there is no sufficient evidence to support the charge. It is not at all probable that either of those officers, had they been guilty, would have considered and heard and decided these very questions with respect to their associates in crime, and then have especially called the attention of the secretary of the interior to the frauds, and invoked his re-examination of the charges made. Neither the secretary of the interior, who investigated and passed upon the charges of fraud, nor the president of the United States, who executed the patent, is charged with being a party to the frauds. The secretary, at least, was not deceived, for his attention was especially called to the subject by the commissioner himself, although one of the parties *now* charged, and the secretary thereupon examined and decided the whole matter.

We might well stop here, but there is another ground upon which the bill must be dismissed. To fully present this point will require a somewhat extended history of the proceedings in the case of this grant, and the presentation of the matter in a connected form will involve some repetition of matters already stated. It would, in our judgment, be inequitable at this late day, considering all the circumstances of this case, to vacate the patent, even if there had been some evidence of conspiracy and fraud on the part of the officers charged. "When

the United States enters a court as a litigant it waives its exemption from legal proceedings and stands upon the same footing with private individuals, and therefore if, on a consideration of all the circumstances of a given case, it be inequitable to grant the relief prayed against a citizen, such relief will be refused by a court of equity though the United States be the suitor." *U. S. v. Flint*, 4 Sawy. 43. Said Mr. Justice FIELD, in the case cited: "Although on grounds of wise public policy no statute of limitations runs against the United States, and no laches in bringing a suit can be imputed to them, yet the facility with which the truth could originally have been shown by them, if different from the finding made; the changed condition of the parties and of the property from lapse of time; the difficulty from this cause of meeting objections which might perhaps at the time have been readily explained; and the acquisition of interest by third parties upon faith of the decree,—are elements which will always be considered by the court in determining whether it be equitable to grant the relief prayed. All the attendant circumstances of each case will be weighed, that no wrong be done to the citizen, though the government be the suitor against him." *Id.* 58. If it can be inequitable to grant relief to the United States in any case, in view of all the surrounding circumstances, coupled with a great lapse of time, then this case affords a striking instance of that kind. Several of the leading parties charged, including the commissioner of the land-office and surveyor general, are now dead, or, for other reasons equally potential, their testimony cannot be had.

The petition for confirmation of the grant in question was filed, under the provisions of the act of 1851, to "*settle private land claims in the state of California*," on March 3, 1852. The claim was vigorously litigated in all the tribunals, original and appellate, having jurisdiction, and finally confirmed by the supreme court of the United States in 1864. *U. S. v. D'Aguirre*, 1 Wall. 311. On April 1, 1864, immediately after final confirmation, Surveyor General Beale issued instructions to Deputy Surveyor Thompson to make the survey; and he made the location. Exceptions were taken to it by parties interested in other claims of one kind and another, and this survey was returned by the commissioner of the general land-office at Washington to the surveyor general of California for further action; and it was afterwards finally located under the instructions of Surveyor General Upson, who in the intervening time had succeeded Beale; but the general location made under Beale's instructions was adopted with modifications to meet the demands of opposing claimants, exceptions having been taken to the location made. Before adopting or approving it, Surveyor General Upson required Mr. Hopkins, the keeper of the Spanish archives,—who is, doubtless, better informed on the subject of Spanish grants in California, and their *expedientes* and *desinos*, than any other man living, and whose aid has probably been called in at some stage of the proceeding in the case of every

grant presented for confirmation,—to examine the archives, the records of the land commissioners, and of the surveying department, and report the extent of the exterior boundaries of "San Jacinto" within which the grant could be located; and the propriety of the location to which exception had been taken. Mr. Hopkins made a thorough examination, and on September 18, 1866, made a very elaborate and lucid report, in which he expressed the opinion that upon an examination of the "original papers in the three San Jacinto cases, the *desinos* found in the Pedrorena case, and explained by the affidavit of Gasper O'Farrell, and the opinion of the supreme court," among others the following points were settled: "(1) That the exterior limits of the old Mission Rancho San Jacinto are the *ranchos* of San Bernardino and Jurupa, or Huapa, on the north; the Temecula on the south and south-west; the San Gorgonio on the east; the Guapa, or Huapa, on the north-west;" that the third grant, as to right of location, was the grant in question; and as the old and new San Jacinto claimants had selected and indicated their locations within the grant, and stipulated as to their western boundaries, that the *sobrante* claimants had a right to survey their 11 leagues in a compact form within the said exterior limits. Surveyor General Upson, after making sundry corrections on the exceptions of the predecessors of the promoters and managers of this suit, then represented by the leading counsel now managing this case for the ostensible complainants, but in the same and similar interests as before, and who was also the counsel in *Manning v. San Jacinto Tin Co.* 7 Sawy. 418, S. C. 9 FED. REP. 726, adopted the views of Mr. Hopkins, and finally approved the location as since patented.

This survey was again attacked before the commissioner of the general land-office, with great vehemence, as being improperly and fraudulently located outside of the bounds of the grant; the same grounds of fraud, the alleged false location, and the interest and connection of Conway with it,—the central point of fraud around which the minor acts set up are grouped,—having been alleged, and relied on to defeat the location. These questions were thoroughly argued before the commissioner, by able counsel, and after full consideration the location was confirmed. The commissioner, as we have seen, then referred the questions, with the record, exceptions, charges, and evidence of fraud, and briefs of counsel, to Mr. Browning, secretary of the interior, who, after long and mature consideration,—he having held the matter under advisement for over five months,—affirmed the decision of the commissioner, and directed the patent to issue; and it was, accordingly, issued October 26, 1867. Thus, after a protracted, tedious, and expensive litigation of nearly 16 years, between the United States and claimants of the land,—the last three and a half of which having been occupied in locating, and in contests over the location of the grant,—the patent was issued. The jurisdiction of all the appropriate tribunals having been exhausted,

the title was, at last, supposed to be "settled." The government appears to have been aided, in its endeavors to detect frauds and make the proper location, by the Argus eyes of all parties, desiring to take a part in the proceedings, making, or ever after hoping to make, under any pretense, adverse claims. Surely, under the circumstances, the location ought to be deemed correct, and it ought not to be disturbed except for the most cogent reasons.

On September 8, 1880, nearly 13 years after the issue of the patent, J. F. Manning, claiming interests as successor of Abel Stearns, being the same interests now represented by Baker, the prosecutor of this suit, with whom he (Manning) now appears, by the evidence, to be acting in concert, commenced in this court the suit of *Manning v. San Jacinto Tin Co.* 7 Sawy. 419; S. C. 9 FED. REP. 726, to declare a trust and control the legal title, under the patent, for his own benefit. The suit rested on the same grounds of false and fraudulent location as now set up in the name of the United States. The equitable opposing title of the complainant relied on, was the location of a large number of tin mines, under the customs of miners, made between 1866 and the date of the patent, long after the final confirmation of the grant in question, and during the progress of the contest over the location, and while the lands on which they were located were still *sub judice*, and at a time when there was no law by which any rights could be acquired in lands so situated. They were not then public lands, as held in *Newhall v. Sanger*, 92 U. S. 761.

On January 3, 1882, the bill was dismissed for want of equity, and on the several grounds that the complaint did not have a proper *status* to maintain the suit; that the facts did not show a case of fraud that was open to investigation, or other substantial equity, and that the equity, if any, was stale, for the reason, among others, that the statute of limitations applicable to private litigants had run nearly four times against the claim. That suit having failed, this suit was instituted in the name of the United States on April 3, 1883, nearly 16 years after the issue of the patent, when the litigation was supposed to be closed between the original parties to it, and more than 31 years after the litigation between the United States and defendant, and its grantors commenced by filing a petition for confirmation. Although the suit is brought in the name of the United States, it is as clearly, to all intents and purposes, a private suit of the parties instigating, prosecuting, and actually controlling it, as if brought in their own names. The attorney general, as a condition of assent to the use of the name of the United States, required a bond from Baker to indemnify the United States against any costs that they might be called upon to pay; and the consent, manifestly, would not have been given without this indemnity.

It appears from the letter of the commissioner of the general land-office to Secretary Teller, of March 2, 1883, that on the application
v.23f,no.6—19

of R. S. Baker, who also seems to have furnished the draught of this bill, permission to bring the suit was recommended and given, in the language of the commissioner, "on the alleged ground of fraud in the survey of the land described in said patent; *said application being accompanied by the draught of a bill of complaint stating more fully the alleged grounds of action in the premises.*" After going briefly over the history of the grant, and the proceedings to confirm it, the commissioner concludes: "It will be seen, by the *corrected* diagrams referred to, that the Rancho El Sobrante de San Jacinto, as patented, as stated in the application referred to, is located entirely outside of the San Jacinto tract; but *nothing appears in the record of the case to verify the allegations of fraud contained in said application, nor aside from the grossly erroneous location 'to corroborate them.'*" Notwithstanding this direct, positive statement of a want of evidence in the record to "verify" the charges of fraud made in the "application" and draught of the bill, or aside from what he is constrained to term, in opposition to solemn contrary decisions of his predecessors in office, who alone had jurisdiction to *finally determine* the question as to this particular grant, and did judicially determine it 16 years before, nothing but "the grossly erroneous location to corroborate them," he adds: "In consideration, however, of said allegations, and of the remarkable location of the tract in question, I respectfully recommend that *authority to bring suit* in the name of the United States for the purpose stated, be granted, *with such conditions as to the payment of costs and expenses as may be properly imposed.*"

The draught of the bill, application, and other papers were returned, and in accordance with this recommendation authority to use the name of the United States was given, upon giving a bond to indemnify the government against costs. The indemnifying bond having been furnished and filed in the case, the suit was instituted. The bill is signed by the attorney general as solicitor, and by the United States attorney for the district of California as counsel, manifestly, in form, to comply with the ruling of the supreme court on this point in *U. S. v. Throckmorton*, 98 U. S. 70. Since the filing of the bill, however, the whole proceedings have been conducted in the case, so far as we have observed, by the able counsel of the parties making the application for leave, and indemnifying the government,—the leading counsel being the same who was counsel for Abel Stearns in contesting the location of the grant 16 years and more ago, and who also was the counsel of record of complainant, and who in fact conducted and argued the case of *Manning v. San Jacinto Tin Co.* in this court, *supra*. Since the filing of the bill in this suit, we have seen no indication in any form of the guiding hand or supervising authority of the attorney general, or of the United States government. So far as our observation extends, neither has taken any part in conducting the case. Thus it appears that leave has been given to private parties, upon indemnifying the government, to prosecute a suit,

which they could not maintain in their own names, in the name of the United States, to vacate a patent issued to a party in pursuance of a final decision and location of a Mexican grant, in a proceeding between the same parties or their privies, at the end of 16 years' litigation, and nearly 16 years after the date of the patent, on the ground that the patent was fraudulently located, when, confessedly, there was no evidence of the alleged frauds presented to the officers of the government, except what appeared to the commissioner of the land-office to be a "grossly erroneous location" of the grant; whereas his predecessors, having the final jurisdiction over the matter, had fully examined the location, considered all objections of fraud, heard elaborate arguments upon them, and judicially determined the grant to be properly located.

The commissioner bases his opinion as to the "grossly erroneous location" of the grant upon a private survey, which he calls the "*corrected diagram*" of O'Farrell, *ex parte as to this grant*, at least, made in 1869,—two years subsequently to the issue of the patent in question,—in which he attempts to locate the exterior bounds of the San Jacinto tract with special reference to the dotted lines on the *desino* prepared by him a quarter of a century before, but without reference to the location of the boundaries of the surrounding *ranchos*, which are represented in the *desino*, and expressly described in the various documents constituting the *expediente* as being "coterminous" with the "tract called 'San Jacinto.'" This survey had been platted upon the maps of the public survey in the land-office and it is referred to as being, *at that time*, recognized "by this office, and the department as giving the out-boundaries of the tract of San Jacinto." However proper it may have been to make this recognition at that time with reference to grants within these out-boundaries still unlocated, and over which he then had jurisdiction, this recognition, it seems to us, should not affect rights vested in grants already regularly located by former commissioners and secretaries of the interior, who recognized different exterior boundaries, based upon a different construction of the *desino* and *expediente*, and diagrams then existing, but afterwards "corrected" for the purposes of other grants yet to be located. Rights of parties, once settled, should not be disturbed for light causes, depending upon varying opinions arising from a change of incumbents of the office having jurisdiction of the same *general* subject-matter, and especially where those changes of incumbents are frequent. The next commissioner and secretary of the interior may reject this O'Farrell survey and "corrected" diagram as "grossly erroneous," and adopt the original decision of Commissioner Wilson and Secretary Brownning upon the point at issue.

O'Farrell himself, who made the *desino* in 1845, manifestly did not, in 1866, regard the dotted lines as the limit of the exterior boundaries of the "tract called 'San Jacinto,'" within which all these grants were to be located, as clearly appears from his affidavit made

in that year before the issue of the *sobrante* patent in question. He says that "he is the person who made the surveys of a *part of the tract of country called 'San Jacinto,'* [not the tract called 'Old and New San Jacinto'] shown on the hereto annexed diagram or map," (Exhibit A,) *including the specific tracts called "San Jacinto Viejo" and "San Jacinto Neuvo,"—"a part," not the whole, of the "tract called 'San Jacinto;'"* the annexed "diagram or map *including the specific tracts called "Old and New Jacinto,"* not the whole or general "tract called 'San Jacinto.'" "That the dotted line shown on the diagram represent the boundaries (being the *part of the hills and mountains adjoining*) of the *said respective tracts;*" that is to say, the said two *specific tracts*. "That the said lands,"—that is, the two tracts, Old and New San Jacinto,—"*were within the tract known and called at the time, 'San Jacinto,'*"—that is, within the exterior larger boundaries of that tract. "That said '*tract of San Jacinto*'" [in the singular number, referring to the larger tract, within which are Old and New San Jacinto, the two specific tracts mentioned] "*extended, as shown on said diagram or map, to the lands then known as San Bernardino, and Hurupa, Huapa, Temecula, and San Gorgonio. The distance to the boundaries of said tract from the boundaries [said dotted lines, as shown on the diagram] of the aforesaid grants*"—not of the tract within which they are located, but said grants—"of San Jacinto Viejo and San Jacinto Nuevo was not ascertained by deponent at the time he made the survey of *said grants,*"—not of the exterior limits within which the said two grants were located, but the limits of the specific location, within the exterior boundary. Thus O'Farrell, throughout the entire affidavit, clearly and sharply makes and keeps up the distinction between the "tract called '*San Jacinto,*'" within the exterior limits of which the two specific tracts of Old and New San Jacinto, as well as the *sobrante* grant, were to be located, and the boundaries of the two tracts, granted out of the larger tract, which he sought to locate within the larger tract; and he only attempts to locate proximately the amounts of land called for in those two grants within the larger tract called "*San Jacinto,*" in which all are to be located. At the time O'Farrell made the *desino*, the *sobrante* grant had not been made or thought of, and, of course, the *desino* was not made with any reference whatever to that grant. He makes it as plain as he can make it, in this affidavit, that the *dotted lines* are only intended to show the limits of those two tracts, and not the limits of the "tract called '*San Jacinto,*'" which was to extend to the boundaries of the surrounding *ranchos*, wherever they might be; their distance from the line of his location not having been ascertained.

It is manifest that this is but a contest between private parties, for some supposed benefit of such parties, carried on at their own expense and managed by their own counsel, solely in their own individual interests, for the accomplishment of their own ends; and the parties maintaining the suit are not alleged in the bill to have any inter-

est in the litigation. In the former suit of *Manning v. San Jacinto Tin Co.* 7 Sawy. 419, S. C. 9 FED. REP. 726, the complainant's alleged interest was only in tin mines, alleged to have been located while the land was *sub judice*,—at a time when no private rights could, under the laws in force, be acquired in them.

Upon bald allegations of fraud in the application for leave to use the name of the United States, and in the draught of the bill submitted, not verified by oath or evidence produced, one citizen of the United States is allowed to harass others with litigation that ought to have been long since closed in fact, as it was supposed to be in law. If the United States have any real interest, it would seem that it ought to be litigated at the expense of the government itself, and upon the responsibility of its own officers. What makes the hardship greater, is, the litigation must be carried on mainly at the expense of the defendant thus harassed, even if it fully succeeds in its defense. The indemnity of the United States against costs only covers the fees of the several officers, advanced by the government, such as clerk's and marshal's fees, which the United States would be called upon to pay to these officers; for, whatever the result of the suit, the defendant cannot recover its own costs and disbursements, which must amount to several thousand dollars, besides counsel fees, against the nominal complainant, for the United States never pays costs to the opposing party. The defendant's costs and disbursements cannot be recovered from the instigators and managers of the suit, for whose sole benefit it is prosecuted, for they are not parties to the record. The costs against which the United States are indemnified, constitute but an insignificant item of the entire expense of the litigation. Thus, except as to the actual costs that must be advanced, the real complainants can harass the defendants with a long and costly litigation at the expense of the defendants thus permitted to be sued, whatever the result of the litigation. The parties do not litigate in such cases upon equal terms.

So far as lapse of time is concerned, as an element of equity, or want of equity, we think the case should be treated as though it were brought by the parties who instigated the suit, and who are paying the expenses and managing it for their own purposes. The statute of limitations of the state bars a suit, founded on fraud, in three years. This time had run five times over, after the frauds are alleged to have been perpetrated, before this suit was instituted, and every fact alleged, supported by evidence, as an element of fraud, existing at the date of the patent, was of record, and as well known then to the government, and to the leading counsel in this case, as it is now. The principal fact asserted, of "grossly erroneous location," was as palpable upon the record then, and as well known, as now. The fact that Conway owned the grant, and was chief clerk in the surveyor general's office, at the time of the location, was as notorious and well known at that time as now. These, and the alle-

gation that Conway managed the location, were the great central facts which formed the basis of all other charges. The charges, as we have seen, were called to the attention of the commissioner of the land-office, and of the secretary of the interior, and repudiated. The charge that Conway had anything to do with the location of the grant, and all other charges inconsistent with the integrity of the parties charged, are distinctly denied in the answer, and not only unsupported by evidence, but disproved by the witnesses examined. There is no other fact, of a fraudulent character, supported by the evidence, that was not, at the time, brought to the notice of the government, considered by the proper officers and tribunals, and decided. The element of staleness is, therefore, fully shown.

Again, when the United States come into a court of equity asking equity, they must, like a private party, do, or offer to do, equity. They cannot do equity in the present case, as it now stands. It is not disputed that the grant is a valid grant, and that the patentee and those holding under her are entitled to the land confirmed, somewhere within the exterior bounds of the grant. The proceedings for confirming and locating land grants under the act of 1851, and amendatory acts, were special; the jurisdiction being special, and not general. Outside the modes prescribed by the act there was no jurisdiction in the courts of the country. When a case had gone through the prescribed course to a patent, the jurisdiction was exhausted, and the officers became *functi officio*. Should this patent be annulled for fraud, in the exercise of the general equity jurisdiction of the court, neither it, nor any other tribunal or officer, has authority to, correctly or otherwise, relocate the grant, and the grant would fail. *U. S. v. Throckmorton*, 4 Sawy. 42. "The circuit court of the United States has now no original jurisdiction to reform surveys made by the land department of confirmed and patented Mexican grants in California." S. C. on appeal, 98 U. S. 61. Besides, on the issue of the patent, on October 27, 1867, the land within the exterior limits of the grant ceased to be *sub judice* as to this grant, and subject to such other disposition as the government should see fit to make of it. In this case, the evidence indicates that, subsequently to the issue of the patent, a railroad grant under acts of congress is claimed to have attached to the odd sections not covered by patents, and that other grants have been made of the even sections; so that there is no land, or at least but little, if any, left to satisfy this grant within the restricted limits insisted on by the complainants; and the grant would, also, be lost on that ground. Manifestly, the parties could in no respect be placed *in statu quo*. The United States are no losers, in fact. If the lands were erroneously located, the lands upon which the location should have been made remained in their stead, and they seem to have been disposed of by the government. The grant could be satisfied but once.

The corporation defendant was organized, and the title of the land

conveyed to it, in January, 1868, more than 15 years before the commencement of this suit. The testimony shows numerous stockholders,—the stock having changed hands to a greater or less extent from time to time,—most of whom are not charged with participating in the alleged frauds, and as to whom there is no evidence whatever showing notice, except so far as notice to the parties originally creating the corporation affects them. Are the interests of such stockholders to be jeopardized by reason of frauds practiced years ago by the original incorporators, prior to the existence of the corporation, admitting that there were such frauds? Is there no time during the life of a corporation—in this state 50 years—within which a stranger can purchase stock in a corporation without risking the loss of his investment, at the suit of the United States, on account of frauds perpetrated by those organizing the corporation prior to its creation? After a great lapse of time, strangers purchasing stock in a corporation, without actual notice of frauds committed before the creation of the corporation, and to which the corporation, as such, was no party, affecting the title to lands held by the corporation, ought to be entitled to rely on the decrees of the United States tribunals affirming such titles.

Those familiar with the notorious public history of land titles in this state need not be told that our people coming from the states east of the Rocky mountains very generally denied the validity of Spanish grants, and their proper limits or location, and, determining the rights of the holders for themselves, selected tracts of land wherever it suited their purpose, without regard to the claims and actual occupation of holders under Mexican grants, with a view of acquiring pre-emption rights, and title under the United States, at some subsequent period. Many of the older, best-authenticated, and most-desirable grants in the state were thus, more or less, covered by trespassing settlers. When the claims of Mexican grantees came to be presented for confirmation, these settlers aided the United States; the most formidable opposition usually coming from them, first, to the confirmation of the grants, on every imaginable ground, of which the most frequent was fraud in some form at some stage of the proceedings. When confirmed, and the officers of the government came to the location, the contest became still more vigorous and acrimonious; the trespassing settlers, or adverse claimants under other grants, seeking to have the confirmed grant located so as not to interfere with their claims or interests. One body of settlers or claimants would seek to move the location in one direction, and another, for similar reasons, in another. Thus the opposition to confirmation and location, from trespassers and contesting claimants, was more violent than the contest between the government and the petitioners for confirmation. Charges of fraud are easily made, and they were by no means sparingly made by incensed defeated parties, and these reckless charges by disappointed trespassing and opposing claimants, in

many instances, as in this case, involved the officers of the government, as well as the claimants under the grant.

These were the matters most embarrassing to the tribunals and officers appointed to adjudge them. It is not improbable that more or less frauds were committed in some of the many grants confirmed. But, if so, it is far more conducive to the public interest and public peace, as well as to private interests, that they should at this late day pass unpunished, than that this kind of acrimonious litigation should be indefinitely prolonged.

The United States compelled the Mexican grantees, willing or unwilling, to present their titles for adjudication, or, as an alternative, forfeit their lands; and for this purpose provided their own special tribunals to "settle" all questions of title and location. There were three opportunities for hearing, and at one time four, as to the confirmation: first, before the board of land commissioners, the tribunal of original jurisdiction; then successive appeals to the district, circuit, and supreme courts of the United States; in all of which, except the last, the parties were entitled to introduce further evidence. There were three hearings, also, in this case, as there usually were in others on the location: before the surveyor general, the commissioner of the general land-office, and the secretary of the interior. Surely a sufficient opportunity was afforded the government, with so much aid from vigilant adverse claimants, to discover and bring to light any weakness in the title, or any error or fraud in the location. If these tribunals have not been able, after so long, patient, and exhaustive a course of litigation, to properly settle the points in controversy, then there is little hope now, by a new course of litigation in the courts of ordinary jurisdiction, of reaching a correct result.

In view of all the circumstances surrounding this case, in connection with the long time that has elapsed since the issue of the patent, we think the equity, if any there be, stale, and that it would be to the last degree inequitable to annul the patent in question, or reopen the controversy as to the proper location of the grant. There should be some time, in the life-time of a generation, when land titles derived from Mexico through the United States should become "settled,"—some time when the United States should themselves cease to litigate, or allow private parties in their name to litigate, with their grantees the titles to lands derived through them from the Mexican government, and confirmed and finally located by the government itself. The interests of litigants themselves, of the state of California, of the United States at large, and the interests of public justice, and the public peace, require that an end be put to this kind of litigation.

In closing, we venture a single observation upon the practice which, unfortunately, as we think, to some extent prevails, of allowing private parties to litigate their claims, of the character in question, in the name of the United States. The United States either have a paramount interest in the lands adversely claimed by private parties,

which justifies them in suing such parties to enforce their rights, or they are legally or equitably bound to some third party, lawfully deriving title under the United States, to maintain the title in the courts for the benefit of such parties; or else they have no such interest as to justify litigation, or are not legally or equitably bound to litigate the title for the benefit of such other parties. It seems to us, therefore, that if the United States have such title or interests as justifies litigation, or if they are legally or equitably bound to maintain the title for the benefit of parties deriving title under them, then the United States ought to pay the expenses, and take the control and responsibility of the suits, and not require an indemnity for costs from private parties, and turn the litigation over to them. If, on the other hand, they have no such interest in the subject-matter of litigation, and are under no obligation to protect parties deriving title under them, then the United States ought not, upon indemnity against costs, or otherwise, to allow the use of their name, thereby lending dignity to the suit, to one set of private parties, who, in consequence of lapse of time, want of equity, or for other reasons, have no rights upon which a suit can be maintained in their own names to harass with protracted, tedious, and expensive litigation, another class of citizens claiming title under the same government. And the fact of requiring indemnity for costs, and of turning over the whole matter of litigation to the indemnifying parties, seems to us to be a strong indication that the government has grave doubts as to its having an interest in the controversy, or of its being under any obligation to litigate for the benefit of others, sufficient to justify their taking control or paying the costs of the litigation. In view of the long struggle to "settle" private land titles under Mexican grants in California, and in the interest of the stability of land titles and of the public peace, it is to be earnestly hoped that in future this privilege of using the name of the United States for the accomplishment of private ends will be more sparingly granted, and only granted upon the most urgent occasion, if such occasion there can be. It appears to us that leave to use the name of the government for purposes of litigation should not be granted upon the representation of private parties, confessedly not verified or supported by any substantial evidence produced by them.

The bill must be dismissed; and it is so ordered. We regret our inability to impose costs upon the real prosecutors of this suit.

Laches as defense in suits by United States. See *U. S. v. Southern Colorado Coal & Town Co.* 18 FED. REP. 273, and *U. S. v. Beebee*, 17 FED. REP. 36. Suits against state and state officers. See *Parsons v. Marye, ante*, 113, and *Baltimore & O. R. Co. v. Allen*, 17 FED. REP. 171, and note, 188-197.—[Ed.]

THE LYDIAN MONARCH.

(District Court, D. New Jersey. March 21, 1885.)

1. CARRIERS OF GOODS BY WATER—BILL OF LADING—EXCEPTIONS—PERILS OF THE SEA—DAMAGE TO CARGO—BURDEN OF PROOF.

Where a bill of lading, containing an exemption from liability for damages caused by perils of the sea, acknowledges the receipt of goods "in good order and condition," and such goods are damaged by sea water, it is incumbent on the carrier to prove that the loss was occasioned by perils of the sea. Evidence held insufficient to show that the damage was caused by perils of the sea.

2. SAME—LIMITATION OF LIABILITY—INVOICE VALUE.

A provision in a bill of lading that "the ship-owner is not to be liable for any damage to the goods * * * in any case for more than the invoice or declared value of the goods, whichever shall be the least," is reasonable, and will be enforced in case of damage to the goods; following *Hart v. Pennsylvania R. Co.* 7 FED. REP. 630; S. C. 5 Sup. Ct. Rep. 151; and *The Hadji*, 18 FED. REP. 459.

Libel in rem.

See & Bro., for libelant.

Butler, Stillman & Hubbard, for respondent.

NIXON, J. The libel was filed in the case to recover damages for injury to merchandise, to-wit, 21 bales or packages of burlaps, on the voyage of the steam-ship *Lydian Monarch* from Dundee, in Scotland, to the port of New York, the libel alleging that the master, officers, and crew of said steamer so negligently and carelessly conducted themselves that one or more of the side-ports were insufficiently or insecurely fastened, by means whereof sea water ran into the said vessel and upon the cargo, and greatly damaged the goods aforesaid. The shippers were James Duncan & Co., of Dundee, and the bill of lading acknowledges that the said packages were received on board in good order and well conditioned, and that they were to be delivered to the libelant in New York in like good order and well conditioned, subject, nevertheless, to a large number of exceptions and restrictions, which it is not pertinent to the case to fully enumerate. Among these limitations to the liability of the ship-owners were the following: They were not to be liable (1) for any damage which arose from perils of the seas; nor (2) in any case for more than the invoice or declared value of the goods.

The steamer sailed from London on March 30, 1884, and arrived at her port in New York, (Jersey City,) on the fourteenth of April following. The consignees paid the freight and duties before the merchandise was delivered to him. When delivered from the ship, he discovered that twenty-six or seven of the bales were more or less damaged by sea water. He sent at once for an insurance appraiser, Mr. Cleveland, who examined the goods, and reported, as an expert, that 21 bales were badly damaged, and that the best disposition for all concerned was to sell the same at public sale, giving interested parties notice of the sale. Acting on this advice, he sent the 21 bales to the auctioneers Field, Chapman & Fenner, and gave notice to the

recognized agents of the steam-ship company, Patton, Vickers & Co., of the time and place of sale, and that the steamer would be held for all loss sustained. The sale was made, and the net proceeds realized were \$3,110.87, from which sum the libelant claims should be deducted \$43.25, the amount of the damages to the other bales not sold, and the further sum of \$20 paid to the appraiser for his certificate of loss. He then proves the value of burlaps in good condition, in the New York market, on that day; claims that the bales sold were worth \$3,771.47, and demands of the respondent the difference between these sums as the measure of his loss.

Two questions are thus presented: (1) Was the injury to merchandise caused by perils of the sea, for which the vessel is not responsible? (2) If not, has the libelant, under a proper construction of the bill of lading, sustained any damage for which the respondent is liable?

1. The bill of lading acknowledging that the burlaps was delivered to the steamer in good order and condition, and the proofs showing that it was damaged by sea water, it is incumbent on the respondent to prove that the loss was occasioned by perils of the sea. Failing in this, the company is liable for the damage sustained. *Hooper v. Rathbone*, Taney, 519. It seems to be acknowledged that the damage was caused by sea water leaking into the compartment where the goods were stowed through cargo port No. 4. The steamer has eight of these ports, four on each side, less than two feet square in size, through which the cargo is loaded until the lower side of the port is brought down to the water-line; they are then closed with an iron door on hinges, and secured with two cross-bars and four nutted bolts. The joints are made water-tight by the use of a mixture of white and red lead. This is necessary, as the ports are partly under water when the vessel is loaded.

The theory of the libelant is that cargo port No. 4 was negligently closed and fastened by the carpenter, whose duty it was to see that they were all made secure and water-tight before sailing. The respondent, on the other hand, assumes that it was properly fastened, but that the screws worked "slack" during the voyage on account of the rough weather which the steamer encountered. It is somewhat significant that, although the carpenter was on the stand as a witness, he was asked nothing about closing this particular port; and the only proof we have on the subject is the ordinary presumption that when one is charged with a duty he is supposed to properly perform it. It is also to be observed that, although it was the duty of the respondent to show that the leakage was caused by perils of the sea, we have no evidence of any storm, except general statements that the sea was rough at times, and the vessel labored heavily. I think the respondent has failed to show affirmatively that perils of the sea caused the damage.

2. The suit is based upon the claims of the libelant that the meas-

ure of damages which he is entitled to receive, is the difference between what was realized on the sale of the damaged goods, and their market value in New York at the time of the sale. It is conceded that this is the general mode of computing damages, in the absence of any agreement to the contrary. But these goods were shipped under a bill of lading which, in express terms, limited the shipper or consignee to a different and smaller rate of compensation in the case of loss. Its language is that "the ship-owner is not to be liable for any damage to the goods, * * * in any case, for more than the invoice or declared value of the goods, whichever shall be the least." Is such a limitation of liability on the part of the ship-owner one which the court ought to enforce? In analogy to the settled doctrine that a common carrier cannot relieve himself from the consequence of his own fraud by any stipulation in a bill of lading, the courts have been quite reluctant to give effect to any clause or contract which tends to lessen his liability, when the loss is occasioned by his own negligence, but it is now settled that they will recognize such limitations when they seem to be just and reasonable.

The question came before Judge McCrory in the case of *Hart v. Pennsylvania R. Co.* 7 FED. REP. 630, which was a suit to recover damages for the negligence of the defendant company in transporting the plaintiff's horses from Jersey City to St. Louis. One of the horses, valued at \$15,000, was killed, and others greatly injured. The shipper took from the defendant a bill of lading, containing amongst other things the printed condition: "That the carrier assumed a liability on the stock to the extent of the following agreed valuation: If horses, * * * not exceeding \$200 each; if a chartered car, on the stock and contents in the same, not exceeding \$1,200 for the car-load." The horses were not shipped in a chartered car, and the question was whether the limitation of \$200 on each horse should be applied. The learned judge held that it was a just and reasonable limitation of the carrier's liability, and ought to be enforced, and directed the jury to assess the damages in a sum not exceeding \$200 on each horse killed or injured. The case was carried up by writ of error, and the supreme court has recently affirmed the judgment of the court below. See *Hart v. Pennsylvania R. Co.* 5 Sup. Ct. Rep. 151.

In *The Hadji*, 18 FED. REP. 459, Judge Brown, of the Southern district of New York, considered a stipulation of a bill of lading in the exact words of the contract in the present case to be just and reasonable, and in a well-considered opinion found abundant authority for so doing.

A decree must be entered for the libelant, and a reference ordered to ascertain the damages. The amount due must be adjusted upon the above principle of computation, and if it should turn out that the libelant has received from the sale of the damaged goods the invoice price, after deducting the costs of importation, sale, etc., the libel will be dismissed.

PAQUETTE v. A CARGO OF LUMBER.

(District Court, S. D. New York. February 23, 1885.)

DEMURRAGE—VIS MAJOR—OBSTRUCTION BY FIRE DEPARTMENT—CUSTOM.

A canal-boat, laden with lumber, was sent to discharge at the wharf of S. & Co., who had bought the lumber of the shipper's agent. When she had been discharging there about two hours a fire broke out in S. & Co.'s lumber yard, adjoining, and two fire department boats, coming up along-side the canal-boat, laid hose across her, so as to prevent the further discharge of the cargo. This continued some four or five days, after which the residue of the cargo was discharged. The owner of the canal-boat libeled the lumber for demurrage. No bill of lading was put in evidence, but it was proved that, by the custom in the lumber trade, four or five lay days upon such cargoes were allowed, and that it was the duty of the captain of the boat to put the lumber on the wharf, the obligation of the receiver under the custom being only to furnish a proper berth and room on the dock to receive the lumber, so that it might be discharged within that period. Such berth, facilities, and room were furnished by S. & Co. *Held*, that the burden was upon the libelant to prove that some fault of S. & Co. caused the delay; that when it became necessary for the fire department to use the position where the canal-boat lay, it was the duty of S. & Co. to provide means to discharge elsewhere, and they would have been liable had it appeared that the subsequent delay was caused by their inability to do so. But the evidence showed that the firemen would not allow the boat to be moved, and that the libelant was unable to move her; *held*, that the obstruction caused by the fire department was in the nature of a superior force, for which S. & Co. were not responsible; and that the loss must remain where it fell.

In Admiralty.

Hyland & Zabriskie, for libelant.

Goodrich, Deady & Platt, for respondents.

BROWN, J. The libel in this case was filed to recover damages in the nature of demurrage for seven days' detention of the canal-boat Mary A. Bigelow, in the delivery of the lumber libeled, to G. L. Schuyler & Co., Forty-second street, East river. The lumber was brought from Canada, consigned to the shipper's agent here, and by him sold to Schuyler & Co. The boat arrived September 17, 1883, reported to the agent, and on that day was directed to Schuyler & Co.'s dock, where she arrived on the morning of the 18th. It was proved that, by the custom in the lumber trade, four or five lay days upon such cargoes were allowed, and that it was the duty of the captain of the boat to put the lumber upon the wharf; the obligation of the receiver, according to the custom, being only to furnish a proper berth and room on the dock to receive the lumber so that it might be discharged within four days after reporting arrival. A proper berth, facilities, and room for unloading were furnished by Schuyler & Co. on the 20th, and at 7 A. M. on the morning of that day the boat, having been hauled to her berth, commenced to discharge. Two days were sufficient time to discharge the lumber after commencing, and only that time was finally employed in the actual work of discharge. But about two hours after commencing the discharge a fire

broke out in the yard of Schuyler & Co., and two fire-boats belonging to the fire department came up to the wharf, made fast along the outside of the libelant's boat, and ran several lines of hose across his boat, so as to prevent any further discharge of the lumber. This continued some four or five days, after which the fire-boats moved away, and the residue of the lumber was discharged.

The liability for demurrage, or damages in the nature of demurrage, must rest either upon express contract, or neglect of some duty imposed by law or custom. Where, by the terms of the bill of lading, the consignee has bound himself to discharge the vessel within a certain time, he must bear all risks of interruption. In this case there was no bill of lading put in evidence; consequently, the only ground of liability is some neglect of duty by Schuyler & Co. Under the custom allowing them four or five lay days, they were only bound to furnish reasonable facilities for the captain to discharge, by providing him with a suitable berth and space in which to discharge the lumber within that time. When it became necessary for the fire department to make use of the position where the canal-boat was, I think it was the duty of Schuyler & Co., under this custom, to provide means to discharge elsewhere, as much as though the wharf at that place had tumbled down, or become unsafe through the elements, such as ice or storm, (*Bowen v. Decker*, 18 FED. REP. 751;) and any delay in furnishing such facilities would be at their risk, because covered by the four or five lay days allowed by the custom. Had it clearly appeared that that delay was solely in consequence of their inability to furnish any other berth, I should hold them liable for the interruption through the fire. But the evidence does not establish this. On the contrary, it indicates that the firemen would not allow the libelant's boat to be moved, because it would interrupt their work. The foreman testified that he endeavored to get the fire-boats to let the canal-boat out, so as to go to another place; but the firemen said it could not be done, and refused to allow the boat to be moved. The libelant had employed Schuyler & Co. to discharge the boat. He made no request of the firemen to be permitted to remove elsewhere.

The burden of proof is upon the libelant to show that some fault of the respondents caused the delay. *Fish v. One Hundred and Fifty Tons, etc.*, 20 FED. REP. 201. Whether Schuyler & Co. had any other available berth or not (which does not clearly appear on the evidence) is immaterial, if the libelant was in fact unable to move his boat so as to avail himself of it; and such is the weight of evidence. Schuyler & Co. are not responsible merely for the obstruction caused by the interference of the fire department. When that interruption arose, it was equally the duty of Schuyler & Co. to provide another berth, and the duty of the libelant to go to it at once. The risk of ability to provide another berth was on Schuyler & Co. The risk of being able to get away from the obstruction caused by the fire department, and to go to another berth, was upon the libelant. As the boat could not

get away on account of this obstruction, and as this obstruction did not arise through any fault of Schuyler & Co., the boat was not kept there by their fault; and hence the delay was not through their fault any more than if the libelant's boat had been sunk at the berth assigned, and he had been unable, in consequence, to put the lumber upon the wharf within the time provided by custom. The obstruction was in the nature of a superior force; and if the libelant could not extricate his boat, the loss must remain where it fell,—as much so as if the delay had arisen from the boat's sinking at her berth. *Fish v. One Hundred and Fifty Tons, etc., supra*, and cases there cited; *Ford v. Cotesworth*, L. R. 4 Q. B. 127, 133; *Cunningham v. Dunn*, 3 C. P. Div. 443; *Postlethwaite v. Freeland*, L. R. 5 App. Cas. 599, 621.

Any delay arising from other causes is fully covered by the amount tendered and deposited in court. The libelant will be entitled to the amount deposited. The costs must be taxed to either party according to the date of the payment of the money into court.

THE SAUNDERS.

(Circuit Court, S. D. New York. March 24, 1885.)

ADMIRALTY PRACTICE—APPEAL—OFFER OF TESTIMONY WITHHELD BELOW.

An appellant will not be allowed to produce testimony upon appeal which he has deliberately withheld in the court below.

Motion to Suppress Depositions.

E. D. McCarthy, for libelant.

Thos. L. Ogden, for appellee.

Butler, Stillman & Hubbard, for the Saunders.

WALLACE, J. The appellee moves to suppress the depositions of witnesses taken in this court, by the appellant because, although the witnesses were present at the instance of the appellant at the hearing in the district court, they were not examined. It is insisted that a party should not be allowed to produce upon appeal testimony which he has deliberately withheld in the court below.

Although appellate courts in admiralty treat an appeal as a new trial, and exercise great liberality in permitting new proofs and new pleadings in furtherance of justice, they are not constrained by any arbitrary rules which require them to receive testimony which ought to have been produced but was not produced in the court of original jurisdiction. In the case of *The Maybey*, 10 Wall. 419, 13 Wall. 738, the supreme court refused to allow a commission to examine witnesses because no excuse was shown in the moving papers why the wit-

nesses were not examined in the courts below. See, also, *The Boston*, 1 Sumn. 331; *Coffin v. Jenkins*, 3 Story, 120; *Taylor v. Harwood*, 1 Taney, 438. In *Farrell v. Campbell*, 7 Blatchf. 158, NELSON, J., held that where the appellant declined to appear upon the hearing in the district court, upon the refusal of that court to postpone the hearing, he could not be permitted to contest the merits of the decree on appeal.

If parties are permitted to withhold evidence in the district court, take the chances of success without it, and then avail themselves of it by appeal in case of failure, the practice would tend to intolerable abuses. It would be unjust to the adverse party, because he might prefer to abandon his case if the testimony had been presented, rather than incur further expense and labor in litigating. It would be trifling with the court of original jurisdiction by invoking its decision upon an hypothetical case while withdrawing the real case from consideration. It would impose unnecessarily upon a court of appellate jurisdiction the duty which appropriately belongs to a court of original jurisdiction.

The authorities referred to justify the granting of the motion.

FRAZER LUBRICATOR Co. v. FRAZER and others, Partners, etc.¹

(Circuit Court, D. Minnesota. April, 1885.)

JURISDICTION OF CIRCUIT COURT—INFRINGEMENT OF TRADE-MARK—CITIZENSHIP.

An Illinois corporation brought suit in the United States circuit court for the district of Minnesota against S. F. & Co., a firm composed of citizens of the state of Illinois, and their agents, Z. & H., who were citizens of the state of Minnesota, to restrain them from infringing its trade-mark in the state of Minnesota. *Held*, on motion to dismiss for want of jurisdiction on the ground that the substantial controversy was between citizens of Illinois, Z. & H. having by answer disclaimed the alleged agency and denied any interest in the suit, that the circuit court had jurisdiction.

Motion to Dismiss.

The bill of complaint is filed by a corporation, citizen of Illinois, against defendants to enjoin them from using a trade-mark belonging to the complainant, or an imitation of it calculated and intended to deceive the public, and advertising that they kept on hand and were the sole agents for the sale of such axle-grease indicated in trade-mark. The trade-mark used by complainant is "Frazer's Axle Grease," printed on a label, with devices and pictures of wagons with horses and drivers, and other representations of a peculiar character. The bill charges that the defendants Frazer & Co. manufacture a similar axle-grease, and attached a label marked "Superior Axle Grease, manufactured by Frazer & Co.," with devices so nearly alike that used by complainant as to deceive the public; and that it is used for the purpose of fraudulently deceiving and misleading persons who buy and use axle-grease. There is also an allegation that defendants Yanz & Howes are the agents of Frazer & Co., in St. Paul, Minnesota, for the sale of axle-grease manufactured by them, and so advertise themselves, and are selling the said axle-grease labeled with the devices substantially similar to the trade-mark exclusively owned by complainant. An injunction is prayed for, etc.

The defendants composing the firm of Frazer & Co. are citizens of Illinois. Yanz & Howes are citizens of Minnesota, and reside in the city of St. Paul. Service of subpoena is made on Yanz & Howes, and this firm alone appear and file an answer, denying that they are agents of Frazer & Co., and allege that they purchased the axle-grease received and for sale by them in the open market in the course of trade, and that they have no interest in the other matters charged in the complaint. Replication is filed.

The title of the complainant to the trade-mark and the manufacture of "Frazer's Axle Grease," as set forth in the bill, is derived from certain assignments of letters patent, and contracts between the complainant, its grantors, and S. Frazer, one of the defendants. A motion is made to dismiss bill for want of jurisdiction. The princi-

¹ Reported by Robertson Howard, Esq., of the St. Paul bar.

pal reason assigned for dismissal is that the substantial controversy in the bill is between citizens of Illinois, and the defendants Yanz & Howes have no interest in it, and have disclaimed alleged agency in their answer.

Horton & Morrison, for complainant.

John B. & W. H. Sanborn, for defendants.

NELSON, J. I suppose the complainant could have brought this suit against Yanz & Howes alone. The controversy between these parties, citizens of different states, is that defendants advertised that they had on hand for sale an article of axle-grease, with a trade-mark "Superior Axle Grease, manufactured by S. Frazer & Co.," with devices similar to the trade-mark of the complainant, and tending to deceive the public. The object of the suit is to enjoin Yanz & Howes from calling the grease sold by them "Superior Axle Grease, manufactured by S. Frazer & Co.," for the purpose of making the public believe it is the "Frazer's Axle Grease" manufactured by complainant. It is the imitation of the device used by complainants that is sought to be enjoined, and there is no reason why the bill must fall because other parties defendant, not served, are citizens of the same state as the complainant. If the trade-mark used by Frazer & Co. is an imitation of complainant's, and used to deceive the public, the defendants who appear can be enjoined from advertising that they are the exclusive agents for the sale of axle-grease put up in the packages labeled as charged, and their denial in the answer of agency, is not conclusive. I shall deny motion to dismiss and let the suit go to hearing, when it can be more clearly determined whether the trade-mark used by defendants infringes the rights of the complainant.

Motion to dismiss bill denied.

CENTRAL TRUST CO. OF NEW YORK *v.* OHIO CENT. R. CO.

In the Matter of the Intervening Petition of the COLUMBUS, HOCKING VALLEY & TOLEDO RAILWAY COMPANY, asking for its Share of Earnings under a Pooling Contract.

(*Circuit Court, N. D. Ohio, W. D.* March 24, 1885.)

RAILROAD COMPANIES—EXECUTED POOLING CONTRACT—DISPOSITION OF FUND REALIZED BY RECEIVER.

Where a "pooling contract" entered into between two railroad companies has been fully executed, and the profits derived therefrom are collected and held by a receiver of one of the companies, he will not be allowed to retain the fund thus acquired, but will be decreed to pay it over to the other company in accordance with the terms of the contract, without regard to the validity of the original agreement.

In proceedings pending in the circuit court of the United States for the district of Ohio, Western division, at Toledo, brought by the

Central Trust Company of New York against the Ohio Central Railway Company, for foreclosure of mortgage, etc., an intervening petition was filed by the Columbus, Hocking Valley & Toledo Railway Company against the receiver, John E. Martin, by leave of court first obtained, in which it claims that there is due to it a large sum of money from said receiver, on the excess of his earnings, while operating said Ohio Central Railroad under a freight pooling contract, referred to more fully in the opinion. Upon the filing of said intervening petition, an order of reference was made to A. J. Ricks, Esq., as a special master, by request of counsel, to take testimony, and report upon the three points stated in the report of said master, which follows. Upon the filing of said report, the questions made by the petition and report were heard by Justice MATTHEWS, sitting in chambers, as circuit justice, at Washington, by request of the circuit judge.

MASTER'S REPORT ON THE INTERVENING PETITION OF THE COLUMBUS, HOCKING VALLEY & TOLEDO RAILROAD COMPANY.

To the Honorable the Judges of the Circuit Court.

Under the order of reference made in the above-entitled cause, upon the intervening petition of the Columbus, Hocking Valley & Toledo Railroad Company, the undersigned was directed to report:

First. "Whether the pooling contract mentioned and set forth in said petition was renewed by the receiver subsequent to his appointment and acceptance of his office, and if not, whether he and said petitioner recognized and acted in good faith upon the belief that said contract was in force and mutually obligatory upon them." Upon this part of the order I report that the original contract was made between the Columbus, Hocking Valley & Toledo Railroad, the Ohio Central Railroad, and the Baltimore & Ohio Railroad, Companies, on the thirteenth day of January, 1883; that J. E. Martin was appointed receiver of the defendant road on the twenty-ninth of September, 1883; and that said receiver, after his appointment, while not formally renewing said contract, continued to recognize it as in force by paying his monthly assessments of the expenses of the pool commission created by said contract as originally established and apportioned under it, and by reporting to it the amount of his business arising under the same. The receiver, in his testimony on this subject, says in substance that he acted upon and recognized said contract in good faith, but did not ask for instructions from the court in regard to the continuance of that pool, for the reason that at that time it was not expected that any cash balances would ever accrue under it, because, upon the basis upon which the business of the road had theretofore been conducted, he expected to come out just about even on the pooling business at the end of the year. It therefore appears very clearly, from the testimony of all concerned, that both of said parties to the contract recognized it and acted in good faith upon the belief that it was in force and mutually obligatory upon them.

Second. The second subject referred to in said order directs the master to "ascertain and report what caused the inequalities in the earnings of said contracting parties, and whether the diminished earnings of the petitioner arose from any dereliction or fault on its part, and if so he will state what such fault or dereliction was. Upon this part of the case the master will report fully the facts and state explicitly the equities of the respective parties as he shall find them to exist." In the contract entered into, as aforesaid, the percentage of business to be allowed each of the parties thereto, was apportioned

upon the basis of the actual coal transportation of each road for some years previous. This actual business showed that the coal produced along the line of road of the petitioner entitled it to 54½ per cent., and the Ohio Central to 27 per cent., of the coal transportation business originating within the territory named in said contract. The business, as conducted under said contract by the roads named, shows that each earned about its apportioned per cent. up to some time about July, 1884. About that time the petitioner herein, without any fault on its part so far as the evidence before me discloses, suddenly lost substantially all of its coal transportation business, because of a disagreement between the owners and operators of the coal mines along its line of road, and the employes and miners therein. The petitioner was not itself a producer and miner of coal, nor had it any interest as stockholder, or otherwise, in any coal producing company along its line of road. Said disagreement between the producers and miners of coal was, therefore, a matter which it could not control, except so far as it might influence the differences between the producers and miners by concessions in prices of transportation. The evidence before me shows that such concession was made on the part of petitioner and other parties to said contract, on all coal shipped to Columbus, by way of effort to reconcile and compromise the differences between the operators and their employes, and afford them a basis for a compromise, and thereby avert the long and ruinous strike that has prevailed in the mining regions penetrated by its line of road. These differences, however, were not adjusted, and for several months there was a substantial suspension of coal transportation upon the petitioner's road. In the mean time the mines along, and tributary to, the line of the Ohio Central road continued to produce coal, and the shipments over said road increased. In this way and for this reason, large inequalities in the earnings of the parties to said contract arose, and the Ohio Central Railroad received a great excess of coal business above the percentage allotted under the contract. For the reasons above stated, it does not appear from the evidence before me that the diminished earnings of the petitioner under said contract was the result of any fault on its part.

The evidence shows that the contract which was in force when the receiver of the defendant road was appointed, and which he has since recognized, afforded to shippers of coal along the lines of the railroads which are parties thereto, rates of transportation as low, if not lower, than was charged by any other railroad companies in the state, quantities and distances being equal. The facilities afforded to shippers and the rates for transportation were uniform, and fixed for a definite period. They were not higher than had been charged the public under the sharpest competition existing before the contract was made. So far, therefore, as the facts before me show, the parties to this contract entered into it free from any conspiracy, or intent, to impose upon the public higher rates for transportation, or to give fewer facilities for the transaction of the public business, than had before been afforded by them, or than was offered by other lines in the state; and if the contract is to be enforced, they stand upon the same footing, so far as the equities between them are to be adjusted. The inequality in their earnings was not caused by fault of one, or procurement of the other, but was the result of influences neither party originated or controlled, and, therefore, if the contract is one which the court can recognize and enforce, the petitioner is justly entitled to the net profits, which have accrued to the receiver upon the excess of coal business which went over his line of road, growing out of the suspension of the coal traffic on petitioner's road, as hereinbefore stated.

Third. I am further required by the order of reference to "show what amount, if anything, is due petitioner under said contract in the event it is enforced." I have not had presented to me the detailed statement of the business done by the roads affected by this contract, as shown by their reports to the pool commission, but the testimony shows that the receiver has trans-

ported a large excess over what his percentage of business under the contract would have been, but, for various reasons stated at length by him, he claims that, even if the contract is to be enforced, it should not be literally applied as to his earnings. The petitioner, by its officers and counsel, concur in the receiver's views in this respect, and I therefore accept his figures as fair, and report that if the contract is enforced there is due to the petitioner, the Columbus, Hocking Valley & Toledo Railroad Company, from the receiver of the defendant road, the sum of \$50,000.

The parties interested were served with due notice of the hearing before me. The complainant was represented by its counsel, Swayne, Swayne & Hayes, and the receiver appeared in person and testified pursuant to notice and request from me. The petitioner was represented by Judge BURKE. All the testimony taken before me is filed herewith, marked Exhibit A, and, with this report, is respectfully submitted.

[Signed]

A. J. RICKS, Special Master.

Butler, Stillman & Hubbard and *Swayne, Swayne & Hayes*, for Central Trust Co., the complainants in the original proceedings.

Stevenson Burke, for the intervening petitioners.

MATTHEWS, Justice. The petitioner prays for an order directing the receiver in this cause to pay over to it the sum of \$50,000, in his hands, claimed to be due to it under a contract entered into January 13, 1883, between the petitioner, the Ohio Central Railroad Company, and the Baltimore & Ohio Railroad Company. The contract is of that description known as pooling contracts, and had reference to the coal business of the several roads, in respect to which they were competitors. It provided that the business and earnings of the parties should be equalized upon the basis of $54\frac{1}{2}$ per cent. to the petitioner, 27 per cent. to the Ohio Central, and $18\frac{1}{2}$ per cent. to the Baltimore & Ohio Railroad Company, the prices of transportation being fixed by commissioners appointed under the contract, and at the end of each year the joint earnings from this business, of which a separate account should be kept, were to be divided according to the same percentage, any excess received by a party to be paid over, after deducting one-half for the cost of carriage.

This contract was in force and in operation between the parties when the bill was filed in this case, and the receiver was appointed. No specific directions in regard to it were given to the receiver at the time of his appointment, or since, and thinking the contract fair, reasonable, and probably beneficial, he has continued to act under it. The percentages for division agreed upon, it appears, fairly represent the proportions according to which the business had been previously divided between the roads, when operating in competition, and the object of the arrangement was to maintain what the parties should deem to be reasonable, but remunerative, prices of transportation by taking away the motive for cutting rates. In consequence of the strike among the miners in the coal region through which their roads run, the amount of coal transported during the past year over the petitioner's road has been greatly reduced below its usual proportion, and that of the road of the Ohio Central relatively increased,

and in consequence a fund of \$50,000, net receipts arising from that excess, has accumulated in the hands of the receiver. The order to pay it over, in accordance with the terms of the contract asked for by the petitioner, is resisted by the complainant in this suit on behalf of the mortgage bondholders, who are prosecuting the suit for a foreclosure and sale. The grounds of objection are:

First, that contract is illegal, being in restraint of trade, and void, as contrary to public policy; *second*, that it is void as *ultra vires*, the Ohio Central Railroad Company having no corporate power to enter into it; *third*, that the receiver was not authorized to recognize and continue it in operation.

In my opinion the receiver was well warranted in recognizing, adopting, and continuing in operation the contract in question. As an officer of the company at the time it was made, he participated in its execution and entered into it on behalf of his company, believing it to be a reasonable, just, and useful arrangement on behalf of all the interests he was bound to consult, both public and private. He was selected and appointed as a receiver in this cause at the instance of the complainant, and the bondholders whom it represents. It was not then thought necessary or expedient to limit his discretion in the practical management of the road, thus placed in his hands, by any express instructions. The existence of this contract, it must be presumed, was well known to those who are now seeking to repudiate it; if not, it might have been by the exercise of the slightest diligence. In consequence of casualties not foreseen at the beginning, it has eventuated in the accumulation of the cash balance now in controversy. The contract has been fully executed as to the transactions and business out of which that balance has grown.

The question now presented to me is not whether an unperformed and executory contract shall be enforced, nor whether damages shall be recovered against a party who refuses to operate under it. It is whether one party, who has received all the expected benefits to be derived from it, shall account for the fruits of its performance, which by its terms belong to another, and which, contrary to its terms, it retains. The contract, whether legal or not, was not binding on the complainant or the receiver; and if objected to in season, proper instruction would have been given in reference to its recognition and adoption. Failing to take proper steps to that end, the receiver was necessarily left at liberty to exercise his own judgment and discretion in reference to it. The contract itself was a customary one among railroads, and the receiver believed it to be reasonable and fair, and that it was expedient to continue it in force. This he has done with the result already stated. Good faith requires that the proceeds arising from its operation, and which by its terms belong to the petitioner, should be paid over to it, without regard to the questions now made as to the original validity of the contract. The receiver is accordingly directed to pay over to the petitioner the amount found to be due by the master, in accordance with the prayer of the petitioner.

ROBERTS v. HILL.

(Circuit Court, D. Vermont. March 27, 1885.)

1. NATIONAL BANKS—PLEDGE TO SECURE DEPOSITOR—ACT OF INSOLVENCY.

If the officers of a national bank, at the time of pledging a note to secure a depositor who had been allowing the bank to use his money and who was apprehensive of a loss thereof, saw that the bank was approaching failure and made the pledge to keep the note out of the assets to be distributed, such pledge would be void; but if they made it to prevent failure, and expecting to prevent failure, by retaining and using the deposit to pay other depositors, it would be good.

2. SAME—PLEDGE HELD GOOD.

On examination of the circumstances of this case, *held*, that the pledge should be sustained.

In Equity.

Roberts & Roberts, for orator.

Jed P. Ladd and Henry C. Adams, for defendant.

WHEELER, J. The orator is receiver of the First National Bank of St. Albans; the defendant is administrator of the estate of D. R. McGregor. The bill is brought to set aside a pledge of a promissory note of \$8,031.35, made by the officers of the bank to the defendant's intestate on the twentieth day of February, 1884, to secure a deposit of \$8,850. The right to have the pledge set aside and recover the note or its proceeds depends entirely upon section 5242, Rev. St. There is no question about the validity of the deposit; nor but that the pledge would be good to secure it at common law. The statute makes utterly null and void all transfers of the securities and payments of the money of the bank made after an act of insolvency, or in contemplation thereof, with a view to prevent the application of the assets in the manner prescribed in that chapter, or with a view to the preference of one creditor to another, except payment of the circulating notes. What would be an act of insolvency is not defined, but would apparently be the failure to redeem the circulating notes according to section 5226, as that is the only thing which would authorize the comptroller of the currency, before the act of 1875, (19 St. at Large, 63,) to take possession of a national bank and appoint a receiver. This bank had not committed such an act of insolvency, but, beyond any fair question, was, in fact, insolvent at the time of the pledge.

The contemplation mentioned in the statute appears to be that of insolvency itself, and not of that particular act of insolvency in not redeeming the circulation. *Case v. Citizens' Bank*, 2 Woods, 23. Here was insolvency, in fact, to be contemplated, sufficient to avoid the pledge, if actually made in contemplation of it with a view to prevent the distribution of the assets ratably by a receiver, or to the preference of one creditor to another. The contemplation and view are to be those of the officers of the bank, and not of the creditor. If these

motives existed and were operative with them, no innocence or good faith on his part would save the transaction. *Case v. Citizens' Bank, supra.* When the insolvency became permanent, the view to prevent ratable distribution, or to make preferences, would, if it developed into actual existence, remain constant, and vitiate, not only all transfers of securities, but all payments of money to depositors, and to any creditors, except of the circulation. The intention of this section would seem to be to prevent the disposition of any of the money or assets to common creditors whenever the insolvency should become so apparent as to make a receivership, or an ultimate loss to some of the creditors, probable to the just apprehension of the officers, and to hold all for the benefit of all. If this apprehension adequately existed in the minds of the officers of this bank at the time of this pledge, not only this pledge but all subsequent pledges of collaterals to and payments of prior existing debts would be void. It would be manifestly unjust to make an innocent receiver of security or payment give up his, and allow others who could be no more innocent to retain theirs, received when the fate of the institution was more and more imminent.

The defendant's intestate is not shown, and does not appear to have been any relative, favorite, or friend of any officer of, or person connected with, the bank. He was a mere depositor, at a low rate of interest, for the mutual advantage of himself and the bank. There was a run on the bank by depositors, which alarmed him. He did not want his money, but wanted to be secure. The officers guarantied his deposit personally, and turned out this note to pacify him. He was dealt with as any other creditor equally importunate would have been. There was no intent to favor him over others; their motive was to retain the money. Had he received the money he would have been equally liable to refund that, under this statute, as has been shown. By mustering available assets and raising money, and a like use of securities with other depositors, they met the run for a time, by paying those who would be paid, securing those who would be paid or secured, and restoring confidence to the rest. They were striving to save the bank, and not striving to help him at the expense of the others.

The bank continued business about six weeks after this pledge. Then the officers saw that the effort to maintain it was hopeless, and stopped business. Their apprehension of the condition of the bank, and motive to prevent suitable distribution of the assets, ought to be made to appear clearly in order to justify going back so far as to the time of this pledge, and opening all pledges and payments on past debts; and their purposes and acts are to be considered in view of what they could see looking forward, and not wholly by what is apparent now looking backward. If they saw at the time of the pledge that the bank was approaching failure, and made the pledge to keep the note out of the assets to be distributed, the pledge would be clearly

void; but if they made it to prevent failure and expecting to prevent failure, it would appear to be good. The insolvency had come gradually, and not by any sudden loss which would arrest attention at once. The actual condition was as good as it had been for some time. They must have known that it was perilous, but do not appear to have lost courage, or then to have expected failure. The evidence does not satisfactorily show that they were placing money and securities where they would be kept from the effect of failure, but rather does show that at that time they were using their assets to prevent failure. Therefore, it is not found that this note was pledged with a view to prevent its application in the manner prescribed by that chapter, nor with a view to a preference of this creditor to any other.

Let there be a decree dismissing the bill of complaint, with costs.

STEAM STONE-CUTTER CO. v. SEARS and others.

SAME v. YOUNG and others.

SAME v. BATCHELDER and others.

SAME v. WINSOR SAVINGS BANK and others.

SAME v. JONES and others.

SAME v. DUFF and others.

SAME v. McCARTY and others.

(Circuit Court. D. Vermont. March 27, 1885.)

VENDOR AND VENDEE—ATTACHMENT ON WRIT OF SEQUESTRATION—NOTICE TO SUBSEQUENT PURCHASERS—REV. ST. VT. §§ 874, 875.

Attachment on a writ of sequestration, by leaving a copy of the writ with a description of the estate attached in the town clerk's office, pursuant to Rev. Laws Vt. § 874, *held* valid against subsequent purchasers without actual notice, without the entry in a book kept for that purpose by the town clerk of the names of the parties, date of the writ, nature of the action, sum demanded, and officer's return, as required by section 875; distinguishing *Burchard v. Fair Haven*, 48 Vt. 327.

In Equity.

Aldace F. Walker, for orator.

William Batchelder, for defendants.

WHEELER, J. These cases each involve title to distinct parcels of land under the same writ of sequestration and levy of execution that were in question in *Steam Stone-cutter Co. v. Jones*, 21 Blatchf. 138;

S. C. 13 FED. REP. 567; and *Steam Stone-cutter Co. v. Sears*, 9 FED. REP. 8. The only question made now is whether the attachment on the writ of sequestration, by leaving a copy of the writ with a description of the estate attached in the town clerk's office, pursuant to section 874, Rev. Laws Vt., was valid against subsequent purchasers without actual notice, without the entry in a book for that purpose by the town clerk of the names of the parties, date of the writ, nature of the action, sum demanded, and officer's return, as required by section 875, Rev. Laws Vt. It is claimed that this question was not decided in either of the former cases. It is understood, however, that the situation of these defendants in this respect is not different from that of the defendant *Sears* in *Steam Stone-cutter Co. v. Sears*, and that of *George, Chase, and Ray* in *Steam Stone-cutter Co. v. Jones*. They all claimed title under *Jones, Lamson & Co.*, in whose deed from the attachment debtor of the whole on record the attachment was expressly mentioned and warranted against. *Burchard v. Fair Haven*, 48 Vt. 327, now much relied upon, was before the court in *Steam Stone-cutter Co. v. Jones*, and its effect upon the titles of those subsequent purchasers fully considered.

In *Burchard v. Fair Haven* the town clerk's office was bare of the copy of the writ and return of the officer left, as well as of any entry of the attachment in a book, and the town clerk, whose duty it was to receive and keep that copy as well as to make the entry, and for whose fault the suit was brought, repudiated the claim that there ever had been such a copy there. It was for his fault in not receiving and keeping the copy as a part of the records of his office, and not for not making the entry of the attachment in a book only, that the plaintiff recovered. It was not decided there, that leaving a copy of an attachment with a description of the estate attached, did not create a lien, without the entry of the attachment in the book to be kept for that purpose, but only that, without either, the title of a subsequent purchaser without notice of the attempted attachment would not be defeated by it. The entry in the book was not only not made, but there was nothing by which to make it, and a denial that there had ever been anything from which it could be made. Here, the copy and description of the estate were always on file after they were left for record, and have since been entered in the proper book. It has always been held in Vermont that when instruments of title to land, required by law to be recorded, are left for record in the proper office, the record, when made, will relate back to the time of the leaving for record. *Bigelow v. Topliff*, 25 Vt. 273; *Essex Co. R. Co. v. Lunenburg*, 49 Vt. 143. The delay in making the entry in this case made the attachment more difficult to find, but did not remove it or vacate it. If these defendants were misled in any way to their damage by the delay, they have the responsibility of the town to look to for redress. The orator appears to be entitled to a decree in these cases similar to that made in *Steam Stone-cutter Co. v. Jones*.

Let a decree be entered, removing the cloud upon the orator's title created by the conveyances subsequent to the attachment, and for an injunction against setting up the same against the title created by the attachment and levy, with costs, in each case.

ABRAHAM and others v. WESTERN UNION TEL. Co.

(Circuit Court, D. Oregon. April 8, 1885.)

TELEGRAPH COMPANIES—BUSINESS OF—LIABILITY FOR NEGLIGENCE.

A person engaged in the business of telegraphy, or the transmission of messages for hire by means of electricity, is a public servant, and responsible to the party injured for any loss arising from his negligence in transmitting or delivering such a message; but he is not liable as an insurer of said message against errors consequent upon causes beyond his control.

Action to Recover Damages.

M. W. Fecheimer, for plaintiff.

Rufus Mallory, for defendant.

DEADY, J. This action is brought by the plaintiffs, citizens of Oregon, against the defendant, a corporation formed under the laws of New York, and doing business in the state of Oregon, to recover damages to the amount of \$1,854, caused by the alleged negligence of the defendant in sending and receiving a message for the plaintiffs between Glendale and Roseburg, Oregon. It is alleged in the amended complaint that on October 30, 1883, the plaintiff Walter Wheeler sent a message over defendant's telegraph line from Glendale to Roseburg, to his partners and co-plaintiffs, by the firm name of Abraham, Wheeler & Co., in these words:

"GLENDALE, OR., Oct. 30, 1883.

"To Abraham, Wheeler & Co., Roseburg, Or.: "Don't sell *any* wheat; hold a few days.

[Signed]

"WALTER WHEELER."

That the price demanded for transmitting said message was prepaid by the sender, in consideration of which the defendant undertook to deliver the same as written and addressed; that the defendant transmitted said message so negligently and unskillfully that the same was delivered to said Abraham, Wheeler & Co., at Roseburg, with the word "all" substituted for "any" in the original, in consequence of which the plaintiffs immediately sold 9,000 bushels of wheat, the same being a portion of a greater quantity they then had on hand, at 97½ cents per bushel, that being the market price at Roseburg therefor; but that thereafter, and on November 1, 1883, wheat was worth at that place \$1.23½ cents per bushel; and that it was the intention of said Wheeler in sending said message to have the plaintiffs hold said wheat for a time, and thereby receive the advance thereon,

and the plaintiffs would have done so, and thereby realized said advance, if said message had been truly delivered.

By the amended answer the defendant denies:

(1) Negligence in transmitting or delivering the message. (2) That the plaintiffs sold said wheat on account or by reason of the information or advice contained in said message as received by them, and avers that such sale was in fact contrary thereto. (3) That on November 1, 1883, wheat was worth at Roseburg \$1.23½ per bushel, or any more than 81 cents per bushel. (4) Knowledge as to the intention of said Wheeler in sending said message, or as to whether the plaintiffs would have realized any greater price for said wheat if said message had been duly delivered. (5) That the plaintiffs were damaged in the sum of \$1,854, or at all, by the negligence of the defendant in sending or receiving said message. And also sets up a special defense to the effect that the error in sending the message was the result of natural causes beyond the control of the defendant.

The answer also contains a statement intended either as a defense to the action, or in mitigation of the damages claimed therein, that the message in question was received and transmitted by the defendant on the condition, and subject to the agreement, that it should not be liable for any mistake in the transmission or delivery of the same, whether caused by the negligence of the defendant or otherwise, beyond the amount paid for sending the same, unless it was repeated; and that the plaintiffs did not have said message repeated, whereby they assumed the risk of any mistake occurring in the transmission thereof. To this statement or plea the plaintiffs demur, for that it does not constitute a defense in whole or in part to the action, which is for damages caused by the negligence of the defendant.

Electricity has been in successful use as a means of transmitting messages and information for about 40 years. During this time the responsibility of the person who undertakes to serve the public in this way, and the nature of his employment, have been the subject of much consideration and some conflicting judgments in the courts. With the progress of time and the marked improvements in the science of telegraphy, there has been a tendency to hold telegraph companies to a higher degree of diligence and a larger measure of responsibility in the discharge of their duties to their employers. From the first an effort was made to liken the business of telegraphy to the carriage of goods by a common carrier. But the courts, with but probably one exception, (*Parks v. Alta Cal. Tel. Co.* 13 Cal. 422,) have declined to hold the telegrapher responsible as an insurer of the accuracy of messages transmitted by him, and have limited his liability to losses arising from mistakes resulting from his negligence in the discharge of the duties of his employment.

The liability of a common carrier is twofold. The one arises from the fact that he is an insurer of the safety of the goods committed to his custody against loss from all danger or accident, except the act of God and the public enemy; and the other from the fact that he is a bailee of such goods, and as such responsible for any loss or injury

thereto consequent upon his own negligence. And the weight of authority is that he may, by contract, restrict his liability as an insurer, but not as a bailee. Care and diligence are the essential duties of his employment in this respect, and it would be contrary to public policy to allow him to contract for less, or to limit his responsibility for his own negligence.

And although a telegrapher is not an insurer, and therefore not responsible for an error in a message consequent on causes beyond his control, he is, like a common carrier, a servant of the public by reason of his employment, and bound to the exercise of care and diligence adequate to the discharge of the duties thereof, and cannot by any notice, regulation, or contract limit or control his liability for the negligence of himself or servants. As was said by Mr. Justice STRONG in *Express Co. v. Caldwell*, 21 Wall. 269:

"Telegraph companies, though not common carriers, are engaged in a business that is in its nature almost, if not quite, as important to the public as that of carriers. Like common carriers, they cannot contract with their employers for exemption from liability for the consequences of their own negligence."

By section 17 of the act of October 17, 1862, (Laws Or. 776,) it is provided that a telegraph company doing business in this state must transmit all messages in the order in which they are received, with certain exceptions of public interest, under a penalty of \$100. This act is a recognition, as well as a declaration, of the fact that the employment of the defendant is a public one, "to be carried on," as was said by BIGELOW, J., in *Ellis v. American Tel. Co.* 13 Allen, 231, "with a view to the general benefit and for the accommodation of the community, and not merely for private emolument and advantage." And the measure of damages in an action against the defendant for a failure to perform a duty pertaining to this employment with due care and diligence is the ordinary one in actions for damages caused by a neglect of duty. Any stipulation or notice limiting the defendant's liability in this respect is void and of no effect. Notwithstanding the contract or condition under which this message is alleged to have been sent by the plaintiff, if the error in its transmission was consequent upon the negligence of the defendant, or the want of ordinary care and prudence on the part of its servants, it is liable to the plaintiffs for the damage sustained thereby. And this includes gains prevented as well as losses sustained, provided they are the natural and proximate consequence of the error or mistake.

In the case of an obscure or cipher message, of which the import or importance is not apparent to the operator, there is a conflict of authority as to whether or not the damages should be limited to the price of the message. *Candee v. W. U. Tel. Co.* 34 Wis. 479; *Hart v. Same*, 4 Pac. Rep. 658.

But the case under consideration is one in which the message, by its terms, informed the defendant of its import and importance, and

the measure of damages for a breach of the undertaking to transmit it with care and diligence is the ordinary one. It follows that the matter demurred to neither constitutes a defense to the action nor a mitigation of the damages sought to be recovered thereby, and therefore the demurrer must be sustained; and it is so ordered.

In addition to the authorities above cited, the following cases have been examined, and are referred to as bearing on the question involved in this cause from various stand-points: *Railroad Co. v. Lockwood*, 17 Wall. 357; *Jones v. Voorhees*, 10 Ohio, 145; *True v. International Tel. Co.* 60 Me. 9; *Bartlett v. W. U. Tel. Co.* 62 Me. 209; *Redpath v. Same*, 112 Mass. 71; *Grinnell v. Same*, 113 Mass. 299; *New York & W. P. Tel. Co. v. Dryburg*, 35 Pa. St. 298; *Passmore v. W. U. Tel. Co.* 78 Pa. St. 238; *Telegraph Co. v. Griswold*, 37 Ohio St. 301; *Breeze v. U. S. Tel. Co.* 48 N. Y. 132; *Wann v. W. U. Tel. Co.* 37 Mo. 472; *W. U. Tel. Co. v. Fenton*, 52 Ind. 1; *White v. W. U. Tel. Co.* 14 FED. REP. 710, and note, 718.

LOGWOOD and Wife v. MEMPHIS & C. R. Co.

(Circuit Court, W. D. Tennessee. March 18, 1895.)

COMMON CARRIERS—DISCRIMINATION—RACE AND COLOR OF PASSENGERS—EQUAL ACCOMMODATIONS.

Equality of accommodation does not mean identity of accommodation, and it is not unreasonable, under certain circumstances, to separate white and colored passengers on a railway train, if attention is given to the requirement that all paying the same price shall have substantially the same comforts, privileges, and pleasures furnished to either class.

Action for the Wrongful Exclusion of a Passenger from a railroad car.

Logwood and wife are colored people living at Huntsville, Alabama. She bought a first-class ticket over the defendant's railroad to Courtland, but when she went on the platform of the ladies' car a brakeman, who had allowed several white ladies to enter, closed the door on Mrs. Logwood, and told her she must apply to the conductor of the train for permission to ride in that car, and that she could take a seat in the front car. According to her testimony and that of her witnesses, the conductor told her she must ride in the front car; that she told him she had always been allowed to ride in the ladies' car and thought she should be permitted to do so again, as she was sick and did not wish to ride in the front car, where there was swearing and smoking and whisky drinking, but that the conductor insisted upon her riding in the front car, and told her he would see that there was no swearing, smoking, or drinking.

According to the testimony of the conductor and the defendant's other witnesses, he told her he was busy then, but had always allowed her to ride in the ladies' car, and if she would be seated in the front car until he got through he would put her into the ladies' car. She

ordered her trunk off the baggage car, refused to take that train, and under instructions from her husband kept her ticket, bought another, and went to her destination on the next train in the ladies' car. Both Mrs. Logwood and the conductor testified that she had often traveled with him, and always rode in the ladies' car. The car in the rear was reserved for ladies, and such other passengers as were admitted to it. The front car was a general one, in which smoking was permitted, but on this particular occasion, according to the testimony of defendant, was newer and brighter, and in all respects equal to the rear one in appearance and comfort. Colored people were generally required to ride in the front car, unless objection was made by them, in which case proper persons were allowed to ride in the ladies' car, the plaintiffs always having been permitted to do so.

W. M. Randolph, for plaintiffs.

Poston & Poston and *L. W. Humes*, for defendant.

HAMMOND, J., (*charging the jury orally.*) Common carriers are required by law not to make any unjust discrimination, and must treat all passengers paying the same price alike. Equal accommodations do not mean identical accommodations. Races and nationalities, under some circumstances, to be determined on the facts of each case, may be reasonably separated; but in all cases the carrier must furnish substantially the same accommodations to all, by providing equal comforts, privileges, and pleasures to every class. Colored people and white people may be so separated, if carriers proceed according to this rule. If a railroad company furnishes for white ladies a car with special privileges of seclusion and other comforts, the same must be substantially furnished for colored ladies. All travelers have to submit to some discomforts and inconveniences, and should not be too exacting, but are entitled to polite treatment, free from any kind of indignity.

The brakeman on the train having referred Mrs. Logwood to the conductor, who was the proper officer to decide upon her right to ride in the ladies' car, and she having gone to him, the question in this case must be determined by what occurred between them; and if you believe from the proof that the conductor ratified the act of the brakeman by telling her she must ride in the front car, and would not be permitted to go into the ladies' car, the company is undoubtedly liable for damages, unless you conclude from the evidence that the front car was, under the rule already announced, equal to the ladies' car. But if you believe that the conductor told her that at his convenience he would admit her to the ladies' car, and there was no unreasonable delay or discomfort in so doing, the plaintiffs cannot recover in this case.

The court announced that it adopted the opinion of Judge MORRIS in the case of *The Sue*, 22 FED. REP. 843, as a proper statement of the law of this case, and it was read in argument before the jury.— [REP.]

NEWBY and others v. BROWNLEE.

(Circuit Court, D. Kansas. March 9, 1885.)

1. TAXATION—LAND SOLD UNDER CONFISCATION ACT.

Where land has been sold under the confiscation act of July 17, 1862, the life-estate of the owner is sold and transferred to the purchaser, and no title remains in the United States to exempt such land from taxation by a state.

2. SAME—DUTY OF LIFE-TENANT.

Ordinarily, a tenant for life must pay the taxes assessed on land, if there is any income to pay them with.

3. SAME—KANSAS STATUTE.

In Kansas the land itself is taxed, and it matters not what may be the condition of the title, or who may be the owner; and unless it comes under one of the exemptions named in the statutes it is subject to its burden of the public revenue; following *Blue-Jacket v. Commissioners*, 3 Kan. 347, and *Miami Co. v. Brackenridge*, 12 Kan. 114.

4. SAME—TAX DEED—SUBSEQUENT TAXES UNPAID.

A tax deed is not invalid because the subsequent taxes had not been paid at the date of making it.

5. SAME—DESCRIPTION OF LAND.

Where the land bid off at a tax sale is described in the tax deed as "the north-east eighty acres" of a quarter section, without saying that it is in a square, this will not invalidate the deed.

Action in Ejectment. The opinion states the facts.

John Doniphan, for plaintiffs.

D. S. Alford, for defendant.

FOSTER, J. The plaintiffs, who are the heirs at law of Nathan Newby, bring this action in ejectment to recover the S. E. $\frac{1}{4}$ of section 7, township 8, of range 20 E., being 160 acres of land lying in Jefferson county, Kansas. The defendant, Brownlee, sets up a superior title to the plaintiffs', derived from a series of tax sales, and deeds made on such sales. The plaintiffs attack the defendant's title as illegal, for the reason that the land was not taxable at the time the taxes were levied, and that the tax proceedings and the tax deeds were irregular and illegal, and are null and void. The facts in reference to the title of this land are as follows: In August, 1864, this real estate was seized by the United States marshal of the district of Kansas, in pursuance of a writ issued out of the United States district court of said district, under and by virtue of the act of congress of July 17, 1862, known as the "Confiscation Act." In September following the United States attorney for said district filed in said court his libel against the property, averring that Nathan Newby, the owner thereof, was giving aid and comfort to the rebels, and was in armed rebellion against the United States, etc. After admonition duly given, on the twenty-ninth day of November, 1864, said court entered a decree of condemnation and forfeiture of said real estate to the United States. In December following a writ of *venditioni exponas* was issued to the United States marshal, and in January, 1865, he sold the said real estate under said writ to one James McCormick,

which sale was by the court confirmed in April, 1865. The land at that time was vacant, unoccupied, and without improvements, and so remained until about the year 1879, when the defendant, Brownlee, entered and took possession under his tax title, and he has since occupied said premises, and has made lasting and valuable improvements, and the premises and improvements are now worth over \$5,000. Nathan Newby died in the year 1881, and plaintiffs are his heirs at law.

The first point urged by the plaintiffs is that after the decree of condemnation and confiscation of this property it was not subject to taxation by the state, or, at most, the state could only tax the title and interest in the land which was confiscated to the United States and sold by the marshal under the writ of *venditioni exponas*. Just why this is so, the plaintiffs' counsel in his argument is not exactly clear and explicit, but raises at least the implication that such is the case because the general government still holds some title or estate in the land, perhaps in trust for the heirs of Nathan Newby; or, because the party in possession of the life-estate must keep down the taxes assessed on the land; that it is but the life-estate that is taxable. Neither of these positions can be maintained. Whatever interest or title in this land inured to the United States under the decree of condemnation and forfeiture passed by virtue of the sale to the purchaser, and thereafter the United States held no title or estate in the land. In the case of *Wallach v. Van Riswick*, 92 U. S. 213, the supreme court, speaking of the effect of a pardon as to restoring property which had been seized, condemned, and sold as this property was, use the following language:

"Considering that amnesty did restore what the United States held when the proclamation was issued, it could not restore what the United States had ceased to hold. It could not give back the property which had been sold, or any interest in it, either in possession or expectancy."

Again, in the same case, p. 212:

"And as the fee cannot be in the United States, they having sold all that was seized, nor in the purchaser," etc.

It is conclusively settled that the estate seized, condemned, and sold, under the confiscation act of July 17, 1862, was the life-interest of the offender. *Bigelow v. Forrest*, 9 Wall. 341; *Day v. Micou*, 18 Wall. 156; *Wallach v. Van Riswick*, 92 U. S. 202. In the case last cited, the court held it unnecessary to decide where the fee remained during the life-time of the ancestor, and it is unnecessary in this case, and would be presumptuous in me, to speculate on that subject. But it is clearly decided that there is nothing left in the person whose estate has been confiscated, and nothing in expectancy which he can alienate or convey. And it is just as clearly decided that after the sale nothing remains in the United States.

There cannot be a pretext of title in the United States to exempt this land from taxation. Is there anything in the laws or statutes of

v.23f,no.7—21

Kansas exempting it? The first section of the statute concerning taxation (Gen. St. 1868, p. 1019). reads as follows:

"All property in this state, real and personal, not expressly exempted therefrom, shall be subject to taxation in the manner prescribed by this act." Comp. St. 1879, p. 937.

The fifth exemption named in the statutes reads as follows:

"All property belonging exclusively to this state or to the United States." St. 1868, p. 1021; St. 1879, p. 938. "Each parcel of real property shall be valued at its value in money," etc. St. 1868, p. 1025; St. 1879, p. 947.

There is nothing in the statutes of Kansas, nor in the theory of taxation, which recognizes the taxing of any particular estate or interest in land. It is the land itself that is taxed, and it matters not what may be the condition of the title or who may be the owner; unless it comes under one of the exemptions named in the statutes, it is subject to its burden of the public revenue. *Blue-Jacket v. Commissioners*, 3 Kan. 347; *Miami Co. v. Brackenridge*, 12 Kan. 114.

The question as to who shall pay the tax is quite another thing, and is a matter with which the taxing power has no concern, nor has the party buying the land at the tax sale any concern therein, unless the duty rests on him to pay the taxes. It seems to be settled by the decided cases that the tenant for life of real estate must pay the taxes, if there is any income to pay them with. *Pierce v. Burroughs*, 58 N. H. 302; *Clark v. Middlesworth*, 82 Ind. 240; *Johnson v. Smith*, 5 Bush. (Ky.) 102; *Prettyman v. Walston*, 34 Ill. 192; 1 Washb. Real Prop. (3d Ed.) 112; *Pike v. Wassell*, 94 U. S. 714. In the last cited case, the supreme court held that if the life-tenant failed to pay the taxes, the children of the person whose estate had been forfeited, being the heirs apparent, may take the proper proceedings to enforce that duty on the tenant. But suppose the heirs fail to enforce this duty on the tenant, and the property is sold for the tax, and a stranger bids it off; certainly no one would assert that it in any way concerned him, or affected his title under the tax sale. This defendant, Brownlee, was not the tenant, nor did he hold under the tenant, nor was he under any obligation to pay off these taxes, nor was he concerned in the confiscation proceedings. He appears to have been a stranger to the whole transaction, and as such bought this land at tax sale. And this brings us to the other question, the validity of the defendant's title under the tax deeds.

There are two or three objections made to these tax deeds or part of them. One objection is that all the subsequent taxes, to the year for which the property was sold, had not been paid at the time of making the deed. Another objection is that in one deed the land bid off is described as "the north-east eighty acres" of said quarter section, and does not say it is in a square.

As to the first objection, I find nothing in the law invalidating the tax deed because the subsequent taxes had not been paid at the date of making the deed. The General Statutes of 1868, p. 1058, §

112, and the Compiled Laws of 1879, p. 966, § 138, have the following provision:

"If any land sold for taxes shall not be redeemed within three years from the day of sale, the county clerk of the county where the same was sold, shall, on presentation to him of a certificate of sale, execute, in the name of the county, as county clerk, under his hand and seal, of the county, to the purchaser, his heirs and assigns, a deed to the land so remaining unredeemed, and shall acknowledge the same, which shall vest in the grantee an absolute estate in fee-simple in such lands, *subject, however, to all unpaid taxes and charges which are a lien thereon.* And such deed, duly acknowledged, shall be *prima facie* evidence of the regularity of all proceedings, from the valuation of the land by the assessor, inclusive, up to the execution of the deed."

The words which I have italicized in the above quotation indicate very clearly that a tax deed may be made where the subsequent taxes have not been paid, but the title conveyed is subject to such unpaid taxes.

The other objection is to the description of the land. It appears in the deed, dated January 22, 1878, for sale of 1873. The law in force at the time of that sale is found in St. 1868, p. 1047, § 85; and it reads as follows:

"The person at such sale, offering to pay the taxes and charges against any one piece or parcel of land for the smallest quantity of land in a square, as nearly as practicable, off from the north-east corner of the tract, or piece of land, shall be the purchaser of said quantity, located as aforesaid."

This statute fixes the shape of the piece of land bid off. It must be in a *square*, and there could be no difficulty in locating exactly the lines, and setting off the land purchased. The Statutes of 1879, p. 961, § 111, changed this section, and provides that the piece bid off shall come off the *north side of the tract*. Of course, the deed would then read, so many acres off the *north side*. Besides, there appears to have been four other sales of this *whole* quarter section for taxes, and deeds made thereon, and that whole title is now held by the defendant, Brownlee. Two of these sales were for taxes prior to 1873, and two for subsequent years, (1875 and 1877;) and all these sales appear to have been made before Brownlee entered on the land. These deeds in form are in substantial compliance with the requirements of the statute, and I am compelled to admit that the objections made to them are not well taken, although it would have gratified me to hold the contrary, and relegate the defendant to his rights under the occupying-claimant act.

Judgment must go for the defendant.

HOWES v. CAMERON.

(Circuit Court, N. D. Illinois. December Term, 1883.)

JUDGMENT—EXECUTION TO PRESERVE LIEN—REV. ST. ILL. CH. 77, § 1.

An execution is not "issued," within the meaning of section 1 of Chapter 77 of the Revised Statutes of Illinois, so as to keep the lien of a judgment on real estate alive unless it is delivered to an officer authorized to execute it, and for the purpose of having it executed. The handing of an execution to a United States deputy marshal with the express direction not to execute it until further instructions, and giving no such instructions during the life-time of the writ, will not preserve the lien.

At Law.

John I. Bennett, for Howes.

Rosenthal & Pence, for Gilmore and others.

BLODGETT, J., (*orally*.) This is a petition to set aside a levy made under an execution issued in this case by the marshal of this district. The plaintiff, Howes, recovered against the defendant on the ninth of July, 1877, a judgment in this court for \$1,978.50. On December 26, 1877, a few months after the recovery of this judgment, as will be noticed, the defendant Cameron acquired title to lot 10, in block 22, in Duncan's addition to the city of Chicago, by deed of conveyance. On the second day of December, 1878, the defendant and her husband sold and conveyed by deed, in good faith, to Jesse L. Nason, the N. $\frac{1}{2}$ of this lot, and on the twenty-second of April, 1879, the latter conveyed to Carry O. Nason; October 1, 1879, Carry O. Nason conveyed to one Erickson; October 1, 1879, the latter conveyed to Melcher, and on the twenty-fourth of April, 1883, Melcher conveyed to the petitioner; so that the petitioner is now seized of the N. $\frac{1}{2}$ of lot 10, block 22, by a series of mesne conveyances from Cameron. On the ninth of January, 1878, an execution was made out by the clerk of this court and delivered to a clerk of the plaintiff's attorney, which was subsequently returned to the clerk's office and a memorandum made on the execution docket that said writ had not been delivered to the marshal. On December 13, 1878, another execution was made out by the clerk, but not delivered to the marshal, and on the seventh of February, 1884, an execution was issued on this judgment and levied on the petitioner's lot. The petitioner asks that the levy under this execution be set aside, on the ground that she is a *bona fide* purchaser of the property after the lien of the judgment had expired, and that her property ought not to be sold, or her title clouded by this levy, or sale under it.

It appears from an affidavit of Frank I. Bennett, who was the clerk of Mr. John I. Bennett, the plaintiff's attorney in the recovery of this judgment, and the issue of this execution, that the execution of January 9, 1878, was taken by him from the clerk's office and handed to one of the United States deputy-marshals, who asked what he

wished done with it; to which Bennett replied he would have to see the attorney and get instructions, and requested the deputy to hold said writ until such instructions should be given; whereupon, as the witness states, said deputy, in accordance with his request, placed said writ away in his office to await further instructions. No instructions were given, and no memorandum or entry was made by the marshal on the writ or elsewhere showing the writ had been in his hands, and after the expiration of 90 days from the date, it was taken from the deputy and returned to the clerk's office, who filed it as of the day it was returned, and the clerk at the same time made an entry on the execution docket in this case that the execution in question had not been delivered to the marshal.

The second execution was merely made out by the clerk and handed to the attorney, who kept it in his office until the expiration of 90 days from the date, when he returned it to the clerk, who marked it filed, and also made a memorandum on the execution docket that it had not been delivered to the marshal.

Section 1 of chapter 77 of the Revised Statutes of Illinois provides that a judgment shall be a lien on the real estate of the person against whom it is issued for the term of seven years from the time it is rendered, and no longer, but when an execution is not issued on such judgment within one year from the time the same becomes a lien the judgment shall thereafter cease to be a lien. The only question is, was an execution issued on this judgment within a year from the time the judgment was rendered?

It is very clear to me that an execution is not issued, within the meaning of this statute, unless it is delivered to an officer authorized to execute it, and for the purpose of having it executed. The handing of this execution to a deputy-marshal with the express direction not to execute it until further instruction, and giving no instruction to execute it during the life-time of the writ, is not such a delivery of the writ to the officer as preserves the lien. For all the purposes of preserving the lien, the writ might as well have never been made out by the clerk. It lay inert and dead by direction of the plaintiff's attorney, and placing it in the hands of a person who happened to be a deputy-marshal with directions not to do anything with it, does not make it any better than if it had been left in the desk of the clerk or attorney, because the vitality of the writ is suspended by express direction of the plaintiff's attorney. That the deputy-marshal understood the writ was not to be executed, is, it seems to me, conclusively shown by the fact that no indorsement was made on the writ, as required by law, of the time he received it; and it is hardly possible the clerk would have made an entry to the effect the writ was not delivered to the marshal if he had not been so informed by the attorney's clerk when the writ was taken back to the clerk's office.

The supreme court in *Gilmore v. Davis*, 84 Ill. 487, says: "A delivery of such a writ to a sheriff, instructing him at the same time to

do nothing under it, is really no delivery, and confers no rights on the creditor." It is true, the case I have cited was not expressly a case like this, where a continuation of a lien by the issue of an execution was involved. That was a case between contending executions, and it was held that the delivery of a writ to a sheriff, with instructions not to execute it, was equivalent to no delivery at all. See, also, *Berry v. Smith*, 3 Wash. C. C. 60.

The case, therefore, seems to me to stand precisely the same as if no execution had been issued on the judgment until after the expiration of a year, and the lien of the judgment had ceased at the time the defendant conveyed the property in question to Jesse L. Nason, from whom the petitioner acquires title by mesne conveyances. At the time the petitioner acquired title, the record in this case showed that the execution had never been delivered to the marshal, and justified the purchaser from the defendant in assuming that the judgment had ceased to be a lien upon this property at the end of the year from the time the judgment was rendered. I am therefore of the opinion that the plaintiff has no right to levy an execution on petitioner's property. An order will be entered setting aside the levy under the execution upon the N. $\frac{1}{2}$ of lot 10, in block 22. The execution will not be quashed because, possibly, it may reach other property.

MOSHER v. ST. LOUIS, I. M. & T. RY. CO.¹

(Circuit Court, E. D. Missouri. March 20, 1885.)

CARRIERS OF PASSENGERS—PURCHASER OF RAILROAD TICKET BOUND TO COMPLY WITH ITS CONDITIONS.

A limited railroad ticket, by an express provision of a contract therein contained and signed by the purchaser, was good for a return trip, provided the purchaser identified himself to the "authorized agent" of the railroad at his destination, and the ticket was "officially signed, and dated in ink, and duly stamped by said agent." The purchaser presented himself at the proper office at a proper time, but the authorized agent was absent, and failed to appear before the train, which the holder of the ticket desired to take, started. He therefore proceeded on his return trip without complying with the condition, and presented said ticket to the conductor and explained said circumstances. The conductor refused to accept it and demanded the usual fare, which being refused, he removed the passenger from the train. *Held*, that such removal gave the holder of said ticket no cause of action.

Demurrer to Amended Petition.

The amended petition differs from the original (17 FED. REP. 830) in stating that the plaintiff presented himself and ticket at the business office of the defendant's "authorized agent" at Hot Springs, his

¹Reported by Benj. F. Rex, Esq., of the St. Louis bar.

original destination, "*during business hours*, and a reasonable time before the time of departure of its train for St. Louis that plaintiff desired to take and did take, and was ready and willing, and then and there offered, to identify himself as the original purchaser of said ticket," etc., but that there was no authorized agent there, and that none appeared before the departure of the train which the plaintiff desired to and did take.

For opinion on motion to remand, see 19 FED. REP. 849.

E. P. Johnson and *William M. Eccles*, for plaintiff.

Bennett Pike, for defendant.

BREWER, J., (*orally*.) The question in this case has been argued the third time in this court. I do not see that this amended petition changes the substantial facts in any respect. It still appears, as heretofore, that the plaintiff purchased a ticket called a round-trip ticket from here to Hot Springs and return. That ticket contained an express contract, which in terms provided that it should be presented to the station agent at Hot Springs, and by him stamped upon the back, after being satisfied that the person presenting it was the person to whom the ticket was issued. It was a limited ticket with special rates. Upon that ticket the plaintiff went to Hot Springs, no objection being made. He was ready to return, but the agent not being present at the ticket office at Hot Springs, the ticket was not presented to him, the holder was not identified, nor the ticket stamped by him. With that ticket unstamped, without any identification, the plaintiff started to come back to St. Louis. He rode from Hot Springs to Malvern without objection, but from Malvern, coming this way, upon the Iron Mountain road, the conductor objected and refused to take that ticket. The plaintiff was removed from the train, and he brings this action to recover damages for the expulsion.

I dissent entirely from the construction placed upon the ticket by counsel at this time, and now for the first time. Heretofore it was conceded that the ticket required upon its face an indorsement stamped by the station agent at Hot Springs. This time counsel seems to claim that it did not require anything of the kind. I think it did. The language is plain.

The authorities which have been cited by counsel do not come up to this case, for here, when the plaintiff took that ticket he entered into an express contract. It is not a question of implied contract, or of rights independent of a contract. The plaintiff took that ticket, signing it at the time he took it, thereby creating an express contract between him and the railroad company, by which the ticket was to be good for a return passage when, and only when, indorsed by the agent at Hot Springs, and when the owner and holder had been identified there to his satisfaction. The conductor, when the ticket was presented, saw no stamp upon it. The plaintiff had not been identified, and the rules of the company, binding upon him as a conductor, required him to remove the party unless he paid his fare. Now, can

it be that the railroad company is responsible because the conductor did that which, by the rules of the company,—reasonable rules, too,—in pursuance of his duty, he ought to have done? Grant that there was an implied contract that the station agent should have been at the Hot Springs depot. If the plaintiff had sued for a breach of that contract, and had asked the amount which he was compelled to pay in order to purchase a return ticket, then a very different question would have arisen. But here he relies on the fact that the expulsion from the train was unlawful, because the conductor ought to have taken his statement instead of that evidence which was provided by the contract, viz., identification and the stamp of the agent at Hot Springs.

It certainly would introduce a very uncertain rule of procedure if a conductor could not rest upon the faith of the ticket which is presented to him; if he is bound to act as a judicial tribunal, and take testimony and inquire into the excuses or reasons for the non-perfection of a ticket which is presented to him. The party took the ticket upon the face of which was the express stipulation that before it should be good for a return passage the holder should be identified by the agent at Hot Springs, and he should stamp that ticket on the back. Now, the party says: "Why, I wanted to prove to the railroad conductor that I was the man—the party who took that ticket in the first instance." Can the courts cast upon the conductor the duty of entering upon a judicial investigation? Of course the conductor could not at the instant secure counter-testimony, and he would be bound to take the statement of the party as to the facts of the case independent of the express language of the ticket. I do not think that the conductor is bound to do anything of the kind. I think he has a right to rely upon the language of the contract as expressed in the ticket. If the party was injured by the negligence or wrong of somebody else, he should have paid his fare back and then sued to recover the amount which he had been compelled to pay owing to the omission, negligence, or misconduct of the agent at Hot Springs.

As I said, this is the third time this question has been presented by demurrer, and while the petition has been changed from time to time, yet the substantial facts still remain to-day as they were in the first instance. The demurrer will be sustained.

The party, of course, will have his exceptions. Judgment will be found for the defendant, and as the *ad damnum* clause is over \$5,000, he can take it to the supreme court of the United States, and there settle the question which by it has not yet been determined definitely. It has been determined one way and another by the courts of the different states, but the question whether a conductor is justified in acting on the letter of the ticket presented to him, or is bound to take the statement of the passenger as to matters concerning which the ticket makes express provision, and whether, if he mistakes, the company is responsible, has not yet been settled by the supreme court of

the United States, but can be settled in this case if the plaintiff desires.

The demurrer will be sustained, and judgment entered for the defendant.

In re AH PING.

(Circuit Court, D. California. March 30, 1885.)

1. CHINESE IMMIGRATION—MERCHANT TEMPORARILY ABSENT—RIGHT TO RETURN WITHOUT CERTIFICATE.

The sixth section of the Chinese restriction act of 1882, as amended by the act of 1884, is not applicable to a Chinese merchant, one of a firm residing and doing their principal business in the United States, who temporarily departed therefrom before the passage of said act to attend to a branch of the said firm's business in British Columbia, and who returned to the United States after the passage of said act; and he may re-enter the United States without producing the certificate required thereby.

2. SAME—CONSTRUCTION OF RESTRICTION ACTS.

Section 6 of the restriction act is not applicable to Chinese subjects, residents of the United States, who left the United States for foreign countries for temporary purposes, intending to return before the passage of the amendatory act of 1884, having a right to return at the time of their departure, and who did not return till after the passage of the act; nor to Chinese subjects, residents of the United States, departing for temporary purposes of business or pleasure since the passage of the act.

Appeal from District Court.

Thos. D. Riordan, for petitioner.

S. G. Hilborn, U. S. Atty., *contra*.

Before SAWYER and SABIN, JJ.

SAWYER, J. This is an appeal from the district court. The petitioner is a Chinese subject of the Mongolian race, a merchant, not a Chinese laborer; and a member of the old and well-known firm of Hop Sing & Co., doing a mercantile business in the city and county of San Francisco, of which firm he has been a member since 1877. He resided in the United States continuously for the period of eight years prior to his temporary visit to China. In 1879 he departed from California for the purpose of visiting China, and returned to the United States on November 30, 1881, before the passage of the original Chinese restriction act. He remained at San Francisco from the last-named date, attending to the business of his said firm, until February 1, 1882, when he departed for Victoria, British Columbia, to temporarily attend to the business of the firm, which has a branch house at that place. On July 19, 1884, after the passage of the Chinese restriction act, he departed from Victoria, and arrived at the port of San Francisco by sea July 23, 1884. He did not produce any certificate of the kind required by section six of the restriction act as amended in 1884, or as required by the act of 1882. The question upon this state of facts is whether said Ah Ping is entitled

to land, or whether the sixth section of the restriction act, as amended by the act of 1884, is applicable to a Chinese merchant, one of a firm residing and doing their principal business in the United States, who temporarily departed therefrom before the passage of said act to attend to a branch of the said firm's business in British Columbia, and who returned to the United States after the passage of said act. I have never had occasion before to consider this precise question. Although it may be possible, it would be impracticable, for the petitioner to go to China, and obtain the certificate required by that section; and if the provisions of the section are applicable, no other evidence is admissible. If section 6 is applicable, then the petitioner is not, otherwise he is, entitled to land.

The question at issue depends upon a construction of the clause of section 6: "*Every Chinese person, other than a laborer, who may be entitled by said treaty or this act to come within the United States, and who shall be about to come to the United States,*" shall obtain the permission of and be identified as so entitled in the mode provided. This, with the clause in the same section making the certificate the sole evidence as to those to whom it is applicable, is the only provision, either in the treaties in force or the act, putting any limitation upon the right of a Chinese merchant to come and go of his own free will, without any limitation or legal obstruction. The only equivocal words in the clause, taken literally, would seem to be, "who shall be about to come to the United States." Does this phrase mean persons residing or domiciled abroad who leave their residence or domicile "to come to the United States" either for travel or pleasure, or to take up their residence here, or for other purposes? or does it also include Chinese subjects already domiciled in the United States, having their residence and business here, and who left the country temporarily before, or who shall leave it after, the passage of the act, for temporary purposes, with the intention of returning after the accomplishment of such purposes to their residence in the United States? We are satisfied, upon the rules of construction and principles established by the supreme court of the United States in *Chew Heong v. U. S.* 5 Sup. Ct. Rep. 255, that this provision should be so construed as not to embrace the latter class. To give the section any other construction would be to bring the act into direct conflict with the treaty, which the supreme court says should not be done if such a construction can be avoided. The object of the act is, undoubtedly, to prevent the increase in this country of the number of Chinese laborers, and this provision is designed to furnish means for readily identifying parties entitled to enter the United States. As to those domiciled in foreign countries, there is no ready means in this country for their identification. In the countries whence they propose to come, the means of ascertaining the facts are at hand; hence the provision. As to those resident or domiciled in this country, we have ourselves the best means of identifi-

cation; while as to many of them, even in their native country, and much less when they are temporarily in other foreign countries, there is no practicable means of either identification or for procuring the certificate prescribed.

The United States statutes do not now, nor have they ever, required or provided for the issue of any certificate in this country to resident Chinese, other than laborers, who are about to depart temporarily, for business or pleasure, either to China or other foreign countries. There are many Chinese merchants in California who have been domiciled in the state from 20 to 35 years. Our own means of identification of such persons are greatly superior to those of any other country, even that of their nativity. To require such parties, every time they go to another country, to perform the required acts abroad, would be utterly impracticable, and practically tantamount to an absolute refusal to permit their return.

The treaty between the United States and China of 1868, commonly called the "Burlingame treaty," guaranties to Chinese subjects the right, without any conditions or restrictions, to come, remain in, and leave the United States, and to enjoy all the privileges, immunities, and exemptions enjoyed by the citizens and subjects of the most favored nation. 16 St. 740. The treaty of November 17, 1880, puts no limitation upon this right, and does not authorize, expressly or by implication, any legislation of congress putting any limitation upon the rights of Chinese, other than "Chinese laborers." The language of the treaty is, "The limitation or suspension shall be reasonable, and shall apply *only* to Chinese who may go to the *United States as laborers, other classes not being included in the limitations.*" 22 Rev. St. 826. On the contrary, articles 2 and 3 of the latest treaty in express terms guaranties that all Chinese of any class, "now either permanently or temporarily residing in the territory of the United States, shall be secured the same rights, privileges, immunities, and exemptions as are enjoyed by the citizens or subjects of the most favored nation, and to which they are entitled by the treaty." There is nothing, therefore, in any of the treaties, that, expressly or by implication, authorizes congress to put any restriction upon the right to come and go of such parties, while in other respects they are expressly placed upon the footing of all other most favored foreigners. If, then, there is anything in the restriction act that puts a limit upon these rights, such limitation is a direct violation of the express provisions of the several treaties with China now in force. While such a provision in an act of congress would, undoubtedly, repeal the conflicting provisions of the treaties, as we have always heretofore held, yet, under the late decision of the supreme court, courts should, if possible, so construe the act of congress as not to bring it into conflict with treaty stipulations. Upon the principles established in the case cited, we are satisfied that the act can be fairly construed so as not to include this case. Section 1 provides in explicit terms, the

literal meaning of which cannot well be misunderstood, that "during such suspension it shall not be lawful for *any Chinese laborer to come from any foreign port or place, or, having so come, to remain in the United States.*" And section 2 makes it an offense for the master of any vessel to "knowingly bring within the United States on such vessel, and land or attempt to land, or permit to be landed, *any Chinese laborer from any foreign port or place.*" This language, without the limitation put upon it by the provisions of section 3, that it shall not apply to persons within the United States at the date of the treaty, is as broad and specific as it is possible to be, and, literally construed, includes every individual laborer of the Chinese race. Yet the supreme court, after quoting those provisions of sections 1 and 2, explicitly say, in substance, that if they had *stood alone, without the limiting clause of section 3*, its construction of the act would be the same as it is now. The exact language of the court, speaking through Mr. Justice HARLAN, is:

"If these sections constituted the entire legislation in reference to the coming to this country of Chinese laborers, the court, under the established rules for the interpretation of statutes, would hold that they did not apply to Chinese laborers who by their residence in the United States, at the date of the last treaty, had acquired the right to go and come of their own free will, and to enjoy such privileges, immunities, and exemptions as were accorded here to citizens and subjects of the most favored nation. For since the purpose avowed in the act was to faithfully execute the treaty, any interpretation of its provisions would be rejected which imputes to congress an intention to disregard the plighted faith of the government; and consequently the court ought, if possible, to adopt that construction which recognized and saved rights secured by the treaty. The utmost that could be said in the case supposed would be that there was an apparent conflict between the mere words of the statute and the treaty, and that by implication the latter, so far as the people and the courts of this country were concerned, was abrogated in respect of that class of Chinese laborers to whom was secured the right to go and come at pleasure." 5 Sup. Ct. Rep. 259.

This language, it is true, goes further than was absolutely necessary under the facts of that case; but it is the deliberate statement that the court would have so held, had the facts required it. Such a deliberate announcement, made under the circumstances of the case, we cannot regard as a mere *dictum*, or the expression of the individual opinion of the judge delivering the judgment. We look upon it as binding upon this court as a rule of decision. The court simply apply the universally recognized rule that the repeal of a statute or treaty by implication is not favored. In this case the clause of section six, under consideration, is less specific, as the words, "who shall be about to come into the United States," are more ambiguous, and are fairly open to the construction upon the language itself, in view of the surrounding circumstances, that they are only applicable to those coming for the first time, or to persons, having no present domicile or residence in the United States, but having their actual residence or domicile in a foreign country, about to come into the United States

either on business, for travel, or as temporary or permanent residents.

At the time the petitioner left his residence in San Francisco for British Columbia, on the business of his firm, both under the treaties and under the laws of the United States then in force, he had a legal right to return without any conditions or restrictions not applicable to subjects of any other or "the most favored nation." He had no reason to anticipate any change of the law. At his departure he had a vested right under the treaties and laws then in full force to return. He had a right to rely on the laws as they then were. If, by the act in question, it was intended to cut off this right of return, then it was the deliberate intention of congress to violate the treaty, and cut off a right vested in the petitioner both by the treaties and other laws of the land. As we have seen, the act must, if possible, be so construed as not to work this wrong. The supreme court, in support of the construction given to the act in the case cited, further observes:

"To these [reasons] may be added the further one that courts uniformly refuse to give to statutes a retrospective operation whereby rights previously vested are injuriously affected, unless compelled to do so by language so clear and positive as to leave no room to doubt that such was the intention of the legislature."

To give the construction insisted on by the United States attorney would be to give the act a retrospective operation which would injuriously affect the right of the petitioner to return, vested under the treaties and laws in force at the time of his departure, for temporary purposes, to British Columbia. And, as we have seen, there is less ground for holding that the petitioner is included within the purview of the act than in the case decided by the supreme court, upon the hypothesis assumed in the paragraphs quoted from the decision.

The following language of the supreme court, in *Chew Heong's Case*, is equally applicable to the petitioner in this case:

"It is also said, in support of the judgment, that the sixth section is significant, in that it prescribes the mode for the coming to this country of Chinese persons, 'other than a laborer, who may be entitled by said treaty and this act to come within the United States,' but fails to provide the means for the return and identification of Chinese laborers who were entitled by the treaty to return, but who were out of the country when the act of congress was passed. But this argument, like the one just alluded to, only 'proves that congress, while making provisions for the coming of persons who were entitled to come, other than laborers, omitted to make special provision in reference to the latter, and consequently left them to stand upon their rights as secured by the treaty, and, if their right to enter the United States was questioned, to prove in some way consistent with the general principles of law that they belonged to the class entitled to go and come.'" 5 Sup. Ct. Rep. 266.

With as good reason may it be said that congress, while providing for the case of Chinese, other than laborers, domiciled in foreign countries, not residents of the United States, and having no vested right to return as present residents of the United States, temporarily absent on business or pleasure, "who shall be about to come to the United States," "omitted to make any special provision in reference

to" Chinese residents of the United States temporarily absent, with a right to return, at the date of the passage of the act, or who, after the passage of the act, temporarily leave the United States for foreign countries on business or pleasure; "and consequently left them to stand upon their rights as secured by the treaty; and, if their right to enter the United States was questioned, to prove, in some way consistent with the general principles of law, that they belonged to the class entitled to go and come."

If we have interpreted the principles established by the supreme court aright, the result is that section 6 of the restriction act is not applicable to Chinese subjects, residents of the United States, who left the United States for foreign countries for temporary purposes, intending to return, before the passage of the amendatory restriction act,—having a right to return at the time of their departure,—and who did not return till after the passage of the act; nor to Chinese subjects, residents of the United States, departing for temporary purposes of business or pleasure since the passage of the act. This is the construction acted upon by the executive department of the government, and, we think, is fully justified in these particulars by the decision of the supreme court.

It results that the judgment of the district court must be reversed, and the petitioner discharged. It is but just to say that the judgment of the district court was rendered before the receipt here of the decision of the supreme court in *Chew Heong's Case*. If there are any expressions in any of my former opinions apparently inconsistent with the views here adopted, they are in opinions rendered before the decision of the supreme court in the case cited, and they had special reference to the facts in the case decided, and no reference to the point now involved.

Let the judgment of the district court be reversed, and the petitioner discharged.

MACKIN and another v. UNITED STATES.

(Circuit Court, N. D. Illinois. March 24, 1885.)

1. CRIMINAL LAW AND PROCEDURE—WRIT OF ERROR TO DISTRICT COURT—STAY OF SENTENCE—ACT 1879, § 1.

Under section 1 of the act of 1879 a writ of error is not a writ of right, but to be allowed in the discretion of the circuit judge, and if he allows it, it is also in his discretion whether he will stay the sentence.

2. SAME—WRIT AND STAY, WHEN GRANTED.

If, upon the errors complained of, there be any doubt, or room for fair debate, the accused should not be denied an opportunity to take the deliberate judgment of the circuit court upon the rulings of the district court, if those rulings have affected the judgment and sentence of that court; and in such a case the proceedings under the sentence should be stayed. Writ of error allowed, and proceedings stayed.

Petition in Error.

R. S. Tuthill and J. R. Doolittle, for the Government.

J. B. Hawley and I. N. Stiles, for the Citizens' Committee.

H. W. Thompson, E. A. Storrs, and Judge Turpie, for defendants in error.

GRESHAM, J. The prosecution in this case was commenced under section 5440, Rev. St., by information filed by the district attorney, containing seven counts, charging that the defendants conspired to commit the offenses described in sections 5403, 5511, and 5512. Gleason, Mackin, and Gallagher were convicted upon all the counts, and the two latter were sentenced to pay a fine of \$5,000 each, and to imprisonment in the penitentiary at Joliet for two years. Beihl was acquitted. Mackin and Gallagher, by their petition, ask the circuit for a writ of error, and for a stay of sentence until the rulings of the district court shall have been reviewed.

The first count in the information charges that at the late election a large number of votes were cast at the second election precinct of the eighteenth ward of the city of Chicago, in Cook county, for a representative in congress, and for state and county officers; that the judges of election canvassed the votes, and the proper clerks made two tally-lists showing the number of votes received by each candidate; that on the day after the election the judges and clerks certified on each poll-book the number of votes cast for each person voted for; and thereupon, one of the poll-books with the certificate indorsed thereon, and one of the tally-lists, together constituting the return from such precinct, properly enveloped and sealed, were delivered by one of the judges to the county clerk and his deputies at the clerk's office, whose duty it was to safely keep and guard the same; and that Mackin, Gallagher, Gleason, and Beihl conspired to break open such package, mutilate and alter the certificate, destroy the tally-list, and substitute in its place a false and spurious paper. The separate acts charged to have been done in furtherance of the conspiracy are:

(1) That Gleason and Beihl made opportunity for and permitted the package to be broken open, and the return taken therefrom, altered, and falsified. (2) That Mackin and Gallagher unlawfully broke open the package and removed therefrom such return. (3) That Gallagher unlawfully mutilated and altered such certificate by erasing the word "four" in the sentence "Henry W. Leman had four hundred and twenty votes for state senator," and wrote in place thereof the word "two," so as to make the sentence read, "Henry W. Leman had two hundred and twenty votes for state senator;" and erased the word "two" from the sentence "Rudolph Brand had two hundred and seventy-four votes for state senator," and wrote in place thereof the word "four," so as to make the sentence read "Rudolph Brand had four hundred and seventy-four votes for state senator." (4) That Gallagher made a false and spurious paper, and substituted the same in place of the genuine list; and (5) that Mackin and Gallagher unlawfully made way with and destroyed the genuine tally-list.

The second and third counts embrace the ballots, as well as the other papers described and embraced in the first count.

The fourth count charges that the defendants conspired to interfere with Michael Ryan, the clerk of Cook county, and such two justices of the peace as he might associate with him in the discharge of his duties, in opening and canvassing the several returns of the election within Cook county, such interference to be effected by mutilating and altering the certificate on the poll-book deposited in the clerk's office before the opening and canvassing of the returns from the second precinct, and by removing from the county clerk's office, and destroying, the tally-list deposited therein, and substituting for and in place thereof a false and spurious paper, purporting to be such tally-list; and that in furtherance of this conspiracy the defendants altered the certificate on the poll-book, making it appear that Leman had received for state senator the number of votes cast for Brand, and that the latter had received the number of votes cast for Leman; and that the defendants removed from the clerk's office, and destroyed, the tally-list deposited therein, and substituted for and in place of it a false and spurious paper.

The conspiracy charged in the fifth count was to destroy the papers described in the fourth count, and, in addition thereto, a large number of ballots which had been deposited in the clerk's office. In furtherance of this conspiracy, it is charged that the defendants destroyed the ballots, as well as the other papers deposited in the clerk's office, and substituted in their place spurious ballots and papers.

The sixth count charges that the returns of the poll of the second precinct had been deposited in the clerk's office, as stated in the previous counts; and that the defendants conspired to steal, carry away, and destroy part of such returns, to-wit, the tally-list; and that to effect the object of this conspiracy they unlawfully did steal and destroy such tally-list, and substitute for it a fabricated tally-list.

The seventh count charges that the defendants conspired to steal from the county clerk's office a large number of ballots, and one of the poll-books deposited therein as part of the return of the election at such second precinct, and destroy the same; and that in furtherance of this conspiracy the defendants actually did steal, from the clerk's office, and destroy, a large number of the ballots and the poll-book so deposited therein, and substituted in the place thereof spurious papers, purporting to be the genuine ballots and poll-book.

The first, second, and third counts are based upon sections 5515 and 5512; the fourth and fifth counts upon section 5511; and the sixth and seventh counts upon section 5403.

Section 5515 declares that every officer of an election at which any representative or delegate in congress is voted for, whether such officer be appointed or created by or under any law or authority of the United States, or by or under any state, territorial, district, or municipal law or authority, who neglects or refuses to perform any duty in regard to such election required of him by any law of the United States, or of any state or territory thereof, or who violates any duty

so imposed, or knowingly does any act thereby unauthorized with intent to affect any such election, or the result thereof, or who fraudulently makes any false certificate of the result of such election in regard to any such representative or delegate, or who withholds, conceals, or destroys any certificate or record so required by law, respecting the election of any such representative or delegate, or who neglects or refuses to make and return such certificate, as required by law, shall be punished, etc.

Section 5512 declares that if, at any registration of voters for an election for representative, or delegate in congress, any person, by force, threats, menace, intimidation, bribery, reward, or offer or promise thereof, interferes with any officer of registration in the discharge of his duties, or by any such means, or other unlawful means, induces any officer of registration to violate or refuse to comply with his duties, or, if any such officer or other person who has any duty to perform in relation to such registration or election in ascertaining, announcing, or declaring the result thereof, or in giving or making any certificate, document, or evidence in relation thereto, knowingly neglects or refuses to perform any duty required by law, or violates any duty imposed by law, or does any act unauthorized by law relating to or affecting such registration or election, or the result thereof, or any certificate, document, or evidence in relation thereto, every such person shall be punishable, etc.

Section 5511 declares that if, at any election for representative, or delegate in congress, any person, by force, threats, intimidation, bribery, reward, or offer thereof, unlawfully prevents any qualified voter, of any state or territory, from freely exercising the right of suffrage, or in any manner interferes with any officer of such election in the discharge of his duty, or by any such means, or other unlawful means, induces any officer of election, or officer whose duty it is to ascertain and announce, or declare, the result of any such election, or give or make any certificate, document, or evidence in relation thereto, to violate or refuse to comply with his duty, or any law regulating the same, he shall be punished, etc.

Section 5403 declares that every person who willfully destroys, or attempts to destroy, or with intent to steal or destroy, takes and carries away any record, paper, or proceeding of a court of justice, filed or deposited with any clerk or officer of said court, or any paper, or document, or record, filed or deposited with any such public officer, or with any judicial or public officer, shall, without reference to the value of the record so taken away, be punished, etc.

Section 59, c. 46, Rev. St. Ill., provides that the ballots counted by the judges of election, after being read, shall be strung upon a thread in the order in which they have been read, and then carefully enveloped and sealed up by the judges, who shall direct the same to the officer to whom by law they are required to return the poll-books, and shall be delivered, together with the tally-books, to such officer, who

shall carefully preserve said ballots for six months, and at the expiration of that time shall destroy them without the package being previously opened: provided, that if any contest of election shall be pending at such time, in which such ballots may be required as evidence, the same shall not be destroyed until such contest is finally determined.

Section 51 provides that when the votes shall have been examined and counted, the clerks shall set down in their poll-books the name of every person voted for, written at full length, the office for which such person receives such votes, and the number he did receive, the number being expressed in words at full length; such entry to be made, as nearly as circumstances will permit, in a prescribed form.

Section 62 provides that such certificate, together with one of the lists of voters, and one of the tally-papers, having been carefully enveloped and sealed up, shall be put into the hands of the judges or board of election, who shall, within four days thereafter, deliver the same to the county clerk or his deputy, at the office of the county clerk, and when received, such clerk or deputy shall proceed to open, canvass, and publish the returns from each precinct or election district as provided by law.

Section 71 provides that within seven days after the close of the election the county clerks of the respective counties, with the assistance of two justices of the peace of the county, shall open the returns and make abstracts of the votes in the form prescribed; the votes for governor and other state officers on one sheet, and the votes for representatives to congress on another sheet.

Motions were made at the proper time to quash the information, in arrest of judgment, and for a new trial, all of which were overruled by the district judge. The fifth amendment to the constitution of the United States declares that no person shall be held to answer for a capital, or otherwise infamous, crime, unless on a presentment or indictment of a grand jury. The defendants were tried on an information filed by the district attorney, and not on an indictment found by a grand jury; for which reason it is claimed the trial, conviction, and sentence were illegal.

It is further urged on behalf of the defendants that the only ground upon which the jurisdiction of the district court can be maintained is that the acts charged in the information were done to influence the election of a representative in congress, and that the information contains no such averment. The sixth and seventh counts charge that the defendants conspired to violate section 5403 by stealing from the county clerk's office, where they had been deposited as required by law, the tally-sheets, poll-book, and ballots; and that they actually did steal, carry away, and destroy such papers. Congress passed an act in 1853, (10 St. at Large, 170,) entitled "An act for the prevention of frauds upon the United States treasury," the fourth and fifth sections of which were carried forward into the Revised

Statutes as section 5403. It is claimed that the clerk's office is not a public office, within the meaning of this section; that it contemplates public offices of the United States only; and that, therefore, the district court had no jurisdiction of the offenses charged in the sixth and seventh counts. Other errors are assigned, which need not now be noticed.

The circuit court, under section 1 of the act of 1879, has jurisdiction of writs of error in all criminal cases tried before the district court, where the sentence is imprisonment, or a fine exceeding \$300. Section 2 provides that the defendant may petition for a writ of error on the judgment of the district court in the cases named in section 1, which petition shall be presented to the circuit judge or circuit justice, who, on consideration of the importance and difficulty of the questions presented in the record, may allow a writ of error, and may order that such writ shall operate as a stay of proceedings under the sentence; but the allowance of the writ shall not so operate without such order. The statute does not say that the circuit judge or circuit justice shall allow the writ of error, and make it operate as a stay of proceedings. The language is that the circuit judge or circuit justice, "on consideration of the importance and difficulty of the questions presented in the record, may allow a writ of error." It is plain that under this statute a writ of error is not a writ of right. It is in the discretion of the judge to whom the application is made to allow the writ or deny it; and if he allows it, it is also in his discretion whether he will stay the sentence. Of course, this discretion is a legal one, and in its exercise the defendant should have the benefit of any doubts arising upon the questions of law presented by the record. If, upon the errors complained of, there be any doubt, or room for fair debate, the defendants should not be denied an opportunity to take the deliberate judgment of the circuit court upon the rulings of the district court, if those rulings have affected the judgment and sentence of that court, and in such a case, the proceedings under the sentence should be stayed. A different construction of the statute would defeat the manifest intention of congress. *U. S. v. Whittier*, 11 Biss. 356.

I cannot say the record presents no question of sufficient difficulty and importance to entitle the defendants to a writ of error, and an order staying proceedings under the sentence.

The sole question now decided is that the defendants are entitled, under the statute of 1879, to have the rulings of the district court reviewed by this court, and a stay of proceedings until that is done.

GOLD & STOCK TELEGRAPH CO. v. COMMERCIAL TELEGRAM CO. and others.

(Circuit Court, S. D. New York. April 1, 1885.)

1. PATENTS FOR INVENTIONS—CALAHAN REISSUE FOR TELEGRAPHIC PRINTING INSTRUMENTS FOR REGISTERING STOCKS—VALIDITY—INFRINGEMENT.

Reissued letters patent No. 3,810, granted to plaintiff as assignee of Edward A. Calahan, January 25, 1870, for an improvement in telegraphic printing instruments for registering prices of gold and stocks, construed, and the second claim thereof held infringed by the Field instrument used by defendants.

2. SAME—FOREIGN PATENT—LIFE OF UNITED STATES PATENT.

Where a foreign patent is published after the issue of a patent in the United States, although it bears date previous to such issue, the life of the United States patent will not be affected.

3. SAME—SECOND CLAIM OF CALAHAN PATENT.

The second claim of the reissued Calahan patent does not enlarge the original claim, and is valid.

In Equity.

C. L. Buckingham and Dickerson & Dickerson, for plaintiff.

Samuel A. Duncan and Roscoe Conkling, for defendants.

SHIPMAN, J. This is a bill in equity to restrain the defendants from the infringement of reissued letters patent No. 3,810, granted to the plaintiff, as assignee of Edward A. Calahan, January 25, 1870, for an improvement in telegraphic printing instruments for registering the prices of gold and stocks. The original patent was dated April 21, 1868. Upon the trial of the case, infringement of the second claim only of the reissue was alleged. The claim is in these words:

"Two or more type-wheels moving independently and controlled by magnetism, and arranged so as to print jointly or separately upon one strip of paper in two or more lines, substantially as specified."

To understand and construe the claim which is in controversy, it is important to know the state of the art at the date of the invention. In this case the defendants took no testimony, and therefore the history of the art, so far as it relates to this claim, is to be learned from the reference which was made to it in the cross-examination and subsequent examination of the plaintiffs' expert. The Theiler, French, and the Johnson, English, patent for the Theiler invention, which seems to be conceded to have embodied the state of the art at the time of the Calahan invention, are not in evidence; but a general statement, and one which will be sufficient, can be given of the extent of the advance which Calahan made.

Theiler had a two-wheel instrument, the wheels being moved by one electro-magnet, and being geared together, and necessarily rotating together. Letters were placed upon one wheel, and figures were placed upon the other, and the letters were printed upon one line, and the figures were printed upon another line, of the same tape by depressing the corresponding type-wheel. But it was necessary to

have complicated mechanism, so as to prevent impressions from one wheel when the other alone was being printed from. Calahan printed letters in one line, and figures in another line, of a tape by the aid of two type-wheels, one of which could be rotated to the exclusion of the other, and a single press-pad. His wheels moved or rotated independently of each other, while in the Theiler machine one wheel could not be moved without rotating the other. He says in his specification that his invention was intended, among other things, to dispense with the complicated mechanism theretofore made use of to cause an impression to be made when the type-wheel had been brought to a proper position, and describes his device as follows:

"A magnet and armature are employed in effecting the movement of the type-wheel, so that the same is turned to the required position, and then, by an independent motion separately controlled from that of the type-wheel, the impression is made, so that the type-wheel can remain after it is adjusted, or be again moved previous to the impression being made. The impression is made on a strip of paper by two type-wheels, so that the printing is in two lines, and the figures and fractions for denoting the prices or quotations are contained upon a wheel, and combined therewith. Letters are provided for printing on the same strip of paper, to denote the article to which the quotations relate. As the different machines will generally be but a short distance apart, it is preferred to make use of two or more wires communicating through the entire circuit of machines. One of these wires transmits the pulsations of electricity that act upon a magnet, and adjust the type-wheel to the proper letter or number. The other wire transmits the pulsations of electricity which, acting in a magnet, produce the impression upon the paper. In the drawings three circuit wires are represented: one for the alphabet-wheel, another for the number, or figure, wheel, and the third for giving the impression; but the number of wires employed is unlimited. * * * The two type-wheels, *k* and *l*, although on separate shafts, stand contiguous to each other, so as to be impressed separately or jointly upon the same strip of paper that is fed along beneath them, the impression from the respective wheels forming two different lines of printing. * * * Each of the wheels, *l* and *k*, has a blank space, that is turned towards the paper while the other wheel, only, is being printed from."

This blank space prevents the wheel, which for the time being it is not desired to print from, from making impressions on the paper.

The independent rotation of the type-wheels, as distinguished from type-wheels which must continuously and necessarily rotate together, is the principal feature of the invention of the second claim, and it is not a prerequisite to this independence of rotation that each wheel should be under the control of its own independent magnet. This is a feature of the Calahan machine, but it is not a part of the second claim. The claim requires that each type-wheel shall move or rotate by magnetic action independently of the other, and that it shall not be necessary to the movement of one that the other should at the same time be rotated also, and that a strip of paper and one impression-pad shall be moved up against the type-wheels by a magnet, so that impressions from the characters upon either or both wheels, may be made upon the strip of paper, and thus a message may be printed

exclusively from one wheel, or may be printed in two lines from the characters on both wheels,—that is, by the united or joint action of both wheels,—but it is not a requisite that this printing shall be done simultaneously.

The great contest in this case was in regard to the meaning of the word "jointly," the defendants insisting that it meant simultaneously, and the plaintiff insisting that it meant by united action, or acting in co-operation, and thus, that when there was occasion to use both letters and figures upon a single strip, as is usually the case in transmitting stock quotations, such printing could be done in two lines by the united or joint action of the two wheels. The latter is, in my opinion, the correct interpretation of the claim, for three reasons:

(1) The improvement, or the advance in the art, did not, in fact, consist in simultaneous printing. It did not remedy an existing evil, and was not the thing which the patentee apparently wanted to accomplish. (2) The patent does not mention simultaneous printing as a thing which the instrument was necessarily to do; it points out that the wheels were so arranged with reference to each other that they could be used on one strip of paper jointly or separately; that is, either or both could be used to make one message; and when both were used, the impression from the respective wheels formed different lines. The idea which the specification and the claim convey, is that the operator can use both wheels, and so a double-line message can be produced by their joint action, but there was no requirement that they must be used simultaneously. (3) While the Calahan instrument, before a unison device was added to it, had the capacity of simultaneous printing, such printing is not and was not supposed to be of practical value.

The defendants', or the Field, instrument has two wheels, one a figure wheel, and the other a letter wheel, on separate shafts, both controlled by magnetism, and each moving independently. The wheels print by their united action, in two lines, upon one strip of paper moved up by a press-pad, and can print by the use of either wheel separately. As in the Calahan machine, both wheels are provided with a blank space, which is turned towards the paper while the other wheel is being used to print from. The difference between the machine of the Calahan patent and the Field machine is that the latter has a device by which, after a wheel has ceased to print, it returns automatically to the zero point, and is locked there, before the other wheel can be rotated. In the opinion of the defendants, their machine is relieved from the charge of infringement because the wheels do not move independently and cannot print simultaneously. The latter suggestion is disposed of by the conclusion that the claim does not require such printing. The defendants say that their wheels do not move independently because it is a "condition of the rotation of one wheel that the other shall first be brought to a state of rest." This does not prevent independence of motion, in the sense in which Calahan used the term "independent." One wheel is not linked to the other so that both must rotate together, which is what he desired to avoid. Either wheel is rotated without thereby rotating or moving the other, a result which he desired to gain.

So far as is disclosed by the record, the allegation of infringement is sustained.

The next point is in regard to the duration of the Calahan patent, the defendants insisting that no injunction can issue, because the patent expired on March 16, 1835. William Edward Newton received, upon a communication from Elisha W. Andrews and Edward A. Calahan, an English patent for the Calahan invention, which was sealed on August 21, 1868, and dated March 16, 1868, the day on which the provisional specification, with the petition of Newton, was filed at the office of the commissioner of patents. The original United States patent to Calahan was dated April 21, 1868, and from the copy of the original patent which is in evidence it appears that the application must have been made as early as December 28, 1867.

The effect of the sixteenth section of the act of March 2, 1861, taken in connection with section 6 of the act of March 3, 1839, upon the duration of United States patents for an invention which had been previously patented abroad, had been frequently discussed, (*De Florez v. Reynolds*, 17 Blatchf. C. C. 436; S. C. 8 Fed. Rep. 434;) but I am not aware that it has been supposed that the sixth section of the act of 1839 related to patents which were issued by the United States before an English patent had been sealed and published. In this case the English patent was sealed five months after the patent in suit was issued, and although the English patent was, when published, dated March 16, 1868, I do not suppose that such date has any effect upon the life of the subsequently issued United States patent. It will also be noticed that the application for the United States patent was made before the provisional specification was filed in the office of the English commissioner of patents. The decision of Judges GRIER and KANE in *French v. Rogers*, 1 Fisher, Pat. Cas. 133, in 1851, was to the effect that a United States patent issued after the issue of the English patent, but applied for before the date of the application for the English patent, was not within the sixth section of the act of 1839. This point was left undecided by the supreme court in *O'Reilly v. Morse*, 15 How. 62, decided in 1853.

The second claim of the original Calahan patent was as follows:

"Two or more type-wheels separately controlled by magnetism, and arranged side by side, or with their axis on the same line, so as to be impressed jointly or separately on one strip of paper, substantially as and for the purposes set forth."

The second claim of the reissue does not enlarge the original claim; it is a more exact and more clearly defined statement of the invention than the original patent contained, but the original claim would probably have received the same construction.

There should be a decree for an injunction and an accounting. The terms of the decree will be settled upon hearing.

MORLEY SEWING-MACHINE Co. and others v. LANCASTER.

(Circuit Court, D. Massachusetts. March 5, 1885.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT—MORLEY AND LANCASTER BUTTON-SEWING MACHINES.

Letters patent No. 236,350, granted to James H. Morley, on January 4, 1881, for improvements in button-sewing machines, construed, and *held* not infringed by the Lancaster machine.

2. SAME—CONSTRUCTION OF PATENT—RULE AS TO INFRINGEMENT.

When an invention is simply an improvement on a known machine by a mere change of form or combination of parts, the inventor is only entitled to the specific form of the device which he produces, and he cannot invoke the doctrine of equivalents to suppress other improvements which are not colorable invasions of his own. But where an inventor precedes all the rest, and his machine performs a function never performed by any earlier machine, the court will treat as infringers all who accomplish the same result by substantially the same or substantially equivalent means. In the one class of inventions slight differences may avoid infringement. In the other class, there must be substantial differences to escape such a charge.

In Equity.

B. F. Thurston and Ambrose Eastman, for complainants.

T. W. Clarke and Geo. E. Smith, for defendant.

COLT, J. The present case arises upon an alleged infringement of letters patent to James H. Morley, dated January 4, 1881, for improvements in button-sewing machines. The invention relates to the automatic mechanical sewing of buttons to a fabric, and, on the evidence before us, we think Morley may fairly lay claim to have invented the first practical machine for accomplishing this result. In view of the position taken by the learned counsel for complainants, based on the claim that Morley was a pioneer in the art, and his invention a primary one, it is necessary to clearly understand at the outset the legal scope of the Morley patent. For if, on the ground of primary invention, the patent covers every other automatic button-sewing machine, or every other button-sewing machine which makes use of the three groups of mechanism employed by Morley, no matter how radical the changes in the specific mechanism of those groups may be, then it is clear that the defendant's machine infringes, and we need go no further.

In his patent, after describing the machine, Morley declares that the same is only one of different mechanisms he has contemplated, which may be effectually employed for carrying out the main feature of his invention,—the automatic mechanical sewing of buttons to a fabric. But it is manifest that Morley cannot patent the principle of sewing buttons to a fabric automatically, any more than the idea of nailing boxes by machinery, when previously nails had been driven singly and by hand, could be patented. He could only patent the particular contrivance to make the idea practically useful, as the supreme court held in the nail case. *Wicke v. Ostrum*, 103 U. S. 461.

Nor do we see how the patent can be held to extend to every button-sewing machine which uses the three groups of instrumentalities employed by Morley, for this is to say that the Morley patent is in no way limited to the specific mechanism described in the specification, but embraces every form of mechanism which these several elements might assume. It is difficult to conceive of a button-sewing machine that is not made up of similar groups of mechanism. To attach a button to a fabric by machinery it would seem necessary to employ some form of button-feeding mechanism, sewing mechanism, and mechanism for feeding the fabric along. To hold broadly that the Morley machine covers every other button-sewing machine which adopts the use of these three groups of instrumentalities in combination, without regard to the specific mechanism employed, is to hold, in substance, that it covers all automatic button-sewing machines. It would, in effect, be another way of securing to Morley a monopoly of the principle of sewing buttons to a fabric by machinery. Morley's patent secures to him the exclusive right to the use of the mechanism described therein. It does not give him the exclusive right to a principle, or to groups of instrumentalities, independent of the mechanism employed.

The most the complainants can ask for, in view of the fact that the Morley invention is a primary one, is that the court should adopt a more liberal rule of construction than is usual in the case of secondary inventions, and thus recognize a principle first clearly laid down in *McCormick v. Talcott*, 20 How. 402. When an invention is simply an improvement on a known machine by a mere change of form or combination of parts, the inventor is only entitled to the specific form of device which he produces, and he cannot invoke the doctrine of equivalents to suppress other improvements which are not colorable invasions of his own. But where an inventor precedes all the rest, and his machine performs a function never performed by any earlier machine, the court will treat as infringers all who accomplish the same result by substantially the same, or substantially equivalent, means. In the one class of inventions slight differences may avoid infringement. In the other class, there must be substantial differences to escape such a charge.

The counsel for the complainants strenuously contend for the application of a broader rule of construction, in the case of a primary patent, than is here indicated. They maintain that the defendant, by adopting the three groups of instrumentalities which Morley uses, infringes, whether the specific mechanism of the two machines is substantially equivalent or not. We know of no case of a machine patent, primary or otherwise, which goes to this length. We do not think the cases cited by the complainants establish any broader rule than we have stated.

In *McCormick v. Talcott*, 20 How. 403, it was held that the patentee, being the original inventor of the device or machine called the

divider, he would have a right to treat as infringers all who make dividers operating on the same principle, and performing the same functions by analogous means or equivalent combinations. In *Railway Co. v. Sayles*, 97 U. S. 554, the court held that the defendant did not infringe, because the patentee was only entitled to the specific form of car-brake which he produced. This was on the ground that the patentee had merely made an improvement in what was old. But in the course of the opinion the court say that if one inventor precedes all the rest, and strikes out something which includes and underlies all that they produce, he acquires a monopoly, and subjects them to tribute.

In *Clough v. Barker*, 106 U. S. 166, S. C. 1 Sup. Ct. Rep. 188, it was decided that as Clough was the first person who applied a valve regulator to a burner, he was entitled, under the decisions heretofore made by the court, to hold as infringements all valve regulators which perform the same office in substantially the same way, and were known equivalents for his form of valve regulator. And in the two cases of the *Consolidated Safety Valve Co. v. Crosby Steam Gauge & Valve Co.*, 5 Sup. Ct. Rep. 513, just decided by the supreme court, the court hold that the defendant's safety-valve is substantially equivalent in construction and mode of operation to that described in the Richardson patents, on which suit was brought.

The complainants' citations of authorities on the construction of process patents are hardly in point, because if one uses the process described in the patent he may infringe though he employs a different apparatus. *Tilghman v. Proctor*, 102 U. S. 707.

In *American Bell Telephone Co. v. Dolbear*, 15 FED. REP. 448, it was held that the Bell patent embraced a process, and was not limited to any form of apparatus; and Justice GRAY said that, as the defendant used Bell's process, or method, it was not necessary to consider whether the defendant's apparatus was a substantial equivalent of the plaintiff's.

As a result of the foregoing inquiry it becomes necessary, in the consideration of this case, to compare the mechanism of the Morley machine with that used in the defendant's machine; to ascertain whether or not they are substantially equivalent. It has been observed that both machines embrace three main groups of instrumentalities,—mechanism for feeding the buttons to the machine, sewing mechanism for receiving and taking possession of the buttons in succession and securing them to the fabric, and mechanism for feeding the fabric along and thereby spacing the buttons at the required distance from each other. The button-feeding mechanism in the Morley machine consists, in substance, of a hopper for receiving the buttons. In this hopper there is a hopper-valve, which picks out the buttons one by one and delivers them into an inclined trough. The buttons enter this trough with their shanks turned in different directions. A corrugated strip of metal lying over the top of the trough, which

is oscillated by proper machinery, rolls the buttons over so that their shanks or eyes lie in the slot or groove at the bottom of the trough. The buttons slide down the trough. At the lower end of the trough there is a button-wheel provided with pockets, each capable of holding a button. The button-wheel rests on a stationary table, and when a button arrives over a notch in the table a plunger or punch descends into the pocket, and drives the button into what is termed a split-spring spoon. The spoon turns round on its axis 90 degrees, in order to bring the eye of the button into a horizontal position, so that it can be entered by the needle. The patent also describes a modified form of contrivance for bringing the buttons successively into position to permit the needle to pass through the eye of the button. In this modification the button-wheel is dispensed with, and a spring applied to the bottom of the trough, which holds the column of buttons in place. This spring, or spring-gate, is opened at intervals and shuts itself. Spring-nippers are used to transfer the button from the trough to the sewing mechanism. These spring-nippers open the gate at the bottom of the trough, receive and clamp the button, and turn it over 90 degrees, so that the shank may be in a horizontal position to be entered by the needle. In the defendant's machine the buttons are thrown into a hopper provided with a reciprocating brush, which forces the buttons into slits, with their bodies down and shanks up. These slits converge into a single slit. Just before reaching the end of the raceway the slit is twisted, so that the shanks of the buttons are presented in a horizontal position at the end of the raceway, ready for the needle to enter. The column of buttons is held up by a spring, or spring-gate, and this spring-gate is opened by the button itself, owing to the vibratory motion of the raceway. The thread passing through the eye of the lowest button, it is prevented from vibrating, but the button is pulled out, and in pulling out overcomes the resistance of the spring.

It thus appears that the defendant's machine has no hopper-valve, and no corrugated plate for turning the buttons over in the trough; but more important than this, it has no button-wheel, or table, or punch, or split-spring spoon, or spring-nippers, or any equivalents thereof. By presenting the button shank upwards in the raceway, or trough, and then twisting the slit in the raceway which holds the shanks, the Lancaster machine dispenses with all the mechanism in the Morley patent for bringing the buttons from the end of the trough to a position to be operated upon by the needle. We think an inspection and comparison of the button-feeding mechanisms of the two machines show them to be essentially different.

As to the sewing mechanism of the two machines we deem it unnecessary to enter into details. It is admitted by the complainants' expert, as it is apparent on inspection of the machines, that the stitching or sewing mechanism of the Lancaster machine is different from that shown or described in the Morley patent, and that the form of

stitch is different. Unless, therefore, the Morley patent covers all forms of sewing mechanism, or all forms in combination with button-feeding and cloth-feeding devices, there can be no infringement. The mechanism for feeding the fabric along and spacing the buttons is substantially the same in both machines. We do not understand that Morley claims that he invented this feed mechanism, or that it is new.

The complainants charge the defendant with infringement of the first, second, eighth, and thirteenth claims of the Morley patent, which are as follows:

(1) The combination in a machine for sewing shank-buttons to fabrics, of button-feeding mechanism, appliances for passing a thread through the eye of the buttons and locking the loop to the fabric, and feeding mechanism, substantially as set forth.

(2) The combination in a machine for sewing shank-buttons to fabrics, of a needle and operating mechanism, appliances for bringing the buttons successively to positions to permit the needle to pass through the eye of each button, and means for locking the loop of thread carried by the needle to secure the button to the fabric, substantially as set forth.

(8) The combination in a machine for sewing buttons to fabrics, of button-feeding and sewing appliances, substantially as set forth, and feeding appliances and operating mechanism, whereby the feeding devices are moved alternately different distances to alternate short button stitches, with long stitches between the buttons, as specified.

(13) The combination, with button-sewing appliances, of a trough, appliances for carrying the buttons successively from the trough to the sewing devices, and mechanism for operating said appliances and sewing devices, as set forth.

Holding that the Morley patent under the law is limited substantially to the mechanism set out and described therein, and having found that the button-feeding mechanism and the sewing mechanism of the Lancaster machine are not substantially the same as, or substantially the equivalent of, those in the Morley machine, it is clear that the defendant does not infringe any of the above claims. It follows that the bill must be dismissed; and it is so ordered.

GRAIN DRILL MANUF'RS Co. v. RUDE and others.

(Circuit Court, D. Indiana. January 24, 1885.)

PATENTS FOR INVENTIONS—GRAIN-DRILLS—CONSTRUCTION—INFRINGEMENT.

Letters patent No. 176,719, granted to J. M. Westcott, April 25, 1876; reissued patent No. 4,091, granted to Thomas and Mast, August 2, 1870; patent No. 66,578, granted to J. P. Fulgham; and reissued patent No. 6,274, granted to E. C. Patric, for improvements in grain-drills,—construed, and *held* not infringed.

In Equity.

Wood & Boyd, for complainants.

Stem & Peck and Mr. L. Hill, for defendants.

Woods, J. The complainant is a corporation organized under the laws of Ohio, having its place of business at Dayton. The defendants are manufacturers, doing business at Liberty, Indiana. The original bill charged the infringement of letters patent No. 176,719, granted J. M. Westcott, April 25, 1876, for an improvement in grain-drills; letters patent No. 171,907, granted Edward Kuhns, January 4, 1876; reissued September 3, 1880, No. 9,066, and reissued letters patent No. 4,091, dated August 2, 1870, granted to Thomas and Mast, the original patent being dated August 3, 1869. These three patents cover the improvements in the seeding mechanism, and in what is called the "shifting-levers" used to throw the machine out of gear.

The defendants in their answer cited numerous anticipating devices, which they allege were the same in construction and mode of operation as the patented devices of complainant. The complainant, having obtained leave of court, filed its supplemental bill alleging the infringements of letters patent No. 66,578, granted J. P. Fulgham, July 9, 1867, for an improvement in grain-drills; also, letters patent No. 100,998, granted Fulgham, Davis, and Lawrence, March 22, 1870, and reissue No. 9,341, dated March 15, 1870, to the same parties; and reissue No. 6,274, granted C. E. Patric, February 2, 1875, the original patent being dated December 29, 1868. The patent to Edward Kuhns, and the last mentioned reissue to Fulgham and the Wayne County Agricultural Company, No. 9,341, have been withdrawn by the complainant.

The devices in controversy relate, first, to the method of constructing the seed-cup and seed-wheel, which is the subject-matter of the Westcott patent. The first mentioned patent, granted to Fulgham in 1867, is for a combined grass-seed and grain-drill. The first claim of reissue No. 4,091, and the first claim of the Patric reissue, (No. 6,274,) as well as the first claim of the Fulgham patent, (No. 100,998,) relate to improvements in shifting-levers. The reissue No. 4,091 relates to the conductors and swinging tubes embraced in the thirteenth, fourteenth, and fifteenth claims. These several patents, it was conceded in the argument, were duly assigned to the complainant before the commencement of the suit.

In view of the previous art, as shown in the record, my judgment is that the patents in question, in so far as they can be sustained at all, must be restricted to a narrow construction, practically excluding any claim of infringement on account of the use by defendants of alleged mechanical equivalents; and by this rule, as it seems to me, the bill is not sustained by the evidence, and should be dismissed.

Decree accordingly.

THE ARCHER.

(Circuit Court, S. D. New York. March 26, 1885.)

1. BOTTOMRY BOND—MASTER APPEARING AS PART OWNER—REPAIRS AND SUPPLIES.

The master of a vessel was also the registered owner, but another was the equitable owner. The vessel having met with disaster, the master executed a bottomry bond to secure advances for repairs and supplies. He was in communication by mail and telegraph with the equitable owner, and the latter was ready to provide funds. *Held*, that the holder of the bottomry bond, with knowledge of all the facts at the time he took it, could not recover; that the equitable owner should be regarded as the legal owner of the vessel; and that the master had no authority to execute the bond, but that, to the extent the bond represented supplies and repairs which the master could properly order, the holder should be subrogated to the liens therefor.

2. SAME—AUTHORITY OF MASTER.

A master can make a bottomry bond only abroad and from necessity. He has no power to do so if the owner can be consulted, or if he can borrow money on the credit of the owner.

Admiralty Appeal.

For opinion of BROWN, J., in district court, see 15 FED. REP. 276. *Theodore F. H. Meyer*, for libellant and appellee. *Robert D. Benedict*, of counsel.

Goodrich, Deady & Platt, for claimant.

WALLACE, J. In October, 1877, the bark *Archer* sailed from Bremerhaven, bound for New York, but met with disaster and put back to Bremerhaven for repairs, reaching that port November 1st. Crossman, the master of the bark, applied to Meiners, who represented the late firm of F. Roters & Co., for assistance. Roters & Co. had been the consignees of the ship on former occasions. Crossman told Meiners that he could draw on New York for the disbursements, and Meiners told him that would be satisfactory, and to go on with the repairs. Crossman had surveys made and the repairs were proceeded with, and bills were sent to Meiners, who paid them, but after having paid some of the bills Meiners insisted upon a bottomry bond as a security for the advances made and to be made. Crossman demurred, but finally consented, and the bottomry bond on which the suit is brought was executed. The bond was given to one Addicks, but, in fact, Meiners was jointly interested in it with Addicks. It was conditioned for the payment of 21,371 marks, with 20 per cent. premium.

The important question in the case is whether Meiners and Addicks relied upon the authority of Crossman, as owner, in executing the bond, or whether they dealt with him as master only. Crossman had no beneficial interest in the ship. He had executed two mortgages: one covering three-fourths of the ship, which became due July 1, 1877, for \$3,000, and had not been paid, and another not then due, covering the whole ship, for \$7,000. These mortgages were held by the claimant, Harrison, and exceeded in amount the value of the ship. Harrison, however, had allowed Crossman to continue in possession after default in the \$3,000 mortgage under a register and ship's pa-

pers which represented him as sole owner. Although the legal title to three-fourths of the ship was in Harrison after default took place in the payment of the \$3,000, and although Crossman had no substantial interest in the other fourth, if Meiners and Addicks treated with him upon the faith of his apparent title, the decree of the district court should be affirmed. If, however, they understood that he had only a naked legal title, and did not assume to contract as owner, but only as master, different considerations arise.

The proofs warrant the conclusion that Crossman, after putting back to Bremerhaven, put himself in communication by mail with Harrison, and informed Meiners of the fact, and when he received a cablegram from Harrison authorizing him to draw on New York, at 60 days, for necessary funds, handed it to Meiners; that Meiners satisfied himself by telegram of Harrison's responsibility, and was aware that he was the person whom Crossman assumed to represent in ordering the repairs; that Meiners intended, until about the seventeenth of December, to make the advances necessary on the credit of Crossman's drafts on Harrison, but then conceived the scheme of making a profit out of the transaction by means of bottomry. Influenced by this motive he insisted upon a bottomry bond, and induced Addicks to co-operate, concealing from Crossman the fact that he had any interest in the bottomry except to the amount of his advances. Addicks offered to advance the necessary funds, and to overcome Crossman's objections to giving a bond with 20 per cent. premium, proposed to make the interest 25 or 30 per cent., and give the difference to Crossman. After the bond was executed, Meiners gave Crossman 400 marks as coming from Addicks as a commission or gratuity. The district judge, in his opinion, states that he could not doubt that Harrison "was known to Meiners and Addicks, at the time of the negotiation for the bond, to be in the position of beneficial owner, though not the legal owner." It seems equally clear that neither of them supposed that Crossman intended to contract as an owner, pledging his own ship, but understood that he was acting as a master who was obliged to make the best terms he could under the circumstances, and who could be induced to consent to bottomry by the payment of a commission. Quite conclusive evidence of this is found in the circumstance that in the recitals of the bond Crossman is represented as the master of the ship, and not as the owner.

It was held by the learned district judge that Crossman, as master, had no authority to execute the bottomry bond, but that the bond was valid because he was the legal owner at the time of executing it. The master can make a bottomry bond only abroad and from necessity. He has no power to do so if the owner can be consulted, or if he can borrow the money on the personal credit of the owner. Communication was practicable here, both by mail and by telegraph; yet Crossman did not consult with Harrison further than to ascertain that the latter was willing to provide the necessary funds. The court below

was clearly right in deciding that the bond could not be upheld as a valid contract of the master.

The learned district judge seems to have considered Crossman to be the owner because he appeared to be such on the ship's register, and Harrison was only a mortgagee. But Crossman had the title to but one-fourth of the vessel after default had been made in the \$3,000 mortgage (*Brown v. Bement*, 8 Johns. 76; *Butler v. Miller*, 1 N. Y. 496; *Burdick v. McVanner*, 2 Denio, 170,) and the ship's register was at best but *prima facie* evidence of Crossman's title as owner. *Myers v. Willis*, 17 C. B. 77; S. C. 18 C. B. 886; *Hibbs v. Ross*, L. R. 1 Q. B. 534; *Morgan's Assignees v. Shinn*, 15 Wall. 105; *Blanchard v. Fearing*, 1 Allen, 118.

Undoubtedly, by allowing Crossman to remain in possession of the ship and proceed on a voyage with his name in her register as owner, after Harrison's title to three-fourths had accrued, the latter authorized third parties to rely upon Crossman's apparent title as owner, and would be estopped from asserting his own rights as owner against any persons who might contract upon the faith of Crossman's title. But Meiners and Addicks had full notice that Harrison was the beneficial and therefore the equitable owner, and they understood that Crossman was not assuming to act in behalf of any interest or title of his own, but only as master; or, in other words, as an agent for an owner. No estoppel can arise in their favor. Their position is no different than it would be if they were asserting their bond against an ordinary owner, who had the legal title to the ship at the time of the bottomry. If the bottomry would not have been good against an ordinary owner, it is not good against one who occupied the relation of owner in the transaction within the contemplation of all the parties. Upon the equitable principles which prevail in courts of admiralty, the lien of the bond must be deemed subordinate to the rights of Harrison.

To the extent that Crossman, as master, had authority to represent Harrison as owner, and subject the ship to liens for necessary repairs and supplies, the bond should be sustained, and the libelants be deemed subrogated to the liens. In the language of STORY, J., in *The Packet*, 3 Mason, 255, 260, "it is not here, as in courts of common law, that the bond must be good in whole or not at all. So far as the money was properly advanced, it may be held to give a valid lien, and be dismissed as to the rest." The district court disallowed the premium upon the bond, but decreed for the principal, with ordinary interest. It appears that the repairs, to a considerable extent, were in excess of the necessities of the ship, one item being the entire new coppering of the ship. The bond can only be allowed to stand for such supplies and repairs as a master could properly order.

The decree of the district court must be reversed, with costs of the appeal, and a decree is ordered for the libellant for such sum as may be found due by a commissioner to whom it is referred to ascertain and report the amount due.

SHARON V. HILL.

(Circuit Court, D. California. March 9, 1885.)

CIRCUIT COURT—JURISDICTION—CITIZENSHIP—HOW PLEADED.

An averment in the introductory part of a bill that "W. S., of the city of Virginia, state of Nevada, and a citizen of the state of Nevada, brings this, his bill against S. A. H., of the city and county of San Francisco, state of California, and a citizen of the state of California," * * * is a sufficient averment of citizenship of the parties to give the United States circuit court jurisdiction.

In Equity.

W. H. L. Barnes, O. P. Evans, and Stewart & Herrin, for complainant.

Tyler & Tyler, D. S. Terry, George Flourney, and Walter Levy, for defendant.

SAWYER, J., (orally.) Counsel for respondent makes the point that the allegation of the citizenship of the parties to this suit, in the introductory part of the bill, is insufficient in form to give this court jurisdiction of the cause. At the time the point was raised, I stated it to be my impression that the supreme court had decided that allegations in the same form sufficiently stated the jurisdictional facts, and upon examination of the authorities, I find that view to be correct. In the respect referred to, the allegation is in the form found in, probably, a majority of the bills filed in this court.

Even the authority which is cited, and so strongly relied on, by respondent's counsel, does not go to the extent claimed for it, but, on the contrary, inferentially at least, is an authority the other way. The case is *Jackson v. Ashton*, 8 Pet. 148, reported, also, in 11 Curt. 53. The opinion is very brief, and the facts are very briefly stated, in the head-note, which was drawn by Mr. Justice CURTIS himself, who is understood to limit his head-notes to a statement of the exact point decided. The head-note reads thus: "The citizenship of the parties was averred in the title of the bill, but not in the bill itself. Held, that the court had not jurisdiction." The defect was not in the sufficiency in form of the averment of citizenship, but that the averment was not made in the bill itself, but only in the title. The title is no part of the bill. The form was, "*Thomas Jackson, a citizen of the state of Virginia, William Goodwin Jackson, and Maria Congreve Jackson, citizens of Virginia, infants, by their father and next friend, the said Thomas Jackson, v. The Reverend William Ashton, a citizen of the state of Pennsylvania.*" The language is not, "is a citizen," etc. Mr. Chief Justice MARSHALL, in deciding the case, says:

"The title or caption of the bill is no part of the bill, and does not remove the objection to the defects in the pleadings. The bill and proceedings should state the citizenship of the parties, to give the court jurisdiction of the case. The only difficulty which could arise to the dismissal of the bill presents itself upon the statement 'that the defendant is of Philadelphia,' [without stating that he is a citizen of Philadelphia, or even a resident of Philadelphia.]

This, it might be answered, shows that he is a citizen of Pennsylvania. If this were a new question, the court might decide otherwise; but the decision of the court, in cases which have heretofore been before it, has been express upon the point; and the bill must be dismissed for want of jurisdiction."

There is, then, no intimation that the averment of citizenship is not sufficient *in form*; but the defect is that the averment is not in the bill, but simply in the caption or title of the bill itself, and it is upon that ground alone that it was held to be insufficient.

In *Curt. Eq. Prec.*, which is a standard authority in the United States, and was prepared to supplement Story's works on Equity Jurisprudence and Equity Pleadings, is set forth, upon page 4, a form of averment of citizenship to be used in a bill in equity, which is the same as that found in the bill under consideration. Curtis gives a form of introduction for various bills; and the form of introduction for a bill, *in the United States circuit court*, is set forth as follows:

"To the judges of the circuit court of the United States, for the district of * * *, A. B., of * * *, and a citizen of the state of * * *, brings this, his bill, against C. D., of * * *, and a citizen of the state of * * *, and thereupon your orator complains and says," etc.

That is the form given by Curtis; and the introductory part of the bill, in this case, is in the same words, the blanks being filled as follows:

"To the honorable, the judges of the circuit court of the United States, ninth circuit, district of California: William Sharon, of the city of Virginia, state of Nevada, and a citizen of the state of Nevada, brings this, his bill, against Sarah Althea Hill, of the city and county of San Francisco, state of California, and a citizen of the state of California; and thereupon your orator complains and says:"

The form adopted in this bill is undoubtedly taken, either from the form given by Curtis, before referred to, or from the form prescribed by the rule of the supreme court of the United States. Equity rule 20 provides that—

"Every bill in the introductory part thereof shall contain the names, places of abode, and citizenship of all the parties, plaintiffs and defendants, by and against whom the bill is brought. The form in substance shall be as follows:"

If the blanks are filled in with the names, places of abode, and citizenship of the parties to the bill, in the present case, the form set out in the rule will then read as follows:

"To the judges of the circuit court of the United States, for the district of California: William Sharon, of the city of Virginia, state of Nevada, and a citizen of the state of Nevada, brings this, his bill, against Sarah Althea Hill, of the city and county of San Francisco, state of California, and a citizen of the state of California. And thereupon your orator complains and says that," etc.

It is, then, apparent that the form of the introductory part of this bill must have been copied, either from this rule of the supreme court, or from Curtis' Equity Precedents, in both of which the form is in exactly the same language, word for word. I intimated to counsel, upon

the argument, that I was confident that the supreme court had ruled directly upon the point here involved, and such proves to be the fact. The decision which I had in my mind was in the case of *Jones v. Andrews*, 10 Wall. 327. In the statement of the case (page 329) appears the following:

"The suit was entitled at the beginning, *Stephen M. Jones, citizen and resident of Richmond county, Georgia, v. Joseph Andrews, citizen and resident of city and county and state of New York; P. Reed and W. H. Bryson, both citizens and residents of Shelby county, Tennessee.*"

That appears in the title or caption only, and not in any part of the body of the bill. Then in the prayer of the bill appeared this language:

"The premises considered, complainant prays that Joseph Andrews, a resident and citizen of the city, county, and state of New York"—

Which is the form of expression adopted in the bill in the case under consideration—not "*who is a citizen;*" and this appears in the *prayer* of the bill in the case cited, and not in the body of the bill, either in the introductory part or elsewhere, where one would look for a traversable allegation. Yet the supreme court held it to be a sufficient averment of the citizenship of the party to give the circuit court jurisdiction of the suit. Mr. Justice BRADLEY, delivering the opinion of the court, says:

"On the question of jurisdiction over the parties, the appellees contend (1) that the citizenship of the parties was not sufficiently alleged in the bill. * * * Although the allegation of citizenship is not made in precise and technical form, we consider it sufficiently explicit to sustain the jurisdiction of the court, if the citizenship disclosed by the allegation does not displace that jurisdiction. It is more explicit than the allegation in the case of *Express Co. v. Kountze Bros.* 8 Wall. 342, which was sustained by the court. All that is necessary is that it fairly appear by the bill of what states the respective parties are citizens. In this case, the form of the allegation leaves no room for reasonable doubt."

The prayer of the bill in the case cited names the defendants Reed and Bryson, "both of whom were residents [not citizens] of Shelby county, in the state of Tennessee," while the other respondent is referred to, as above stated, as "Joseph Andrews, a resident and citizen [not "*who is a resident and citizen*"] of the city, county, and state of New York," in precisely the same form adopted in the introductory part of the bill in this case. The omission of the words "*who is,*" which would make an explicit allegation, is simply one of those ellipses which are so common to, and admissible in, the English language. Any ordinary person, possessing a fair understanding of the language, upon reading the statement, "William Sharon, of the city of Virginia, state of Nevada, and a citizen of the state of Nevada, brings this, his bill," etc., would understand it to be an averment that William Sharon is a citizen of the state of Nevada. It is a common form of expression, and no one could be misled as to the fact that this was intended to be stated; and the supreme court, in the case cited, has held it to

be a sufficiently explicit averment of the fact of citizenship, even where the expression appears in the prayer only, and not in any portion of the body of the bill.

The objection to the jurisdiction is therefore overruled.

HACK and others *v.* CHICAGO & G. S. RY. Co. and others.

(Circuit Court, D. Indiana. 1885.)

1. REMOVAL OF CAUSE—DENIAL OF MOTIONS TO BE MADE PARTY AND TO REMOVE CAUSE.

If one who is a necessary party to a cause in a state court is wrongfully excluded, and denied leave to file a proper cross-bill and answer, and to present a motion and bond for removal of the cause to the federal court, he will be treated by the latter court as if a party, and the motion for removal determined accordingly.

2. SAME—SEPARATE CONTROVERSY—NOMINAL PARTY—REFUSAL OF TRUSTEE TO ACT.

If the owner of bonds, secured by trust deed or mortgage, has been let in as party to a cause concerning the trust property, and as such has a separate controversy with citizens of another state, his right to remove the cause to the federal court is not affected by the citizenship of the trustee named in the mortgage deed, who is not a party in fact, and had refused to move to be made party, or otherwise to execute the trust. If brought in, such trustee would be only a nominal party.

Motion of Henry H. Porter to have the court docket and take jurisdiction of case.

The objections made to the motion are, in substance,—

(1) That the same motion was made before and overruled; (2) that Porter was not a party, either plaintiff or defendant, in the state court, and therefore had no right, under the second section of the act of March 3, 1875, to apply for a removal of the cause from the state court to the federal court; (3) that, considered as a party to the suit, Porter has no controversy "which is wholly between citizens of different states, and which can be fully determined as between them;" (4) that the alleged refusal of John C. New, trustee of mortgage bonds of which Porter claims to be owner, to become a party to the cause was collusively made, in order to enable Porter to come into the case and procure the removal of it to the federal court.

The facts of the case are, in substance, these:

In the original case, commenced in Jasper county, and taken thence by change of venue to the Newton circuit court, the plaintiffs, Hack and others, claiming to be creditors of the Chicago & Great Southern Railway Company, and that that company was threatened with insolvency, and with numerous suits in different courts, prayed an accounting and an adjustment of the demand of all creditors who should come in, and of their respective priorities, and that a receiver be appointed to conserve and keep the road in operation for the benefit of the creditors. The receiver was appointed, and is in possession. The complaint upon which this appointment was made, makes mention of the first mortgage or trust deed of the property, but the trustee named in that deed, John C. New, shown to be a resident and citizen of Indiana, was not made a party. Early in March, 1885, Porter, claiming to be sole owner of

all bonds issued under and secured by that mortgage, made application to the Newton circuit court, then in session, to be admitted as a party in the cause, and for leave to file an answer and cross-bill; and, upon a denial of this motion, on the same day or the next, renewed the motion, and at the same time presented a motion and proper bond for a removal of the cause to this court, and these motions having been also denied, he procured and presented a transcript and moved this court to take jurisdiction. It then appearing that the application to be made a party in the state court did not show a refusal by New, the trustee, to act in the premises, this court considered the application defective, and refused to docket the cause. Thereupon an amended motion, showing New's refusal to take any step whatever in the further execution of the trust, was prepared, and, as is shown by the affidavits set out in the record now offered, was presented in the Newton circuit court then yet in session, on the thirteenth ult., and at the same time an answer and cross-bill, and petition and bond for removal.

These petitions and the cross-bill, before presentation to the judge of the court, had each been sworn to in open session by Mr. Porter, before the clerk of that court. The court at that time was presided over by a judge *pro tempore*, who, being of counsel in this cause, declined on that account to entertain the motions, or to note or permit the filing of the papers, though all objection to his acting was waived at the time by Porter's attorney. Thereupon communication was had with the regular judge of the court, who was then in Chicago, and his promise obtained to be in attendance at the court the next day, which by law was the last day of the term. On the afternoon of that day, Saturday, March 14th, the presiding judge, in order that the court might remain open until the regular judge should return, made no adjourning order, but upon the general order-book of the court signed an entry reading in this wise: "This record read this far, and signed this fourteenth day of March, 1885;" and thereupon left the bench and took train for his home at Monticello. Two hours thereafter—at 4 o'clock—the clerk entered upon the probate order-book, over the signature of the *pro tempore* judge, a journal order of adjournment of the court until court in course. Otherwise than this, it does not appear that any formal declaration of adjournment or attempt to adjourn was made. At or near 4 o'clock P. M., the regular judge arrived at Kentland, and went to the clerk's office, and thence to the office of the county recorder, where he was found by Mr. Pierce, attorney for Porter, and Mr. Wiley, who was also waiting for his action upon the bench in certain matters pending. In answer to a request to go to the court-room, he said that the court, as he was informed, had been finally adjourned; and upon being then told just what the judge presiding had done, and what entries had been made upon the dockets, he again peremptorily declined to go to the court-room and take the bench, saying, as the showing is, "that he believed the best thing he could do was to stay away from there." Thereafter, at a later hour of the same day, Porter filed with the clerk his application to become a party to the cause, his proffered answer and cross-bill, and his petition and bond for the removal of the cause; and, having procured a transcript, now again moves this court to assert jurisdiction.

In respect to the citizenship of the parties and persons concerned, it is shown that Porter is a citizen of Illinois, and that Hack and others, the plaintiffs, and the railroad company, defendant in the original cause in the state court, are citizens of Indiana. Before the present petitions to be made party and to remove the cause had been filed in the state court, an additional claimant, a citizen of Illinois, came into the cause, seeking as a plaintiff to share the benefits of the suit. New, the trustee in Porter's mortgage or trust deed, is a citizen of Indiana. In his proposed cross-bill, and in his petitions to be made party and to remove the cause, Porter shows that he is sole owner of 1,200 bonds for \$1,000 each, made by the defendant railway company and secured by a trust

deed, a copy of which is exhibited, containing the usual provisions of such instruments, and constituting a first lien upon the property, franchises, and income of the company and its road; that no other bonds were issued or outstanding secured by said deed of trust; that the company is totally insolvent; that default had been made in payment of interest due, and that the trustee had brought an action for foreclosure in the Newton circuit court; that, upon consideration of a demurrer to the complaint of the trustee, the court intimated a ruling to the effect that the trustee alone had no right to maintain the suit, and that thereupon said New dismissed his action and has since refused to bring any action or to come into this case, or take other steps of any kind for the enforcement of his trust, though thereunto especially requested. Porter's proposed answer was the general denial.

R. B. F. Pierce and McDonald, Butler & Mason, for Porter.

John S. Cooper and U. Z. Wiley, contra.

Woods, J. Upon the showing made, it is too clear—as it seems to me—to admit of dispute that Porter was entitled to be made a party defendant; and, having been wrongfully denied that right, he should, in respect to the question of removal, be deemed to be a party. The case in this respect is very like one decided by Judges DAVIS and TREAT in the circuit court of the United States for the Southern district of Illinois. That decision was not reported officially, but in a note upon pages 42 and 43 of Dillon's Removal of Causes, is given a statement of it which, as has been shown at this hearing, is authentic and accurate. The present case is stronger than that, because in that the application to become a party was made to the judge in vacation, while in this it was made to the court in open session, and to the judge of the court at the county seat during the term allotted by law and before the court had been adjourned. There is certainly no good reason apparent in the record why the presiding judge should not have permitted the papers to be filed. If a judge be interested in a cause pending in his own court, he must make the formal entries or orders necessary to put the case in a way to be determined; and a refusal to do so, under ordinary circumstances, is equivalent to an active interference to the injury of the adverse party. The essential wrong in this case, however, was the refusal of the regular judge to go upon the bench and give a hearing upon the proposed motions. The court in contemplation of law was open, or at least capable of being opened. The judge presiding had not adjourned it; the clerk and sheriff, so far as appears, had not attempted to adjourn it. The judge having been present on that day, they had no power under the statute to declare an adjournment. Rev. St. 1881, §§ 1381, 1382.

The entry made by the clerk upon the probate order-book, it seems to me, is not material to be considered; and even if a formal adjournment had been declared, entered of record, and signed by the regular judge, it could not well be held, I think, that the order might not have been disregarded or vacated, and other business done in the court upon the same or even upon a succeeding day, if within the lawful term of the court. Mere inconvenience would seem to forbid a different rule, and there is apparently no insuperable, or even strong,

reason against this view. The question, however, does not now arise. In this case the power to hear clearly remained; its exercise, was seasonably and properly invoked; and under the decision referred to, the authority of which is not now and here, at least, to be disputed, it must be held that Porter acquired such standing in court, or in the case at least, as to enable him to claim a removal. It may be that if the motion to be made party had been heard and overruled, the remedy might and ought to have been sought in an appeal to the supreme court of the state, and thence, if necessary, to the federal supreme court, though it is not clear how a case could be so presented, on appeal from the overruling of a motion to become a party, as to present also the question of right of removal. Upon this record, however, the court is not required to review any decision or ruling of the state court upon a matter brought within its jurisdiction, but only to give effect to its refusal, without apparent excuse, to receive and pass upon the motion when rightfully presented.

The other objections made to the removal are all, as I think, untenable. They turn upon the relation to the case of New, the trustee. He is not in fact a party. He refused to become a party of his own motion. By reason of this, Porter became entitled to be made a party in his own right. He could not bring New into the case with him,—that is not the office of a cross-bill,—and if upon consideration the court should order New to be made a party, his relation to the case would, as it seems to me, be so entirely nominal as not to affect the jurisdiction. The case of *Thayer v. Life Ass'n*, 112 U. S. 717, S. C. 5 Sup. Ct. Rep. 355, is cited in support of the opposite view; but in that case the trustee was proceeding to sell the trust property, and the action being to restrain him from making the sale, he was of course held to be an indispensable party. If New were brought into the case, it is to be presumed that he would persist in his refusal to act under the trust, and if he did this, it is clear that his relation to the case would be purely nominal and of no significance. If necessary, the court might, and of course would, appoint another to exercise the powers conferred by the trust deeds.

It is claimed, however, that the refusal of New to apply to be made a party was for the collusive purpose solely of enabling Porter to come in and remove the cause. Without going into details, it is enough to say that it was in the power and apparent duty of the complainants to have made New a party to the original bill; they chose not to do it; and upon the entire record and proof made, the alleged collusion for the purpose of obtaining a removal is not manifest. To say the least, the justification for seeking a removal is so manifestly strong that the court is not called upon to make a minute search for grounds upon which to base a refusal of jurisdiction.

That there are controversies in the case between Porter, as a citizen of one state, and citizens of other states is sufficiently clear. Upon his cross-bill he has a controversy with the defendant railway com-

pany, and upon his cross-bill and answer he has separate controversies with that company and the original complainants. Each of these controversies is between, and may be wholly determined between, citizens of different states. Indeed, each claimant in the original bill,—and there are three of them,—and each additional claimant who has or may come in under that bill, has a separate claim which Porter does or may contest; and the controversy so raised is clearly separable, and determinable wholly between him and the particular claimant as if there were no other parties to the record. And one of the claimants in the case is, as I understood it to be stated and conceded upon the argument, a citizen of the state of Michigan; and as against him, even if New were an actual and willing party and ranged upon the same side of the case with Porter, there would be, in this view, a proper controversy upon which the application for removal could stand. This would certainly be so, unless the railway company should be deemed a necessary party to such controversy. This question, however, need not be decided.

It follows that the transcript and other papers offered should be filed, and the cause docketed here as properly removed.

Ordered accordingly.

STEBBINS *v.* MORRIS and others.

(*Circuit Court, N. D. New York. March 22, 1885.*)

TRUST—PAYMENT OF PURCHASE MONEY FOR LAND, AND TITLE TAKEN IN NAME OF THIRD PARTY—REV. ST. N. Y. §§ 51, 52.

M., D., W., and K. entered into a verbal agreement to purchase from J., for their joint benefit, certain land, each of them to advance one-fourth of the purchase money, and the title to be taken in the name of K. The money was advanced, the land purchased, and an absolute deed executed to K., who immediately delivered to M., D., and W. a written memorandum acknowledging the receipt of the purchase money, and that each of the co-purchasers was the joint owner of one-fourth part of the land. K. became insolvent, and made an assignment to V., and V. assigned and deeded to S., as assignee in bankruptcy of K., all of the property assigned to him. S. sold the land under order of the court. *Held*, that the purchaser at such sale acquired a good title as against M., D., and W.

In Equity.

Hale & Bulkley, for plaintiff.

F. Fish and John M. Carroll, for defendant.

WALLACE, J. This action was brought in the supreme court of the state of New York, and was removed to this court upon the petition of the plaintiff. It is a partition suit, brought under the provisions of the Code of Procedure, and the defendants are made parties as claiming an adverse interest to the plaintiff in the real estate sought to be partitioned. The defendant Cornelius Kline has the legal title

to one undivided fourth part of the real estate. The suit involves the rights of the other parties to three undivided one-fourth parts of certain real estate conveyed April 1, 1870, by one Jackson to James W. Kline. Kline was adjudged a bankrupt upon the petition of his creditors filed on the twenty-ninth day of August, 1878, in the United States district court for the Northern district of New York, and one Vandenburg was subsequently appointed his assignee. On the twenty-fourth day of September, 1881, the said Vandenburg as such assignee, pursuant to the direction and order of the court in bankruptcy, sold and conveyed by deed to the plaintiff all the estate, title, and interest of said Kline in said real estate vested in said assignee. Within three months of the filing of the petition in bankruptcy, Kline had made a general assignment of all his property for the benefit of creditors to one Stewart; and on the twenty-seventh day of December, 1878, Stewart, by deed, granted, conveyed, and released to Vandenburg, as assignee of Kline in bankruptcy, all the real estate which was transferred to him by Kline under the general assignment.

Whether Vandenburg, as assignee of Kline in bankruptcy, acquired Kline's interest by a title superior to Stewart's, or acquired it by the deed of release from Stewart, is not material. The title was in him at the time of the sale under the order of the court, and the plaintiff acquired any title that the assignee could convey. It follows that the plaintiff had the legal title at the time of the commencement of the suit to the three undivided fourth parts of the land in question. The defendants claim to be the equitable owners of the three undivided fourth parts of the land, and insist that the plaintiff's legal title is subordinate to their equitable title because the plaintiff is chargeable with notice of their equities. Their equitable title arises out of the following facts: On or before April 1, 1870, Morris, De Wolf, McDonnell, and Kline entered into a verbal agreement to purchase for their joint benefit of Jackson the land in controversy. By this agreement each of them was to advance one-fourth of the purchase money to pay for the land, and the title was to be taken in the name of Kline. The money was accordingly advanced, and on the first day of April, 1870, a deed was executed by Jackson to Kline, in which Kline was named sole grantee. The deed did not express any trust in behalf of the co-purchasers. Immediately after receiving the deed, and on the same day, Kline delivered to each of the co-purchasers a memorandum in writing, whereby he acknowledged the receipt of the purchase money, and that each of the co-purchasers was the joint owner of one-fourth part of the real estate. Kline subsequently mortgaged an undivided fourth part of the land. The title remained in him as sole owner until he became insolvent and made the general assignment to Stewart.

Upon these facts it must be held that the defendants who claim under Morris, McDonnell, and De Wolf have no equitable title. If the agreement between Kline and the other co-purchasers had been

made after he acquired title from Jackson, or if the deed from Jackson had not been executed directly to Kline pursuant to the agreement between the co-purchasers, there would be no difficulty in maintaining that all the co-purchasers acquired an equitable title by virtue of the transaction between themselves. But the transaction is directly within the operation of those sections of the Revised Statutes of the state relating to uses and trusts, which are as follows:

"Sec. 51. Where a grant for a valuable consideration shall be made to one person, and the consideration therefor shall be paid by another, no use or trust shall result in favor of the person by whom such payment shall be made; but the title shall vest in the person named as the alienee in such conveyance, subject only to the provisions of the next section.

"Sec. 52. Every such conveyance shall be presumed fraudulent as against the creditors, at that time, of the person paying the consideration; and where a fraudulent intention is not disproved a trust shall result in favor of such creditors to the extent that may be necessary to satisfy their just demands."

The meaning and effect of these provisions was considered by the court of appeals in *Garfield v. Hatmaker*, 15 N. Y. 475, and it was held that where a grant for a valuable consideration is made to one person, and the consideration therefor is paid by another, no interest, legal or equitable, vests in the person paying the consideration, but the statute imposes upon the legal estate in the hands of the grantor a pure trust in favor of the creditors at the time of the person paying the consideration, which can be enforced in equity only. As stated in the opinion of Brown, J., "the plain and obvious import of the language of the sections is to destroy the trust or use which, but for the statute, would have resulted to the person paying the consideration as a legal consequence of the act;" and, in the language of Comstock, J., (page 478,) "the person paying the consideration money must take the conveyance to himself or he can have no legal or equitable interests in the land." In *Everett v. Everett*, 48 N. Y. 218, such was held to be the legal consequence of the conveyance, although the deed was delivered to and retained by the person who paid the consideration. The object of the statute was to prevent secret frauds by imposing the penalty of forfeiture of the estate upon parties who thus conceal their real ownership under the name of another person. *Siemon v. Schurck*, 29 N. Y. 610. Doubtless, in the transaction here, there was no fraudulent purpose in the minds of the parties to it. The effect was, however, by investing Kline with the ostensible title, to give him credit, and produce just such consequences as the statute was intended to prevent. The written memorandum delivered by Kline cannot be treated as a contract to convey made after he acquired title. It was evidence merely of the original transaction.

A decree will be entered for a partition and sale, and establishing the rights of the parties according to this opinion.

QUINN v. NEW JERSEY LIGHTERAGE CO.

*(Circuit Court, E. D. New York. April 2, 1885.)***MASTER AND SERVANT—INJURY TO EMPLOYE—NEGLIGENCE OF VICE-PRINCIPAL WHILE ACTING AS CO-EMPLOYEE.**

An employer is not liable to an employe for the negligence of a vice-principal in doing the duty of a co-employe of the person injured.

Motion for New Trial.

Chas. J. Patterson, for complainant.

Benedict, Taft & Benedict, for defendant.

WALLACE, J. The plaintiff was injured by the negligence of the captain of a barge, owned by the defendant, while engaged in loading the barge with iron rails. The captain at the time was assisting the plaintiff and other employes in the work. In loading the rails, two men worked on the hand-winch, one hooked the tongs upon the rails, and two pushed and guided the rails into the barge, when they were raised by the men at the winch; and it was the duty of the man at the tongs to give the order to hoist to the men at the winch when the tongs were properly hooked. Prior to the accident, one Lee had been at the tongs, and the captain had been helping one of the men at the winch. At the time of the accident, the captain was at the tongs, and the plaintiff was one of the men to guide the rails. The captain gave the order to hoist prematurely, and the rail fell upon the plaintiff, inflicting the injuries for which his suit was brought.

Upon the trial the judge instructed the jury that the negligence of the captain was the negligence of the defendant, and the motion for a new trial raises the question whether that instruction was correct. Stated in other terms, the question is whether an employer is liable to an employe for the negligence of a vice-principal in doing the duty of a co-employe of the person injured.

It was assumed at the trial that the recent case of *Chicago, etc., R. Co. v. Ross*, 112 U. S. 377, S. C. 5 Sup. Ct. Rep. 184, was an adjudication in point which is controlling in this court, and the instructions to the jury were given in consequence. The only question in that case was whether the corporation defendant was liable to an engineer managing the locomotive of a freight train who was injured in consequence of the neglect of a conductor of the train to communicate instructions to the engineer essential to the safety of the train; the conductor, by the regulations of the corporation, being in control of the train and of all employes on it, and responsible for all its movements. The court held that the conductor did not occupy the position of a co-employe with the engineer. Mr. Justice BRADLEY, delivering the opinion, used this language:

"A conductor, having the entire control and management of a railway train, occupies a very different position from the brakeman, the porters, and other subordinates employed. He is in fact, and should be treated as, the

personal representative of the corporation, for whose negligence it is responsible to subordinate servants."

The case turned upon this point, and it having been ruled against the defendant it was not necessary to decide any other question. The conductor was charged with the duty of giving instructions, in the absence of which the engineer could not perform his duties intelligently, or protect himself or his employes from danger. The engineer was injured in consequence of the conductor's failure to perform this duty. As he was not a co-employee of the engineer, the risk of the conductor's negligence was not among those incident to the employment which the engineer impliedly assumed when he engaged in the service of the corporation.

The decision is of marked significance, because it departs from the rule established by the courts in England, New York, and Massachusetts, and other courts, that all those are fellow-servants who are engaged in a common object in the business of the employer, whether they are of the same grade of authority or not. The doctrine of these authorities is that all the employes of the same employer, engaged in carrying forward the same general enterprise, although in different departments and in different ranks of supremacy, are co-employees, who, by the implied terms of their employment, assume towards the employer the risks arising from the negligence of any of their number. The *Ross Case*, on the other hand, is in line with *Cowles v. Richmond, etc.*, *R. Co.* 84 N. C. 309; *Chicago, etc., R. Co. v. Bayfield*, 37 Mich. 205; *Whalen v. Centenary Church*, 62 Mo. 326; and decisions in Ohio and Kentucky cited in the opinion.

The case does not touch the question here, which is, not whether the defendant is liable to a subordinate employe for the negligent act of the captain in the discharge of his duty, but whether the defendant is liable for the negligence of the captain, not as captain, but as a subordinate employe. The solution of this question depends upon the implied obligation assumed by an employer to his servant. Unless there is a breach of that obligation there is no negligence. Briefly stated, this obligation is that the employer will not expose the servant to any unreasonable hazards, in view of the nature of the services to be performed. As to those things which are to be done by the employer personally he undertakes not to be negligent. As to those things which he is not to do personally he undertakes to use due care to see that they are properly done; and as incidents of this obligation he is to use due care to provide safe appliances and facilities for the servant in the service to be performed, and to employ competent fellow-servants to assist him, if fellow-servants are required. Those things which are to be done by the employer personally are employer's duties, and if he delegates them to others he undertakes for their proper discharge precisely as though he personally were to discharge them.

Conversely, the servant who engages in the employment of another

for the performance of specified duties, takes upon himself the natural and ordinary risks and perils incident to the performance of such services, and, in legal presumption, his compensation is adjusted accordingly. Among these risks are those arising from the carelessness and negligence of fellow-servants; because these are risks which are incident to the service, and he can as effectually guard against them as the employer. This has been deemed to be the law by all the authorities, beginning in England with *Priestley v. Fowler*, 3 Mees. & W. 1, and in this country with *Murray v. South Carolina R. Co.* 1 McMul. 385, and *Farwell v. Boston & W. R. Co.* 4 Metc. 49; and the doctrine is reiterated in *Hough v. Railway Co.* 100 U. S. 213.

If it is within the contemplation of both the employer and employee that when the former fully discharges his duty of preparation and general supervision for the particular service, all other incidental risks are assumed by the latter, and are included in his compensation, it follows logically that the employee can only allege negligence when the employer has failed, either in person or by his agents, efficiently to discharge his duty. If an employer does not undertake responsibility to a servant for the acts which are ordinarily to be performed in the service by a co-servant, there is no reason why he should be held liable for the negligent performance of those acts. And if the duty negligently performed is not the master's duty, but a servant's duty, the servant injured has no right to complain unless the employer was negligent in selecting the co-servant.

The distinction between the acts of negligence for which the master is liable, and those of which the employee assumes the risks, is well stated in *Davis v. Central Vermont R. Co.* 45 Amer. Rep. 593, S. C. 55 Vt. 84, as follows:

"The rule of law which exempts the master from responsibility to the servants for injuries received from the ordinary risks of his employment, including the negligence of his fellow-servants, does not excuse the employer from the exercise of ordinary care in supplying and maintaining suitable instrumentalities for the performance of the work required. One who enters the employment of another has a right to count on this duty, and is not required to assume the risks of the master's negligence in this respect. The fact that it is a duty which must always be discharged, when the employer is a corporation, by officers and agents, does not relieve the corporation from the obligation. The agents who are charged with the duty of supplying safe machinery are not, in the true sense of the rule, to be regarded as fellow-servants of those who are engaged in operating it. They are charged with the master's duty to his servant. They are employed in distinct and independent departments of service, and there is no difficulty in distinguishing them, even when the same person renders service by turns in each, as the convenience of the employer may require. In one, the master cannot escape the consequence of the agent's negligence; if the servant is injured in the other, he may."

The true inquiry in this case is whether the character of the act of the captain was one which it was incumbent upon the defendant to see properly performed. This is the rule of *Crispin v. Babbitt*, 81

N. Y. 516, where it was held that the liability of a master for an injury to an employe, occasioned by the negligence of another employe, does not depend on the grade or rank of the latter, but upon the character of the act, in the performance of which the injury arises. In that case, the plaintiff was injured by the act of the manager and superintendent of defendant's factory, who carelessly started a wheel while the plaintiff was occupied with the machinery. The court below refused to charge that this was the act of an operative for which the defendant was not liable, and the court of appeals held this refusal to be error and reversed the judgment. RAPALLO, J., delivering the opinion of the court, approved the language of CHURCH, C. J., in *Flike's Case*, 53 N. Y. 549, as follows :

"The true rule, I apprehend, is to hold the corporation liable for negligence in respect to such acts and duties as it is required to perform as master, without regard to the rank or title of the agent intrusted with their performance. It is as to such acts the agent occupies the place of the corporation, and the latter is liable for the manner in which they are performed."

This was also held in *Hoke v. St. Louis, etc., R. Co.* 11 Mo. App. 574, where it was determined that where a road-master of a railroad company, having superintendence of the road department, was negligent in an act which he assumed to do as a mere boss of a gang, and a workman was injured, the company was not liable as for the negligence of a vice-principal. The court used this language :

"But just as the tortious act of a servant to make the employer liable must pertain to the particular duties of that employment, so the wrongful act of a vice-principal or *alter ego* must be an act done by him as vice-principal. The fact that he is vice-principal in one department of the business does not make all his acts the acts of a vice-principal."

Applying the rule to the present case, where the captain of the barge was not performing a captain's duty while working at the tongs, but that of a common laborer, his negligence was not that of a vice-principal but of a co-laborer. If he had directed any of the men assisting the plaintiff to do that particular part of the work which he undertook to do himself, as he might have done if he had seen fit, and the plaintiff had been injured by the fault of the one thus selected, the defendant would not have been liable, in the absence of proof that the captain had selected an incompetent man for the place. The plaintiff has no more ground of complaint than he would have had if he had been injured by the carelessness of any of his fellow-laborers. It was the act of a co-servant, and among the risks incident to the employment which the plaintiff impliedly assumed when he engaged in the work. The captain exercised no more control over him than did the other laborers.

A new trial is therefore ordered.

THREE THOUSAND EIGHT HUNDRED AND EIGHTY BOXES OF OPIUM v. UNITED STATES.

(Circuit Court, D. California. September 20, 1883.)

1. CUSTOMS DUTIES—SMUGGLING—EVIDENCE—DECLARATIONS OF STEWARD OF SHIP.

Declarations of the steward of a ship, on which it is claimed certain opium was smuggled, made to the officers seizing such opium an hour after the seizure, but while the opium was in their possession near the place of seizure, waiting to be transported, *held* admissible, in an action to condemn such opium, as part of the *res gestæ*, though not made in the presence of, or by authority of or with the knowledge of, the claimant.

2. SAME—LETTERS OF THIRD PARTIES.

A letter written by a third party, whom the evidence tended to implicate, to other parties in China two months after the seizure, apparently referring to the transaction, and left by the writer with the claimant, who added a paragraph thereto, also seemingly referring to the transaction, and a letter written by a Chinaman to another Chinaman in China, supposed to refer to passages in the other letter, both letters being put in the same envelope, and directed and mailed to the party in China, also *held* admissible.

3. SAME—PROBABLE CAUSE—REV. ST. § 909—BURDEN OF PROOF.

When the evidence is sufficient to show probable cause, in cases of information to condemn smuggled goods, the burden of proof is on the claimant to show the innocence of the transaction.

4. SAME—PREPONDERANCE OF EVIDENCE—PROOF BEYOND REASONABLE DOUBT—FORFEITURE OF GOODS.

A mere preponderance of evidence, in a case by information to condemn smuggled goods, in favor of the guilt of the transaction, will justify a decree of forfeiture.

Information *in rem* to Condemn Smuggled Opium.

Philip Teare, U. S. Atty., and *A. P. Van Duzer*, Asst. U. S. Atty., for libellant.

W. H. L. Barnes and *George W. Towle, Jr.*, for claimant.

SAWYER, J. This is an appeal from the decree of the district court, condemning the opium in question, on the ground that it had been smuggled into the port of San Francisco. The record from the district court contains nearly 1,700 pages of legal cap, and nearly 800 pages additional testimony have been taken in this court. The case was argued orally, and submitted a long time ago, the argument occupying 13 days, with leave to file printed briefs, the last of which was filed March 10, 1883.

Owing to a large number of cases having precedence, and the large record to examine, it was impossible to properly take the case up before the summer vacation, or to dispose of it till now. The large amount of new testimony taken in this court is upon the points wherein the district court held the evidence to be deficient, and is additional to, and not as has been claimed in conflict with, the claimant's case as made in the district court; and it is of such a character as to require a thorough and careful re-examination of the entire case, and such examination has been given to it. The following

facts, when stated as facts, are satisfactorily shown by the evidence. On doubtful points the substance of the testimony is stated:

On the night of January 3-4, 1882, the steam-ship City of Tokio was lying at the outer end of the Pacific Mail Steam-ship Company's wharf, extending from the foot of First street, in the city of San Francisco, into the bay in a southerly direction on the easterly side of the wharf. She had arrived from Hong Kong, China, and been docked on December 25, 1881, or nine days previously. The steam-ship City of Sydney was at the same time lying at the same wharf on the westerly side, directly opposite the City of Tokio. The City of Sydney runs between San Francisco and Australia, stopping each way at Honolulu, in the Sandwich islands. She was, at the time, advertised to leave for Australia on January 14, 1882, or 10 days later. A few minutes after midnight, not to exceed from 5 to 15 minutes, police officers Egan and Smith, patrolling the harbor, were going down the bay in a boat from Folsom-street wharf towards the Pacific Mail wharf, and when a short distance from the end of Beale-street wharf, at about the point marked on the diagram annexed to the findings, they saw a whitehall boat about 300 yards distant, near the steam-ship City of Tokio, between them and the steam-ship, not at the side of the ship nor in contact with it, but a short distance off, pulling with muffled oars in a southerly direction past the stern of the steamer. The boat, when discovered, was probably not less than 50, nor more than 150, feet distant from the ship. At first they thought it was the government lookout boat, but as soon as it had passed the stern of the Tokio, they saw it was not, and gave chase. The boat pulled southerly for some distance, and then turned in on the westerly side of the wharf, where it was met by the officers, somewhere between the City of Sydney and the slips of the Central Pacific Railroad's transfer steamers, as it had changed its course. The diagram shows the situation of the wharves and steamers. In the boat were the claimant, James K. Kennedy, and a boatman named McDermot. Egan says he asked what they had, and "they said they did not know." Egan then jumped into the boat and put irons on the men, ironing them together. Egan says they were very much excited, and that one of them said: "Good God, you are not going to arrest us! We are men of families. Take the stuff and let us go;" that "they would land anywhere and give up the stuff;" that we could "keep the boat and all that was in it, and let them go. It would do no good to arrest them."

After this communication Egan and Smith took the boat in tow, and returned to Folsom-street wharf, whence they had started. It was a stormy night, and the bay was rough; so rough that the claimant and McDermot were afraid that their boat, heavily loaded as it was, would swamp, and being ironed together, and one of them unable to swim, they earnestly asked to be taken into the other boat on that expressed account. Egan refused, whereupon Kennedy commenced throwing overboard some of the packages to lighten the boat; but, upon Egan's threatening to shoot them if they did not stop, he desisted after throwing over three packages similar to those remaining in the boat. The wind was from the south-east, driving the waves—a heavy chop sea—directly against the eastern side of the Tokio, while the Sydney, on the other side of the wharf, was partially protected and in comparatively still water. That it was rough, with considerable sea, there can be no doubt. On that point all the witnesses, including Egan and Smith, agree. Officer Metzler designates it as "a south-east gale." There was, ordinarily, a custom-house lookout boat on watch anchored easterly of the Tokio, a short distance off. This is the boat which the captured boat was supposed to be when first seen. But the sea was so rough on this night that it was deemed unsafe for it to be there, and it was accordingly taken in. Such is the uncontradicted testimony as to the weather and condition of the bay. The weather

grew more stormy and the sea rougher as the night wore on. It was a moonlight night, but cloudy, and at times rainy, and the moon was well down in the west, and hidden by the sheds of the wharf, when the boat was first discovered. On reaching the Folsom-street wharf, officer Smith took the claimant, James K. Kennedy, and McDermot to the district police station, Egan remaining with the captured boat till his return in some 10 to 15 minutes, probably 15. About 5 minutes after Smith left, and while waiting for Smith's return, Egan saw a man at a distance on the wharf, apparently looking for them, but there was no conversation between them, and he was not identified. Upon the return of Smith, two other officers, Metzler and Dillon, arriving soon after, the boat was unloaded and its contents placed upon the wharf, the packages being counted as they were passed out. After being placed upon the wharf, the packages were again counted. There were found to be 97 square packages, weighing 20 pounds each, carefully wrapped in Chinese matting, sewed with twine, and neatly tied or strapped with bamboo splints, in the usual mode of strapping packages of merchandise by the Chinese. Each package contained two soldered tin boxes or cans, the cans being new, weighing 10 pounds each; each can containing 20 small brass boxes; each small box containing one-half pound, or five taels, of prepared opium, labeled with Chinese labels, presenting the same general appearance in all respects as the prepared opium regularly imported from China through the custom-house, except that none of the half-pound or five-tael boxes had United States revenue stamps upon them, the whole amounting to 3,880 boxes. Three like packages, doubtless containing 120 like boxes each, had been thrown overboard. Thus the boat, at the time of the capture, contained 100 packages, or 2,000 pounds or 20,000 taels, of prepared opium, valued at about \$20,000 to \$25,000, as claimed by the United States attorney. There were also found two rolls of silk. Egan says it might have taken 20 minutes to unload the stuff, and Metzler, from half to three-quarters of an hour. Egan passed the packages out, Metzler received them, Dillon piling them up on the wharf.

It is highly probable, therefore, that, from the time of their arrival at the wharf, including the time of the absence of Smith (say 15 minutes) with the prisoners, till the unloading and recounting of the packages on the wharf were completed, three-fourths of an hour to an hour had elapsed, most likely a full hour. After the recounting on the wharf, and while they were waiting for an express wagon to remove the goods, and not before, as inadvertently stated by the district judge, Officer Smith called Egan's attention to a man standing a short distance off, who had approached from the west on Folsom street, when both officers approached him; whereupon the man said: "One at a time; I want to do business with one at a time." He gave his name as Kennedy. It afterwards appeared in evidence, and I so find the fact to be, that this man, who at the time was unknown to the officers, was Henry Kennedy; that he is a brother of James K. Kennedy, the claimant; and that he was, at that time, and on the last preceding voyage of the Tokio he had been, the steerage steward of that vessel. The following is the direct testimony of Egan as to what took place at that interview: "At first he (Henry Kennedy) said if I would let those men go, he would give me two thousand dollars. Then he raised it up to ten thousand, and said we could keep the stuff to let those men go; he did not want to be exposed." And he said, "You can keep the stuff, and I will show you, too, where you can sell it." Egan testified that he sent Officer Smith to him, and after Smith had talked with him a while, he (Egan) talked with him again, when "I (Egan) says, 'What is your business?' He (Henry Kennedy) said, 'I am a calker by trade; but,' says he, 'I am in the smuggling business now,' and, says he, 'if you let these men go, I will give you ten thousand dollars, and you can keep the stuff, and I will put you in the way to make many a dollar hereafter.' I asked him

how it was to be done, and he said, 'In the smuggling business.' He was in the business right along, and he would put me in the way of making many a dollar. He said in twenty minutes he would have the money (ten thousand dollars) here." This is the fullest statement of what Henry Kennedy said on that occasion. He was not arrested. Officers Smith and Metzler testify that they each had a short interview separately with him, and that he made similar, though briefer, statements to them. And Metzler says Kennedy said to him at that interview, in response to an intimation that he would get himself into difficulty, "Well, I have all that I have got, invested in that boat." As there is no contradiction to this testimony of Officers Egan, Smith, and Metzler, and Henry Kennedy did not see fit to take the stand, and he was not called by claimant, I find that these conversations took place as stated.

There had been no communication between Henry Kennedy and the two captives, James K. Kennedy and McDermot, or either of them, after the capture of the boat and arrest of the men, and before this communication between Henry Kennedy and the officers, or afterwards, during that night. Egan and Smith were state police officers, and not United States officers, and had no authority from the United States, or otherwise than such authority as they had by virtue of their said offices, to make said capture or arrest.

The said opium was sent to the city hall of San Francisco, and there detained till some time during the day-time of January 4th, when it was reported and turned over to the custody of the collector of customs of the port of San Francisco, said delivery to said collector being on the land, and not on the water. Queock Keung Chung, who declared himself a judge of the matter, examined one of the five-tael boxes captured, opened it, and smoked some of the opium, and pronounced it Lai Yuen opium, manufactured at Hong Kong.

The foregoing constitutes the facts as shown, and the testimony on the doubtful points as first presented, by the government in the district court. To meet this case, the claimant proved certain facts, and introduced evidence to establish others, which I shall now proceed to briefly state:

There was a strict watch kept on the steamer by government watchmen, both night and day, at all times after her arrival. The night-watch was, ordinarily, regularly changed at 12 midnight, though, when the members of the second watch arrived, they generally relieved the prior watch then, even if a few minutes before midnight. On this particular night, the ship having been nearly discharged, two special extra watchmen were supplied at the steamer; but, it being too rough to be safe, no lookout boat was stationed outside the steamer, as was ordinarily done. On the night of January 3d most of the watchmen, if not all, were relieved before 12 o'clock, at various times from 11:20 to 11:30 P. M., as their successors from time to time came along. If the opium came from the Tokio, it was mostly, if not wholly, loaded before midnight, as the boat was first seen at latest but a few minutes after 12 M. The transactions in removing the opium, if removed from the Tokio, occupied a part of two watches. There were seven men on each watch, two of them stationed on the deck of the vessel, one forward and one aft, and the others at various places along the dock opposite the vessel, and in positions to have that whole side of the ship in view.

All the men on both watches were examined as witnesses, and each testified that he did not see anything leave the ship; that he did not see the boat around the ship; and that the opium was not taken from the ship with his knowledge. The witnesses on the deck also testify that they did not see either the police boat or the captured boat pass the stern of the Tokio in going down or returning, till it got some distance past it on the return. One of them, at least, the man on the after-part of the Tokio's deck, ought to

have seen them, and perhaps the one on the forward part; but the others were not stationed in such positions that they would be likely to see them. Egan and Smith also state that they were hailed from the deck of the Tokio when they passed on the way down; but these watchmen testify that they heard no one hail any boat passing the ship. They testify that they kept faithful and careful watch; that they did not hail the boat, or hear anybody else hail it. The watchman on the after-part of the deck is the only man shown by the evidence whose duty it was to be in a position, or who, at that time of night, was likely to be in a position to hail the passing boat in the position it was stated by Egan and Smith to have been in; and he states that he did not hail it, or hear any one else hail it, or see either boat pass down. He ought to have seen them, unless the roughness of the bay and darkness of the night prevented. But if he did see them, or hail them, it is not apparent what motive could exist to falsely deny it, even if, as is suggested by the government, he was in complicity with the alleged smugglers. It certainly would have much better comported with the theory of the claimant to not only have admitted, but to have insisted, that the boats did pass by from Main-street wharf. That is the theory upon which the claimant's case rests; and if perjury was committed, it might better have been in that form than in the one adopted.

In addition to the night inspectors or watchmen, there was a searching force of three men of several years' experience each, the captain of the force having been six years in the business. They all testify that they thoroughly searched the ship for smuggled goods in every part, so far as it could be done without moving freight about to see what might be under it; that this search commenced on the day after the arrival of the ship, and continued from day to day down to the time of the seizure; that, although absent on some days, they were there, from time to time, during all of the time while freight was going out, to see what went out, and then examine the parts of the ship that had been discharged; that at the time of the seizure all of the freight had been discharged except a portion of the freight in the forward hold, and that that part of the ship had been searched so far as was practicable without moving the freight; that heretofore they had never found opium under other freight. It was expected that all the remainder of the freight would be discharged by 10 A. M. of the next day. It was not pretended that the searchers were there all the time, but it was claimed that they were there sufficiently to make a thorough search of the entire ship so far as was practicable without removing freight. The captain of the searchers says there was "no part of the ship but what we examined thoroughly; that is, that we could search, of course. Where the freight was, we could not search that." And he says he searched with the "incentive of a reward ahead in case of success." The other searchers testify to the same effect, and that they did not find the opium. There is no direct testimony to the contrary as to the search or its extent. As showing the incentive to diligence referred to by these witnesses, and as indicating the interest and bearing upon the credibility of Officers Egan and Smith, it may be observed, in passing, that, under the act of 1874, (1 Supp. Rev. St. 77, § 4,) the secretary of the treasury is authorized to allow a reward to "*any officer of the customs, or other persons,*" who shall detect or seize any smuggled goods, not exceeding in amount *one-half of the net proceeds*.

One B. K. Sheridan, owner of an express wagon, testified on behalf of claimant that on the evening of January 3d he hauled two loads of packages like those seized, making about 100 in all, from the store of Tai Hung & Co., a Chinese mercantile firm, No. 1014 Dupont street, for James K. Kennedy, the claimant, to the foot of Main street, corner of Main street and the water front, near Bryant street, shown on the annexed plat. He stated the facts in detail, and minutely. He said, by previous arrangement he went to 1014 Dupont street, arriving a little after 7 P. M., where he found claimant, James

K. Kennedy, waiting on the sidewalk; that he had a covered wagon; that a Chinaman, Choy Lum, assisted by another, brought the packages out, and he arranged them in the wagon; that, after putting in his wagon about 50 packages, he judged, without counting them, Kennedy got on the seat with him, and he drove to the water front at the foot of Main street, at the corner of the Bryant-street front, a few feet from a small building, supposed to be the wharfinger's office, where he passed the packages out to Kennedy, who lowered them down by a rope and hook on it to somebody in a boat under the wharf; that, after thus passing them down, he returned for the second load, when the same Chinaman, Choy Lum, and another, brought out the remaining packages, and he loaded them in the same way, when the Chinaman, Choy Lum, who brought him the packages, rode down with him to the same place, where he passed them out to the Chinaman, who let them down from the wharf to Kennedy and another man in the boat below, in the same manner as the first were lowered by Kennedy; that two rolls of silk were also carried down in his wagon on one of the loads. He testifies that he arrived the second time somewhere from 10 to half past 10 o'clock; that he thought he did not carry quite so many packages at the last load as at the first; and that there were about a hundred in all. He states that he then returned, the Chinaman riding back with him to Montgomery avenue, where the Chinaman got out, near the Commercial Hotel, and he went to his stable and put up his horse at No. 2333 Taylor street. He testified that he had hauled similar packages for Kennedy, some six months before, from the same place to the foot of Mission street, to be put aboard a packet for the Sandwich islands; that he understood those packages to contain opium, to be shipped for the Sandwich islands; and, as those hauled on January 3d were similar packages, and hauled under similar circumstances, he supposed they were opium; but Kennedy did not state to him that they were opium.

In the district court neither the claimant, Kennedy, McDermot, nor the Chinaman, who are alleged to have aided in loading and unloading these packages, was examined to corroborate the testimony of Sheridan. On the other hand, a witness was called who testified that he slept at Sheridan's stable on the night of January 3d; that the stable was locked, and he had the key; and that Sheridan could not have had the horse and wagon out, and used it, as he had stated. But there were such inherent elements of weakness in the testimony itself, when taken in connection with other testimony, as to his habits and whereabouts at about the time, being some two months before he was examined, and such manifest ill-feeling and desire to punish Sheridan for imputed injuries, that the district judge attached no importance to it, and I reject it also as wholly unworthy of credence.

As to the testimony of the other three witnesses referred to by the district judge, who testified to Sheridan's spending the whole evening of January 3d, more than two months before, at a free concert saloon, which the district judge did not wholly discredit, I entertain a different view. After carefully considering their entire testimony and the opposing testimony on the point; the character and habits of the men, as disclosed by themselves; the glaring inconsistency of some of their testimony; and the manifest inherent improbability of their story in the most important particulars, and the more probable counter-testimony,—I am unable to attach any importance to it. Whatever the truth may be as to Sheridan's hauling the packages as he states, I am not satisfied that he was at the saloon mentioned on the night in question. He had never been seen there before or afterwards by these men, who said they were there every night; one of them saying he had not missed a night for a year and a half. On the contrary, I am satisfied, from a careful consideration of all the testimony on that point in all its bearings, that he was not there; and I so find.

Upon opening the tin boxes of the seized opium, wrapped in matting, each

large tin box was found to contain pieces of San Francisco newspapers of recent dates,—dates so late that it is impossible that they should have been put in in China. They must therefore have been put in either on shore in San Francisco, or on the steamer after her arrival at San Francisco, and the tin covers afterwards soldered on, and the cans then packed in matting, sewed, and bound. The tins were *old*, but the covers *new*, and *newly* soldered. There are two factories at Hong Kong, as shown by the evidence, manufacturing opium: one known as Lai Yuen, and the other Fook Loong. The opium seized is put up like these two brands of opium, in similar boxes, with apparently similar labels, either genuine or attempted imitations of the genuine labels. The smoking opium made at those factories is manufactured of India or Patna opium. The evidence points to no other factories or kinds of opium made in Hong Kong. Considerable quantities of smoking opium have been, and still are, manufactured at San Francisco and in the eastern states. The smoking opium made in San Francisco and in the eastern states is made entirely from Turkish or gum opium. The Turkish or gum opium contains a much larger proportion of morphine than Patna opium. The prepared opium manufactured in the United States is put up and labeled so as to resemble prepared opium imported from Hong Kong, and is often put up in the old boxes of the imported article. Imported opium is required by law to be stamped, but it is not necessary to stamp domestic opium. The government, however, furnishes stamps expressly prepared for the purpose, on application, for domestic opium, and these are frequently, but not always, used as a convenient mode of protection from suspicion and annoyance. The laws of the Sandwich islands absolutely prohibit the importation of opium, except by the board of health for medicinal purposes, under heavy penalties, and even make it a penal offense to have it in possession, except for medicinal purposes, under clearly-defined regulations. Opium, duty paid, at San Francisco, was worth \$12.50 to \$12.75 per pound, and would sell in Honolulu for from \$25 to \$30 per pound, and sometimes even higher,—even at times as high as \$60. Hong Kong opium is higher in San Francisco than domestic opium. There were 40 men, in the aggregate, at different times, employed by the custom-house in looking after the Tokio while in port. At Honolulu the custom-house force does not exceed four men in all, as appears from the testimony of the Hawaiian consul; and the consul has reason to believe that considerable opium is smuggled from San Francisco into Honolulu, and that it is done both by sailing vessels and steamers. There was no custom-house watchman over the City of Sydney on the night of January 3-4, 1882, there being only the single watchman of the steamer on duty; and the water on the sheltered or westerly or port side of the steamer was comparatively smooth, as contrasted with the water on the eastern side of the Tokio.

Miles A. Short was employed on the City of Sydney as a water tender in the engineer's department, and joined the ship on January 1, 1882, which was advertised to sail on January 14th. Short testified that he had an arrangement with James Kennedy "to take some stuff on board the City of Sydney, and stow it away for him, and keep it in my [his] charge until I went to Honolulu and delivered it to him." And it was to come at 12 o'clock; between 12 and 1 o'clock,—somewhere about that time,—"and Kennedy was to be there the night of the third, or morning of the fourth, about that time." He testified that he (Short) was there at the time, for the purpose of receiving the stuff, and saw two boats pass by the stern of the Sydney; that he arranged with Kennedy to take the stuff in through the coal port on the port side, and that he opened the port to take it in at about half past 11 o'clock; that he was to get a dollar a pound for assisting Kennedy; and that he had several times smuggled opium into Honolulu before on the steam-ship City of New York, the companion ship of the Sydney. Kennedy was to go on the steamer to Honolulu.

On March 16, 1882, a Chinaman approached at the proper window of the post-office at San Francisco, with a sealed package in his hand, had it weighed by the clerk to ascertain the proper amount of postage, purchased the necessary stamps, and was about to affix them and deposit the package in the post-office, to be carried by the mail about to leave for China, when he was arrested by Officer Lynes, by the direction of the United States attorney, who was present, and the package taken from him. The package was duly sealed and addressed, "Messrs. Tong Tang Wo. No. 1 Bornhan, Strand street, (corner,) Hong Kong, China; per steam-ship Oceanic." On the corner was printed, "From Kwong Hon On & Co., 736 Commercial street, San Francisco." The package, being opened, was found to contain several letters, each in a sealed envelope, in Chinese language, and written and addressed by various parties in San Francisco to various parties at Hong Kong. Among these letters was one written in broken English, and sealed up in a separate, smaller envelope with another brief letter in Chinese, and addressed on the outside, "Charley, Hong Kong." The following is a copy of this letter, and the signature is shown and admitted to be that of one Joseph Goetz. The letter is as follows:

"SAN FRANCISCO, March 16, 1881.

"Friend Charley: This time Oceanic come again, but Murray not come; he sick, and can do nothing about the trial in court about the opium; it will be decided in a few days, and in our favor, as I expect so, and everybody the same. I am sorry you did not get the telegram from here to stop the letter to that bith, in account of the trouble of Tokio. I did not want it delivered, but can be helped no; all I wanted for Harkins not to no anything about, but I think she will tell Hennessy about it as soon as the case is decided. I will go to Europe and bring the children bak whit me to San Francisco. This is about all, about the money to is over there on my account. James Kennedy will give you particulars what to do whit my return of Tokio, perhaps he will order the money to return, or give it to Henry Kennedy, so must be prepared for it in case that should be so. And about our account, everything is all right, only you charge me for the draft one dollars, and so on every time latley, and don't want this for you to charge so. I will send you my accounts, and I want you to correct it, total, \$15,871.33, this include Murray money for the opium ho was bought and return to you again. About the Carpenter money, I don't no yet, but I will see before this letter is close what he intends to do. This is about all; and as I said before, the busines looks bad at present, and the only change is now to do the cargo busnies here, but there must be one house ho imports some goods every steamer, and everything will be all right, so you can think about it, and if you like, you can send some goods right on, consigned to some name a few steamers ahead of it, before sending any stuff. This is about all. I hope this will find you in good health, the same I am at present myself. Yours truly, friend,

"JOSEPH GOETZ.

"N. B.—Write to me in Europe; you no my address, if you have any news for me."

The following was written by James K. Kennedy on the same sheet following the preceding:

"Charley—DEAR SIR: You will please pay the carpenter back his money that he paid for the stuff, if he wants it, and if he wants to take it in stuff give it to him aneway he may want it.

"Give my regards to Oh Yep, and oblig me,

JAS. K. KENNEDY.

"P. S. Carpenter will present a card from me.

J. K. K."

Goetz's note was left with the Chinese firm, who inclosed the letter in the package to be mailed. It was left unsealed, in order that Kennedy might see

it, and append anything he desired, and Kennedy was notified of the fact; whereupon, he went to the store and wrote the paragraph signed by him. He was aware of the contents of Goetz's letter. There is no evidence that Kennedy knew anything of the contents of the Chinese letters, either the one inclosed in the smaller envelope, with his own and Goetz's, or those separately sealed and addressed, and found in the large general package; but evidently he did not as to the letters not inclosed with his.

The Chinese letter inclosed in the same small envelope with Goetz's letter, being translated, is as follows:

"Jim Kennedy said last trip, Murray brought the 100 pounds of opium. Of course, send them on return of steamer. Murray took sick; not come on this steamer. The *carpenter* of the steamer, I don't know his name, goes to Hong Kong, and if he wants one hundred pounds let him have it, and help buy it, and deliver it to him; or if he wants the money back, deliver to him also. He has a *ticket from Jim Kennedy as a proof*. If you see the ticket deliver to him all right.

"*This year, 1st month, 28th day.*"

Brother,

"WOO CHING."

Various tests were made in the district court by experts, to determine the character of the opium seized. Mun Tong examined nine boxes by applying smoking and burning tests. Of these, four were Hong Kong boxes, furnished by the government, and five were taken by permission of the government from the seized opium. In every instance he distinguished the seized from the imported opium, and declared that the seized was domestic opium. He was afterwards put to a severe test before Commissioner Hoffman. Sixteen boxes, each being carefully wrapped so as to conceal the labels and boxes, and leave nothing but the opium exposed, were tested. Ten of them were of the seized opium; five genuine Hong Kong opium, furnished by the custom-house; and one of admitted San Francisco manufacture, not of the seized lot. The test occupied several hours, three separate smokes being taken from each box, making 48 smokes in all. He determined 15 out of the 16, declaring which was domestic and which was Hong Kong, and only failed on one. Chow Suey also made several successful tests in the same way. Some other witnesses making similar tests were not so successful, making mistakes both ways, their testimony being about as favorable to one side as to the other. So, also, 20 boxes of the seized opium were selected at random and marked, and 20 of the imported furnished by the custom-house selected and marked. They were placed promiscuously on the table, and up so as to expose the top only. The Chinese experts rapidly selected and separated the Hong Kong from the seized opium without a single mistake in the 40 boxes, claiming to detect them by the difference in the labels, the imitations not being close. A similar successful selection was made by arranging them so as to expose the side labels only. Mr. Van Duzer, the assistant United States attorney, also separated them by the appearance of the boxes and labels, claiming that he did it from the *never* appearance of the labels in the seized lot. Mr. Van Duzer, in his printed brief, says: "I relied on the new appearance of the labels and boxes, and had no difficulty in segregating them." If so, this would indicate that the labels had been recently put on here, or on the way, and had not been much handled, thus tending to support claimant's theory. It would seem to be something of a feat to secretly paste three labels on each one of 4,000 boxes necessary to be concealed during the voyage from China, or during the nine days while the steamer lay at the wharf, with three government searchers—unless acting in concert with the smugglers—on the watch, and afterwards pack them and solder them up in 200 larger tin cans containing the late newspapers, and then pack them in matting, such as the packages were when seized. The seized opium was packed in *old* 10-pound tins, with new covers

soldered on. The several searching officers on the Tokio testified that, in their opinion, it was not possible for a ton of opium to be concealed on the Tokio, taken out of its place of concealment, and soldered up on the Tokio during the time that ship was in port, without being discovered; that there was no place on the Tokio where the soldering could be done without discovery; that fires were not permitted on the Tokio while in port; and that it would be impossible to carry the large tin cans used aboard the ship without discovery, there being officers, men, and watchmen at all times on the deck and the ship.

The foregoing, so far as it purports to state the facts, are the facts established by the evidence; and where the evidence is stated as evidence, the substance of the important evidence in the case, as it was presented in the district court.

The claimant, as we have seen, produced testimony to show that the opium seized was taken from the store of Tai Hung & Co., at No. 1014 Dupont street, carried to the foot of Main street, and loaded in the boat; but there was no effort to trace it beyond that, or to show the particular place where the opium was in fact prepared. It was shown that opium was manufactured at San Francisco from Turkish opium, and also at Newark, New Jersey; and witnesses testified, from the looks of the opium, and from testing it by smoking, that, in their opinion, it was San Francisco made smoking opium, prepared from Turkish or gum opium. Beyond this general opinion the claimant did not attempt to go or to trace the opium, and it was in consequence of this failure to show where and by whom the opium was manufactured; from whom the crude opium was obtained, etc.; and because other testimony, presumably within the claimant's power, corroborative of Sheridan's statement, if true, was not produced,—that the district court found against the claimant, and condemned the opium, as appears by the opinion of the judge; reported in 8 Sawy. 140, 141; S. C. 12 Fed. Rep. 402.

In this court much testimony upon these points, where proof was wanting in the district court, was introduced. The claimant, James K. Kennedy, himself appeared as a witness. He testified that on the evening of January 3d, at about half past 7 o'clock, Sheridan met him, by previous arrangement, at No. 1014 Dupont street, where a part of the seized opium was loaded into Sheridan's express wagon,—a little more than half, he thought, but he did not count the packages;—that the packages were passed out of the store of Tai Hung & Co. by Choy Lum and Choy Suey, he (Kennedy) standing in the door of the store at the time; that he directed Choy Lum to go down with the next load, and then got on the wagon himself, having the two rolls of silk, with Sheridan, who, by his direction, drove to the foot of Main street, at the corner of Main street and the water front; that upon arriving there, Sheridan passed the packages out of the wagon to him, and he let them down to McDermot, who was in a boat under the wharf waiting for him by previous arrangement, by a rope and hook, when McDermot received them and stowed them in the

boat, after which Sheridan went back to 1014 Dupont street for the other load; that he (Kennedy) then slid down a pile and got into the boat, where he and McDermot arranged the packages already in the boat, and then awaited the return of Sheridan with the remainder; that in due time Sheridan returned with the other load; that Choy Lum, as he had before directed, came with him; that Sheridan passed the packages out of the wagon to Choy Lum, who let them down to him by the rope and hook, who received them, and McDermot stowed them away; that after unloading Sheridan and Choy Lum left in the wagon together; that they got through somewhere about half past 10 o'clock.

Choy Lum testifies to the transaction in all material particulars, giving precisely the same account of what transpired as that given by Sheridan in the district court, and Kennedy in this court, and stated that he counted the packages as they were loaded, and that there were 55 packages and the silk in the first load, and 45 in the second. He stated that he went down with the last load by Kennedy's directions, then returned with Sheridan to somewhere about Pacific street on Montgomery avenue, where he got off and went home, while Sheridan went in the direction of his stable; that he got to the store about half past 11,—the testimony corresponding fully with that of Sheridan and Kennedy. He also says that he was aided in passing out the packages from the store to Sheridan by Choy Suey, his brother and partner. Choy Suey gives precisely the same account of what took place at the store as that given by the others: that the first load contained 55 packages, and the second 45; that his brother, Choy Lum, was directed by Kennedy to go down with the second load, and he went, returning about half past 11. McDermot gives the same account as the others as to the unloading and passing down of the packages into the boat. He states that he knew Sheridan, and, although he did not see him, being under the wharf, he recognized his voice, and said: "Hallo, Tom! Is that you?" Sheridan, Kennedy, Choy Lum, Choy Suey, and McDermot agree in their testimony as to obtaining and loading the seized opium at 1014 Dupont street, and unloading it and passing it into the boat at the corner of Main street and the water front. This testimony is consistent in itself, and, independent of any other testimony affording a contrary inference, contains no apparent inherent improbabilities. To discredit this statement, a man is called who testifies that on that night, from about dark till after midnight, he was stationed as a watchman on a vessel lying on the other side of Main-street wharf, about 100 feet from the water front; that it was also his business to keep a lookout for a lumber-yard, situate on the north-west corner of Main and Bryant streets, diagonally across the wharf and street, and to do so he had to look from his station on the vessel across the point where Sheridan is said to have unloaded the opium; and that he did not see any wagon there, or anybody unloading opium, or otherwise. He did not

leave the vessel, but not only watched the vessel, but also the lumber-yard from the vessel at a distance. Kennedy and McDermot both testify that they remained under the wharf till about half past 11 o'clock, when, by the direction of Kennedy, they started from their place of concealment, and pulled for the City of Sydney, for the purpose of putting the opium aboard the Sydney; that they pulled out, passing the end of Beale-street wharf, then past the stern of the Tokio, which, according to the plat and scale, is from 665 to 670 yards, or more than a third of a mile, from the starting point. They testify that at no time going out were they within 100 or 150 feet from the Tokio; that, owing to the wind and the tide, after passing the Tokio, they made a larger circuit than would otherwise be necessary, and then turned in and rowed directly for the Sydney; and when within 30 or 40 feet, more or less, from her, (amidships,) they were captured; that they did not see the pursuing boat until they had turned in, and were pulling directly for the Sydney. In going back, both Kennedy and McDermot state, and the officers Egan and Smith admit, that they passed so near the Sydney that their oars touched her stern, Egan and Smith saying in consequence of the space required to turn round in. As to what took place at the capture, and afterwards, there is but little discrepancy between the testimony of the parties and that of the officers. The only material difference is in the language used by Kennedy, and what he meant. It is not quite so strongly stated by them as by Egan. Kennedy testifies that when Egan said he was going to take them to the station-house, he told him "to take it, and let us go;" that "I meant that we should go with the stuff, of course;" "that they should take it along with us to the station;" and McDermot said that he heard no such remark as, "Good God, you are not going to arrest us! We are men of families," etc. They state that they did not see the pursuing boat until they had passed the Tokio and turned in, and were pulling directly for the Sydney; that they heard the oars of the other boat before they saw the boat. And Egan and Smith admit that the captured boat had turned back before it was overtaken.

Kennedy testifies that he bought all this opium through Tai Hung & Co., at 1014 Dupont street, in five different lots of 400 pounds each, at five different times through the month of December, 1881; that he did not know of whom Tai Hung & Co. purchased the first lot till after it was purchased, but he then ascertained that it was purchased of Hop Kee & Co., another Chinese firm, and that when the subsequent orders were given to Tai Hung & Co., he knew they expected to get it of Hop Kee & Co.; that Tai Hung & Co. bought it in large packages, packed the opium in small boxes, labeled it, then put it up in larger cans, and then in packages, as it was found when seized, in accordance with his instructions; that he purchased of Tai Hung & Co. because he could get it fixed there just as he wanted it, and he only knew Hop Kee by reputation; that he furnished the newspapers

and had them put in the large tins to keep the small tins from rattling, and also to have it as evidence in case he should want it. These newspapers all bore date so late that it was impossible that they could have been put in before the steamer arrived at San Francisco, some of them bearing date the day before the arrival of the steamer; that he did not know there was a private stencil-mark of Tai Hung & Co. on the back of the label, as it afterwards appeared there was, on each box.

Kennedy further testified that he furnished the money to Tai Hung & Co. to pay for the opium, from time to time, on each occasion, as it was purchased; that he borrowed \$10,000 of this money for the purpose from Joseph Goetz, the party whose name appears in other connections in this case, but that Goetz had no interest whatever in the opium, he (Kennedy) being the sole party interested in it. He also testified that of the money used by him he obtained \$3,400 or \$3,500 from his brother, Henry Kennedy, before he went on his last trip to China. In corroboration of Kennedy, Choy Lum testified that he had for over three years been a merchant, dealing in opium, dry goods, and general merchandise, at No. 1014 Dupont street; that he was a member of the firm of Tai Hung & Co., composed of himself and his brother, Choy Suey; that on December 2, 1881, he sold to the claimant, Kennedy, 4,000 taels domestic opium,—that is, opium called gum or Turkish opium, prepared in the United States; that he bought it of Hop Kee & Co.; that when he bought it, it was put up in large tins, like coal-oil cans, containing 200 taels each; that Kennedy directed him to put it up in small tins containing 5 taels each, and then to put them up in 100-tael tins, or 20 small 5-tael boxes in 1 tin; that he put them up as directed, using old boxes, from which he soaked and rubbed off the labels, and put on new ones, and put 20 of the small 5-tael boxes in 1 tin can; that one Ah Hock, a Chinese tinsmith, soldered on the covers; that he cut the covers out of new tin himself; that he packed two of the large tins together in Chinese matting, sewed the matting, and then tied it with bamboo splints; that, by the direction of Kennedy, he put pieces of newspapers furnished by him in each large tin; that it takes four to five days to pack up 400 pounds, or 4,000 taels, in this way; that he paid for it before taking it away with money furnished by Kennedy; that after this lot Kennedy ordered 4,000 taels more, which were bought and put up at his store in the same manner until he had given five orders of 4,000 taels each, so as to make up 20,000 taels; that all were purchased, paid for, and put up in the same manner; that all, except the last order, were filled by purchases of the same kind of opium of Hop Kee & Co. But on the last order Hop Kee had only 2,000 taels, and he bought the remaining 2,000 taels of Tuck Kee, another Chinese firm; that the opium bought of Hop Kee & Co. was in large coal-oil tins, containing 200 taels each, but the 2,000 taels bought of Tuck Kee was already put up in five-tael boxes, but with-

out labels on them; that all bought of Hop Kee he put up in the same manner at his store; that, after putting the opium in five-tael boxes, he put on the labels, some in imitation of Lai Yuen and some of Fook Loong; that he also put the labels on the 2,000 taels bought of Tuck Kee, which had been put up in five-tael boxes before he purchased it, but had not been labeled.

The labels consist of two red labels and one white one, corresponding in width and length with the sides of the box to which it is attached, put on three sides of the five-tael boxes. He testifies that he had stamped on the back of the label on each—on the side pasted next to the box, near the bottom—the words "San Francisco," in printed letters. In reply to a question by the United States attorney he said he had the stamp with which he so stamped the labels at his store, and he could produce it. By direction of the United States attorney he produced in the afternoon a piece of India rubber with the words "San Francisco" formed on it, with materials for stamping, and stamped with it similar labels produced by him. Upon moistening the labels on the boxes seized in question, and turning them up, each label was found to be stamped, as Choy Lum said it was, with the words "San Francisco," exactly like the one made with the India-rubber stamp produced. So, also, the genuine Lai Yuen and Fook Loong opium boxes produced in evidence have each impressed upon it a peculiar Chinese character, about one-half an inch wide by three-quarters long, a little longer on the Fook Loong than on the Lai Yuen, stamped with a die in the tin cover of the box.

The seized opium outer tins had similar stamps, apparently corresponding generally with the respective stamps of the kind of opium represented. Choy Lum presented two steel dies, exactly corresponding with the dies used in stamping the seized opium outer tins, with which he said he stamped those tins. He stamped pieces of tin with them when testifying, which were put in evidence. An engraver was examined, who used a magnifying glass to inspect the stamps, and he measured the respective impressions, and pointed out very marked differences between the impression on the seized opium tins and those made by the dies produced corresponding with them and those on the genuine opium, showing that those on the seized were not the genuine stamps of the manufactory. So, also, Choy Lum stated that the labels on the seized opium were not the same. There were decided differences in the characters, though generally resembling each other in appearance; and there were also differences in the shades of the paper, the red Chinese paper being brighter, and the white lighter, than that used here. He also produced wooden engraved blocks upon which many of the labels on the seized opium were said to have been printed, and labels were printed from them corresponding with those on the tins. He testified that similar labels were printed here in large numbers, and his testimony was corroborated by printers who had printed for him and others.

Choy Lum testified that he put on all the labels and marks and the words "San Francisco" himself. Some were marked and labeled "Fook Loong," and some "Lai Yuen," about 9,000 taels being marked and labeled "Fook Loong;" that his partner and nephew helped pack and label the opium. Choy Suey, brother and partner of the last witness, gave precisely similar testimony upon all these points; and Gu Ah Hock testified that he, at Tai Hung & Co.'s store, soldered on the covers of the tins, containing 20 small boxes each, with pieces of newspaper in them, at the several times of the purchases in December mentioned. Upon cross-examination and demand of the United States attorney, Choy Lum hunted up and brought into court what purported to be the receipted bills for the five lots of opium claimed to have been purchased from Hop Kee and of one lot of Tuck Kee, which corresponded in dates and all other particulars with the facts as before testified to by Choy Lum. They appeared on their face to be in all particulars bills made in the regular course of business, with nothing intrinsic in the papers, or the testimony of the witness in regard to them, to throw discredit on them. The following is an example, as translated in the evidence:

"Tai Hung & Co., bought of Hop Kee & Co., domestic opium, 4,000 taels, \$0.85 a tael.

"Rec'd payment in full.

"*Dated December 4, 1881.*

[Stamped]

"HOP KEE & Co."

These bills of Hop Kee bore date, respectively, December 1, December 4, December 12, December 24, and December 29, 1881. Choy Lum testified that these receipted bills were received at the time they bore date, and when the opium was purchased, in the regular course of business; and a member of the firm of Hop Kee & Co. testifies that his firm sold the opium to Tai Hung & Co., as stated by the members of that firm and in the several bills in evidence, and that these are the genuine receipted bills given at the time of the transactions, and at the respective dates they bear. And Wy Noon, of the firm of Tuck Kee, testified that his business was the manufacture of domestic opium; that on December 26th he sold to Tai Hung & Co. 2,000 taels opium prepared by him, put up in five-tael boxes, without the labels on the boxes; that he made it of Turkish opium bought of Downing & Son, 14 Second street, San Francisco; and a receipted bill bearing date December 26, 1881, was produced by Tai Hung & Co., which he stated was the same bill delivered at the time.

It was proved beyond all ground for controversy that Hop Kee & Co. had a manufactory of prepared opium at Newark, New Jersey, prior to 1880, which was closed up about the last of December, 1879, or first of January, 1880; and I so find the fact to be. This appears by uncontradicted evidence as well as by reports of the United States revenue officers of that district. It is not denied by the United States that it was in existence and operation to that date, and it is

not claimed by claimant to have been in operation since. Smoking opium was prepared by this firm out of Turkish or gum opium, purchased from Lanman & Kemp, well-known druggists, in New York city. It also appears beyond all doubt, and I so find the fact to be, that in February, 1880, there were 25 packages or boxes, each inclosing 2 large tin cans about the size of coal-oil cans, containing each 40 pounds of prepared opium, or 2,000 pounds in the aggregate, shipped from Newark, New Jersey, through Lanman & Kemp, of New York, from whom the crude opium had been purchased, to Downing & Son, San Francisco, to be delivered to Hop Kee & Co., upon the payment of certain charges, which charges were paid, and the packages delivered by Downing & Son to Hop Kee & Co. Choy Lum produced a box, and the cover of another, as a box and cover of another box in which he bought some of the opium in question of Hop Kee & Co., the cover having parts of seals of Hop Kee & Co. put on at Newark, and the cover having the address to Downing & Son and other marks stenciled or printed on it, which were identified by a member of the firm of Downing & Son and by the drayman who hauled the packages from the railroad office to Hop Kee & Co., as being one of, or at least wholly like, the boxes so received by Downing & Son for Hop Kee & Co., from Newark. Of the fact that Hop Kee & Co., in February, 1880, received 2,000 pounds of prepared opium from Newark, through Downing & Son, there can be no question on the evidence; and I so find the fact to be.

Loo Gee Wing, one of the members of the firm of Hop Kee & Co., also testifies that at the time of the receipt of said 25 boxes in February, 1880, Hop Kee had on hand 6,000 pounds of opium prepared at Newark, making in all, including the 2,000 pounds received through Downing & Son, 8,000 pounds. He also testified that the 18,000 taels, or 1,800 pounds, of opium sold by Hop Kee & Co. to Tai Hung & Co. at the several times in December, 1881, for claimant, Kennedy, was what remained of the said 8,000 pounds of opium manufactured at and received from Newark, New Jersey. And Choy Lum testifies that to make up the 20,000 taels wanted by Kennedy he bought of Tuck Kee 200 pounds, or 2,000 taels, manufactured by him at San Francisco. There is no direct evidence to contradict any of this testimony as to the sale of so much opium by Hop Kee & Co. to Tai Hung & Co., or that it was not the remnant of the opium prepared by Hop Kee & Co. at Newark; but it appears that Hop Kee & Co. had borrowed of Joseph Goetz, the same party whose name appears in other parts of the testimony, some \$6,000, upon which they were paying interest. And it is insisted by the United States attorney that it is highly improbable that such would be the case while they were carrying \$20,000 worth of opium which could at any time be disposed of. On the other hand, it is insisted that business men might well think it better to pay interest and carry stock for a better market. It is also shown by the testimony that some one, probably

Loo Gee, acting on behalf of Hop Kee & Co., made a statement to the assessor, for the purposes of taxation, in March, 1881, in which the word "opium" had been written, and afterwards erased, from which it is argued that the firm had no opium in March, 1881; and as they went out of that business and of the manufacture of opium in San Francisco not long after that date in that season, they could not have had any on hand, and especially of Newark manufacture, at that date, and consequently none to sell to Tai Hung & Co., in December, 1881.

It was shown by the records of the custom-house that Hop Kee & Co. had obtained stamps for domestic opium prepared at Newark, from November 19, 1879, to August 24, 1880, to the number of 5,080, sufficient for 2,540 pounds; and from April 22 to August 25, 1881, for domestic opium, purporting to have been made at San Francisco, to the number of 793, sufficient for 396 pounds of opium. To this is replied that there was no law requiring stamps to be purchased for such opium, and it was optional with the manufacturer whether he would use them or not, it being a matter for his own convenience. No testimony is introduced to show that all stamps purchased are used, or that stamps are in practice purchased for all manufactured, or that stamps are put upon any but such as is put up in small five-tael boxes for retail; while the opium sold in bulk, as this is claimed to have been, to Tai Hung & Co., it is insisted is not stamped; and there is no evidence that it is stamped in practice when sold in this form in bulk in large quantities. It is also insisted by the claimant that the purchase of a considerable quantity of stamps between April and August, 1881, is conclusive evidence that Hop Kee had opium on hand in the preceding month of March. Hop Kee & Co. then had a manufactory of domestic opium at Newark, New Jersey, prior and down to about January 1, 1880; and also as late as February 24, 1880, the firm had at least 2,000 pounds of the opium prepared at that factory on hand, and if Loo Gee Wing testifies truly, the firm at that time had 6,000 pounds in addition, making an aggregate of 8,000 pounds then on hand. There is no intrinsic improbability that his testimony on this point is not true, and no direct testimony to the contrary. Whether he had 18,000 taels or 1,800 pounds of this opium still remaining to sell to Tai Hung & Co., and whether he did so sell it in the month of December, 1881, must be determined by the direct testimony of Loo Gee Wing, Choy Lum, Choy Suey, Kennedy, McDermot, and such other facts and testimony stated, and inferences therefrom, as bear upon the question, including the Chinaman who says he soldered the tins for Choy Lum. It is a question of credibility to be determined upon all the evidence. It should be stated that the claimant, Kennedy, had been acquainted with Choy Lum over three years, and that they first became acquainted while they were working together on steamers running to China. Goetz also appears to have loaned money to Hop Kee & Co., as well as to

have advanced money to Kennedy to purchase the opium in question, and thus to have had business relations with these dealers in opium, both Chinese and Americans. On appeal, the government introduced testimony to rebut that of Short.

Lisseck, the first officer of the City of Sydney, testified that when the ship was in San Francisco, about the first of May, or some four months after January 3, 1882, he experimented with the coal port, which Short said he opened alone; to take in the opium, to see if it could be done by Short, as stated by him in the district court. Lisseck's evidence was that at that time, to open the port, it required a series of seven or eight heavy blows with a scantling six or eight feet long, and three by six inches in size, making a loud noise that could be heard all over the ship; and that it could not well be opened by one man alone, he always sending another man with the carpenter, whose business it was to perform that duty, to aid him. Three other men, who witnessed the experiment, corroborated his testimony. Some of these witnesses said this port opened to the side, and some that it opened upwards.

There appears to me to be some tendency to exaggeration in these witnesses concerning the difficulty of opening this port. It would seem to require a very heavy steel plate to stand those blows, as described, without injury.

It was said, however, that the port had not been opened for a long time, and the screws were so rusted as to make it difficult to turn the nuts, and that the port was thoroughly packed in India rubber to make it tight. It may well, by long disuse, have become firmly bedded, so as to adhere with greater tenacity at this time than on the third of January, it being four months after Short's alleged opening of the port, although it had doubtless been opened in the mean time.

To rebut this testimony of Lisseck and his associates, offered by the libellant, one Coutts testified on the part of claimant, who said he engaged as ship-carpenter on the Sydney on the voyage succeeding January 3d; that he entered upon his duties as such either on January 8th or 9th, five or six days after the day when Short says he opened the port; that, it being his duty to do so, he immediately examined the coal ports to see that they were in good working order; that he opened the starboard port without difficulty, alone, giving two or three light blows with what he called a five-pound maul or sledge; that he found already open the port coal port, (which is the one Short said he opened on January 3d or 4th,) and closed it; that he kept the ports well oiled while he had charge of them, and he could open them alone without difficulty; and that they were in good condition when he *first* examined them. Robinson, the superintending engineer, said he thought one man might open the ports, he having a small monkey-wrench to remove the nuts; and another witness said he thought the ports could be opened with a five-pound hammer. It

does not appear who left the coal port open when found open by Countts. It may have been Short, when he opened it on the third, if he did open it. Such is the testimony *pro* and *con*, with reference to the practicability of opening the port by Short, Short having before testified that he did open it to take in the opium. There was testimony also tending to show the impracticability, and the contrary, of landing the opium at Honolulu during the short stay of the steamer, from 6 to 16 hours.

Dr. Burrell testified that he was a regular graduate in medicine, and was an employe of the government in examining drugs and chemicals at the appraiser's store; that no crude opium is allowed to come into the United States that contains less than 9 per cent. of pure morphia, that being the minimum; that the crude Turkish opium he admits into this port contains from 9 to 18 per cent. morphia; that the only specimen of crude Patna opium, which he analyzed out of curiosity, only contained four and a half per cent. morphia; that crude Patna opium does not come here, as it is not admitted; that he analyzed opium from boxes marked, respectively, "A," "B," and "C," boxes A and B having been seized by the government on the steamer as genuine Hong Kong prepared opium, respectively, June 27, and March 29, 1882, and box C being one of the boxes in question seized January 3, 1882; that box A of the Hong Kong opium contained 4.70 per cent.; box B, 6.08 per cent.; and box C of the *seized* opium, 9.18 per cent., a considerably larger per cent. than even crude Patna opium contains, and large enough to admit it as crude Turkish opium.

In accounting for the presence of Henry Kennedy soon after the capture, the claimant, James Kennedy, testified that he had requested his brother Henry to be at Beale-street wharf on the lookout from 8 till after 11 o'clock of the night of January 3d, and that it was in obedience to this request that Henry Kennedy was on hand so soon after the capture.

I have now stated the probative facts, so far as they are clearly established by the evidence. Where I have stated a fact as a fact, I consider it as clearly established, and so find the fact to be, and not open to question or doubt. On the other points, where there may be doubt, I have stated the salient points of the evidence as evidence, and the substance so far as it is deemed important *pro* and *con*, without attempting to refer to every minute circumstance.

The facts and testimony stated are the controlling facts and circumstances in the case. From the facts found and stated, and the evidence stated on the points open to question, the great controlling ultimate fact: was the opium in question smuggled into San Francisco on the steamer Tokio? must be determined.

It will be seen that there are two theories, and but two, suggested by the evidence and maintained by the opposing counsel. One is that the opium is Lai Yuen and Fook Loong opium, prepared at Hong
v.23f, no.8—25

Kong, out of crude Patna opium, and was smuggled into San Francisco on the steam-ship Tokio. The other is that it is domestic opium, prepared in the United States, and out of crude Turkish opium, 1,800 pounds of it at Newark, New Jersey, and 200 pounds of it at San Francisco, and that the claimant was attempting to smuggle it into the Sandwich islands on board the City of Sydney. One of these theories must be accepted as true, and the case decided on that principle; for, although it makes no difference on what vessel it was smuggled, if smuggled at all, the *testimony* does not indicate, or even suggest, that it was smuggled on any vessel other than the Tokio, and, if smuggled, that it is any other than Tai Yuen or Fook Loong opium, manufactured at Hong Kong out of Patna opium; and we are not at liberty to depart from the testimony and adopt some other theory or hypothesis not suggested or supported by the evidence. The question to be decided upon the facts and evidence stated, then, is, which one of these two theories is correct? for one or the other must, necessarily, be adopted. Was this opium smuggled into San Francisco on the Tokio? or was there an attempt to smuggle it into Honolulu on the Sydney?

At the outset of the discussion of the questions involved it is necessary to pass upon the admissibility of certain evidence, without which the government cannot possibly maintain this libel. The admission of the acts and statements of Henry Kennedy hereinbefore set out, performed and made soon after the capture of the opium while it was still lying on the wharf, is strenuously objected to on the part of the claimant as being utterly incompetent and inadmissible, on the ground that he is not a claimant, and it is not shown by any testimony, other than his own admissions, or otherwise than as appears by the foregoing, to be in any way connected with the transaction; that he is not shown to have any authority over the subject-matter, and the acts were not performed, or statements made, in the presence, or by the authority, or even with the knowledge, of the claimant, who testifies that he, and he alone, is the owner. It appears affirmatively, by the testimony of the officers who made the capture and arrest, that Henry Kennedy had no interview or communication with James K. Kennedy, claimant, and McDermot, or with either of them, after the capture and arrest, and before the statements and acts offered and objected to were performed and made. What transpired between him and the officers took place probably not far from one hour after the arrival of the captured boat at the Folsom-street wharf and the starting of Officer Smith to the station-house with the prisoner. It does not appear that Henry Kennedy was the man first seen by Egan; if he was, it is not apparent why he did not at once advance to meet Egan, when he found him alone, as he subsequently insisted upon seeing him alone. It may be that this evidence would be wholly incompetent on the trial of an indictment against James Kennedy and McDermot for smuggling this same opium, as being *res*

inter alios actæ; but, however that may be in this case, which is a proceeding *in rem* against the opium to condemn it, I think, upon the authorities cited by the United States attorney, these acts and declarations of Henry Kennedy, under the circumstances set out, are competent evidence, and admissible as a part of the *res gestæ*. I therefore overrule the objection and admit the evidence. The claimant duly excepts to the ruling, and the exception is allowed.

The letter of Goetz and the further note appended by Kennedy, set out in the preceding statement of facts, are also strenuously objected to as being no part of the *res gestæ*, they having been written two months and a half after the seizure and arrest, and whatever they may refer to or mean, they are statements respecting past transactions, and are incompetent and inadmissible. The note appended by James K. Kennedy to the letter of Goetz I think clearly admissible as a declaration of Kennedy himself against himself, the claimant of the opium, who himself testified that he alone is the owner. A party's own declarations are admissible in evidence against him, as such, whenever or wherever made, and without reference to whether they constitute a part of the *res gestæ* or not.

The letter of Goetz is on the same sheet of paper, and immediately preceding the appendage made by the claimant, and was left open expressly for Kennedy to read and make such additions as he saw fit; and Kennedy, having been informed of the fact, did read it and make the addition already considered. Both were doubtless intended for the same party, and had some relation to the same subject-matter. I consider, therefore, that Goetz's letter must be considered in precisely the same light as if it were a declaration of Goetz made in the presence of James K. Kennedy, without any comment made on his part, or with such comment as he saw fit to make. Such a declaration, made in his presence, would be admissible, and I think this letter, under the circumstances of the case, stands upon the same footing, and is admissible upon similar principles. As to the letter of Woo Ching, also set out in the statement of facts, I entertain more doubt. Goetz and Kennedy's letter, already considered, was inclosed in the same separate small envelope, and sealed up with this letter. They were, therefore, going to one address, and they were, doubtless, intended to be seen at least by the same party, and they seem to relate to the same transaction. Both this and Kennedy's postscript refer to the carpenter. Kennedy and Goetz both left their letter with the Chinaman, open, with an opportunity to read it, and intended it to be read, sealed up, and forwarded by him, the Chinaman, and they, with reference to these communications, were evidently acting in concert. It is true, Kennedy says he did not see this letter, or know of its contents, or that it was to be sent, and there is no direct evidence, or evidence other than the circumstance stated, to the contrary; but, upon the whole, though with some hesitation, I think it stands upon the same footing with Goetz's letter, and admissible.

To each of these rulings the claimant duly excepts, and the exception is allowed.

The letter of Lee Yue Wye was not in the same envelope with Goetz's and Kennedy's letter, but was a separate, independent letter, like a large number of others, from other parties to other parties, inclosed in one large outer package, a sort of small mail-bag by itself. The writer says the contents were written merely upon hearsay, without any knowledge of the facts upon his part or privity upon Kennedy's part. The claimant is not sufficiently connected with this letter to justify its admission, and it is, consequently, excluded from consideration; but, if admitted, it would add nothing of moment to the force and effect of the others. The observations of McDermot, made to the officer several days after the arrest, were no part of the *res gesta*, and as he is not a claimant, I exclude them. But they would add little to the force of the testimony, if in, and would not affect the result.

After mature consideration of the testimony and facts in all their aspects, I find it impossible to adopt either of the theories propounded as to the smuggling, and feel *entirely satisfied* that it is correct. Set aside the acts and statements of Henry Kennedy, the declarations made and alarm manifested by James K. Kennedy and McDermot at the time of the arrest, and the letters of Goetz, James Kennedy, and the Chinaman, and it must be conceded, I think, that the evidence would be overwhelming against the government. Even the acts of James Kennedy and McDermot, at the time of the capture, if they stood alone, would not be so specific and definite as to be necessarily inconsistent with claimant's theory. There is no direct, positive evidence, outside of these matters and acts referred to, and the inference to be drawn therefrom, to show that this opium ever was on the Tokio, and no established *other* fact, or direct reliable evidence of any fact, that is not just as consistent with the theory of the claimant that he was attempting to smuggle this opium to Honolulu on the Sydney as that it was smuggled into San Francisco on the Tokio; while the great mass of the direct testimony, whether reliable or not, is directly and positively opposed to and inconsistent with the latter, and as directly and positively supports the former. The boat containing the opium, when first discovered, was just where it would have been if, in fact, after having been loaded at the corner of Main street and the water front for the purpose as alleged, it had started to go to the Sydney to put the opium on board; and its subsequent movements were not inconsistent with that theory. No man testifies to having seen the boat in contact with the Tokio, or near enough to receive the opium, or in a condition to receive it from on board. No man testifies to having even seen any of this opium on the Tokio, or going off from it, although from five to seven men were constantly watching the ship night and day, and three additional experienced men searching her from time to time to find the drug. All these men

on watch, at the time the boat was discovered, together with the men on the prior watch, testify to their vigilance, and that they failed to see the boat in question, or any other, at the Tokio, or anybody carrying the opium off or putting it in the boat.

It is insisted by claimant that in the condition of the weather and the bay on that night it would have been impossible for so small a boat to lie along-side the steamer and receive so large an amount of goods. The bay was certainly rough. Such is the concurrent testimony of all. No expert gives an opinion as to whether it was practicable for a boat of the kind, in the condition of the sea, to lie along-side the steamer on the outside and take on board a ton of opium in the shape shown in the case.

I should myself, from the evidence, in view of the state of the bay, think it far more probable, if the opium was taken on board from the steamer on that night, that it was taken on board on the inside, between the steamer and the wharf, and not on the outside. But this involves the grossest negligence or complicity of a larger number of custom-house officers, for in that case all on watch must have been in such a position that the operation could not fail to have been brought to the notice of each. But, as there is no *direct* evidence as to its being taken on board from the ship at all, we can only infer which is most probable from the facts known. The improbability that this opium could have been taken off from the outside in the known condition of the bay, with the negligence, or complicity, of two watchmen, seems to my mind to outweigh the improbability of its being taken from the inside, even with the gross negligence or implication of all those whose duty it was to prevent it. The inside must have been certainly more practicable than the outside, and it only involves negligence or complicity of a greater number of men. If taken from the Tokio at all, I think it much more probable that it was done from the inside than from the outside. If there was complicity, then there must have been perjury also, and a great deal of it, for all of both watches and the searchers profess to have been vigilant, and to know nothing about the transaction. It is difficult to believe, and distressing to contemplate, the fact of so much official dishonesty or negligence, or both, as must have occurred if this opium came from the Tokio. Besides, there must also have been barefaced, unmitigated perjury on the part of numerous other witnesses. There undoubtedly seems to be difficulty in supposing that it was practicable to get this opium aboard the Sydney in this port, and off again at Honolulu; and the testimony upon the practicability of so doing is also in conflict. But the Sydney, at the wharf in San Francisco, was in smoother water than the Tokio, with no watchman except the single one employed by the ship; and the whole custom-house force at the port of Honolulu consisted of but 4 men, while in this port nearly or quite 40 in number, as shown by the testimony of a superior government custom-house officer, were engaged in the business

of watching the Tokio at one time or another, and not less than half a dozen at all times, and sometimes eight or ten at the same time.

The time is shorter, it is true, at Honolulu, but human nature can hardly be presumed to be much better there than elsewhere; and it is quite as likely to be practicable, in smoother water, with one watchman, and the aid of an acknowledged confederate on board of the Sydney, to elude the vigilance or corrupt the virtue of that one man at San Francisco, and of from one to four at Honolulu, as, with a rough sea prevailing, to elude the vigilance or to corrupt the virtue of the large number of the public guardians placed over the Tokio.

At Honolulu the price of opium, and consequently the inducement to violate the laws and take the risk, is much larger than at San Francisco. Then there is the direct, well-knitted, consistent, compact, concurrent, and homogeneous account given of the purchase of the 1,800 pounds of opium by James Kennedy, through Tai Hung & Co., of Hop Kee & Co., and 200 pounds of Tuck Kee; the putting of it up in small boxes; labeling it with new labels in imitation of Hong Kong labels but different in type and color, with "San Francisco" as a private mark stamped on the under and concealed side of each label found to exist as stated by Choy Lum in his testimony, with a character imprinted on the outer tins with steel dies different from the genuine, supported by a production of what would seem to be the dies, stamps, and wood engravings used to produce them; the packing and soldering up of the small boxes in larger, containing newspapers of dates so late that it must have been done since the arrival of the steamer in San Francisco; the transportation of the opium from 1014 Dupont street to Main street, and loading in the boat, etc.,—all this supported by the direct, positive testimony of so many witnesses as to their own personal acts in the premises. All this testimony, taken in connection with the remarkable success of the tests of the character of the opium tending to show it to be of domestic manufacture, and the fact that it contains the percentage of morphia that exists in the domestic article; the established fact that Hop Kee had an opium manufactory at Newark, New Jersey, prior to 1880, and afterwards at San Francisco, and received 2,000 pounds of prepared opium from the former so late as February 24, 1880; and the testimony that the firm then had 6,000 pounds, before received, on hand, besides the difficulty of so concealing and manipulating so large an amount of opium on the Tokio as to give the external appearance it presented at the time of the seizure, and the other facts favorable to the claimant, set out in the statement,—makes a very strong, not to say overwhelming case, when standing by itself.

On the other hand, the government insists that the facts and evidence set out in the statement disclose a body of men systematically engaged in smuggling opium; that the direct evidence as to the purchase, packing, stamping, etc., comes from the very men engaged in this unlawful business, who are largely interested pecuniarily, and

some of them criminally, and it is therefore to be distrusted on those grounds; that parties systematically engaged in smuggling opium, as they admit, to Honolulu, are capable of smuggling into San Francisco, and of defending and concealing their smuggling by the grossest perjury; that the watchmen, searchers, etc., are implicated with them; that all this business of packing, labeling, stamping, dies, etc., except in regard to soldering up the smaller boxes in the larger tins, containing the newspapers, and subsequent packing in mats, could have been done, and—although there is no direct evidence of it—was pre-arranged and accomplished, in China before coming on the steamer, or during the passage,—the dies, engravings, private marks, labels, etc., having been prepared for the occasion; and that the soldering up and packing in mats could have been done, and was done, with the connivance of the searchers and inspectors on the steamer, during the nine days while she lay at the wharf in San Francisco; that the purchase of the opium from Hop Kee and Tuck Kee, packing, stamping, etc., on Dupont street, is an after-thought of the claimant and those engaged in smuggling with him, who are claimed to be thoroughly experienced and skilled in the business,—no such position having been taken or suggested, or evidence of the kind given, in the district court, although Loo Cho Tong, the senior member of the firm of Hop Kee & Co., and Choy Suey were examined as a witness on other points; that it was impracticable to get the opium on the Sydney here and off at Honolulu, and it is therefore improbable that it should be attempted; that it is inconceivable, if the theory of the claimant is true, that he should have failed, in the district court, with the means at hand, to prove the facts now testified to by Kennedy, Choy Lum, Choy Suey, Loo Gee Wing, Tuck Kee, Wy Noon, and McDermot, since they clearly constitute far the most important part of the claimant's case; and that it is impossible to reconcile with the truth of the claimant's theory, or with any theory except that of the government, the conduct, acts, and declarations of Henry Kennedy, the steerage steward of the Tokio, and brother of the claimant, James Kennedy, who was on the watch at the unseasonable hour of the seizure, and who, notwithstanding the interest then manifested by him, has not since appeared at the trial in either court, where his evidence would have been of the highest importance, or the conduct and statements made, and the fears manifested by McDermot and the claimant, James Kennedy, at the time of the arrest, especially when considered in connection with the letters of Goetz, Kennedy, and Woo Ching, in evidence. Some of these suggestions, and especially the fact that the parties were actually engaged in smuggling somewhere; the failure to produce so much valuable evidence on the first trial; the suggestions relating to the action of the two Kennedys, McDermot, Goetz, and Woo Ching, under the circumstances,—are weighty, and entitled to great consideration.

In view of the established facts and the evidence on questionable

points indicated, I am satisfied that the finding on the controlling issue of fact must be determined by the rule of law to be adopted as to where the burden of proof lies, and as to the amount of evidence necessary to control the finding.

Undoubtedly the government introduced ample testimony in the first instance to show probable cause. This being so, under section 909 of the Revised Statutes of the United States, and the numerous decisions upon the statute cited, the burden of proof is thrown upon the claimant to show the innocence of the transaction. This point is conceded, and the claimant assumed that burden, and he now earnestly insists that he has fully discharged the burden, and fully, by affirmative evidence, overthrown the case of the government within the requirements of the law. But a further question arises. The burden of proof being on the claimant, what amount of proof is necessary to discharge that burden and relieve the claimant of the forfeiture? The United States attorney earnestly insists that the claimant is bound to affirmatively show the innocence of the transaction *beyond a reasonable doubt*, contrary to the rule of the criminal law, that innocence is presumed till the contrary is proved, and contrary to the rule that the government must affirmatively show the guilt of the accused beyond a reasonable doubt; and he cites, among other authorities, *The Short Staple*, 1 Gall. 107, in which Judge STORY remarks: "The *onus probandi* rests on him, (the claimant,) and a forfeiture must be pronounced, unless he brings the defense *clear of any reasonable doubt*." This position is as earnestly controverted by the claimant. If the rule is as insisted on by the government in this particular,—although claimant's counsel maintains a contrary view,—I think the claimant has failed to show the innocence of the transaction beyond a reasonable doubt, and the opium must be condemned. But conceding the rule not to be so rigid as is claimed by the government, the claimant takes another and intermediate position, which, if adopted, would control the case, and its decision will control my finding and decree.

The rule insisted on is that the burden of proof being on the claimant, yet when the proof is all in, no matter from which side it came, the guilt of the parties concerned, upon the whole evidence actually before the court, must affirmatively appear, beyond a reasonable doubt, as in criminal cases, or the goods cannot be condemned; that it is not enough, as in ordinary civil cases, between man and man, that there is a mere preponderance of evidence in favor of guilt. This rule was also combated with great vehemence by the United States attorney, as presenting the turning point in the case, and he frankly, distinctly, and emphatically stated at the argument, and I think correctly and properly, that if the rule, as claimed by him, was rejected, and this rule, as insisted upon by claimant, adopted by the court, the government could not, under the evidence, maintain its case, and there would be no possible use in spending any more time in discuss-

ing the voluminous evidence. The authorities are not in harmony upon questions of this kind, some holding that always, in a civil case, in form, even though involving penalties and questions criminal in character, the ordinary rule in civil cases prevails, that the verdict or finding is to be determined by a mere preponderance of evidence. Others hold that where the acts constituting the ground of action upon which a recovery is sought, constitute a criminal offense, so that it is necessary to prove the offense, in order to recover, the offense must be affirmatively shown by the evidence beyond a reasonable doubt, and that a mere preponderance of evidence is insufficient.

In this case the opium must be condemned, if at all, under section 3082, Rev. St., which provides:

"If any person shall fraudulently or knowingly import or bring into the United States * * * any merchandise, * * * contrary to law, * * * such merchandise shall be forfeited, and the offender shall be fined in a sum not exceeding five thousand dollars, nor less than fifty dollars, or be imprisoned for any time not exceeding two years, or both."

If, on an indictment for smuggling, under this section, any party should be on trial, the question, as it is in this case, being, not whether he was in possession of the goods, but whether he imported them contrary to law, he could not be convicted unless the evidence should affirmatively show, beyond a reasonable doubt, that he was guilty. The forfeiture of the goods is provided for in the same section as the *fine* and imprisonment, and it is insisted that the forfeiture is as much and as clearly a part of the punishment for the offense committed—inflicted upon the owner of the goods, whoever he may be—as the *fine* imposed by the same section. The goods are his, as much so as his money; and it is argued that to take from him his goods, because he has violated the law, is as clearly a punishment as to take his other money for the same reason; and there is no limit to the amount and value of the goods forfeited, while the additional fine is limited to \$5,000.

In this case, the property claimed to be forfeited is said by the United States attorney to be of the value of from \$20,000 to \$25,000, and this part of the punishment is therefore four or five times as large as that part which can be inflicted in the form of a fine. They are both, it is claimed, but parts of the punishment inflicted by the statute, the only difference being the form in which the conviction is had and the punishment inflicted: one being prosecuted against the goods as the formal party to the record, and in the form of a civil proceeding, and the other against the owner, or the party unlawfully importing the goods, as the formal party, in the form of a criminal proceeding; that only the form is different. In substance and effect the result is said to be exactly the same so far as it affects the rights of the owner, both resulting in punishing the owner to the extent of the value of the property or money taken from him, both being alike a penalty or amercement.

It is therefore insisted that the rule as to the amount of evidence necessary to condemn in the one case and convict in the other, and inflict the punishments prescribed,—which are, in substance and all essentials, alike,—must be the same. I confess there is great force in these positions, and that it is not easy to perceive any reason, which rests upon a sound basis, for making any distinction. If the criminal rule is good as to one part of a punishment, why not as to the other? No matter through what channel, or in what form, a like substantial result is reached. A criminal offense committed is the basis of the proceeding and ground of punishment, alike, in the indictment, and of forfeiture and condemnation on the information, and the same offense must be shown in order to maintain either proceeding. Then, it is plausibly asked, why not required to be proved by the same quantity of evidence, both culminating, not in establishing a mere civil right, but also in the infliction of a punishment for the crime committed? It is well suggested that there may be good ground for a distinction where the form of the action is not only civil, but the end is to establish a mere civil right, and not to punish in part for a crime. As in a civil suit for damages by the sufferer from an assault and battery, the rule may well be different from that in an indictment against the perpetrator for the same offense committed against the laws.

Upon the question now under investigation, not only the authorities in the state courts, but in the courts of the United States, not even excepting the decisions of the supreme court, appear to me to be at variance. *U. S. v. The Burdett*, 9 Pet. 690, was an information in admiralty to forfeit the brig, appraised at \$6,000, for a breach of the revenue laws. In discussing the case, the supreme court, by Mr. Justice McLEAN, states the rule applicable to the case thus:

"The object of the prosecution against the Burdett is to enforce a forfeiture of the vessel, and all that pertains to it, for a violation of a revenue law. This prosecution, then, is a highly penal one, and the penalty should not be inflicted unless the infractions of the law shall be established beyond reasonable doubt. That frauds are frequently practiced under the revenue laws cannot be doubted, and that individuals who practice the frauds are exceedingly ingenious in resorting to various subterfuges to avoid detection is equally notorious. But such facts cannot alter the established rules of evidence, which have been adopted as well with reference to the protection of the innocent as the punishment of the guilty."

And the rule is again repeated on page 691 in the following language:

"No individual should be punished for a violation of law, which inflicts a forfeiture of property, unless the offense shall be established beyond a reasonable doubt. This is the rule which governs a jury in all criminal prosecutions, and the rule is no less proper for the government of the court when exercising a maritime jurisdiction."

In this case, as in that, which was also an information in admiralty *in rem*, it is sought to punish the claimant "for a violation of the law which inflicts a forfeiture of property"—and a large amount of prop-

erty—as a part of the penalty for the offense. If the rule in criminal cases was proper in that case, when the court was “exercising a maritime jurisdiction,” why not in this case, it is asked, when exercising a similar jurisdiction?

The rule in criminal cases seems to be recognized in suits for penalties and forfeitures in *Chaffee v. U. S.* 18 Wall. 517. The fourth head-note substantially states one of the points decided to be “that in an action for penalties for alleged frauds upon the revenue * * * the burden rests upon the government to make out its case *beyond a reasonable doubt*.” But in *Lilienthal's Tobacco v. U. S.* 97 U. S. 237, a later case than either of those cited, the supreme court appears to me to lay down the rule in cases of information *in rem* as it exists in civil causes, as to the amount of proof. This is distinctly done on pages 266, 267. And it is distinctly repeated on page 271, where the court says:

“Suggestion was made during the argument at the bar that the court erred in not instructing the jury that they could not find that the property was forfeited, unless the matters charged were proved beyond a reasonable doubt; but no such exception was taken at the trial, nor is any such complaint set forth in the assignment of errors, nor is there anything in the case of *Chaffee v. U. S.* 18 Wall. 516, which conflicts in the least with the views here expressed, as is obvious from the fact that the two cases are *radically different*, the present being an information against the property, and the former an action against the person to recover a statutory penalty. Informations *in rem* against property differ widely from an action against the person to recover a penalty imposed to punish the offender. But they differ even more widely in the course of the trial than in the intrinsic nature of the remedy to be enforced.”

The court also distinguishes it from the other case cited, though it seems to me that the distinction is not very broad. I regard this case as giving the last expression of the views of the supreme court, and as controlling in this court in this case; also as adopting, in a civil case in form, by information against the goods to enforce a forfeiture, notwithstanding it is essentially criminal and intended to punish a crime, the ordinary rule that a mere preponderance of evidence should determine the finding of a court or verdict of a jury. One rule or the other, either that in civil or that in criminal cases, must be applicable. So far as I am aware no intermediate rule depending on degrees in doubt, or certainly between proof by a mere preponderance of evidence and proof beyond a reasonable doubt, has ever been suggested in the authorities. Any intermediate rule would be difficult of application, if not wholly impracticable. The present case will afford the supreme court an opportunity to review the question, if desired, and to lay down the rule definitely, and draw the line sharply, so as to be beyond further question, for the future guidance of the subordinate courts. There is some ground for believing that the cases cited went off on the special circumstances of the respective cases rather than on strict rules of law. The question, in its various

phases, was discussed and authorities examined in an article entitled "Some Rules of Evidence," in 10 Amer. Law Rev. 642, for the year 1876. See, also, *Welch v. Jugenheimer*, 25 Alb. Law J. 271; S. C. 56 Iowa, 11; S. C. 8 N. W. Rep. 673. For the purposes of this case, therefore, in accordance with what I conceive to be the authoritative rule laid down by the supreme court in its latest decisions, I shall apply the rule in ordinary civil cases, that a mere preponderance of evidence in favor of guilt must determine the controlling question of fact as to whether the opium was smuggled into San Francisco on the Tokio or not.

After as careful and dispassionate a consideration of all the facts and evidence in this case as I am capable of giving it, if I were required to determine the title to the property between two citizens, upon precisely the same case, I should say, but with considerable hesitation, that, upon the whole, the preponderance of evidence is in favor of guilt in the transaction. Adopting the same rule as to the quantity of evidence requisite, while the point is not, in my mind, free from serious doubt, I find that the opium in question was smuggled into the port of San Francisco on the steam-ship City of Tokio, and that it was so smuggled with the actual intent to defraud the United States.

I think no unprejudiced mind can carefully consider the testimony in this case and say that it can adopt either theory of the case presented, as to whether the opium was smuggled into San Francisco on the Tokio, or attempted to be smuggled out on the Sydney, and rest with entire satisfaction and confidence in the conviction of the correctness of his determination. There must be some doubt, a reasonable doubt, not a mere fanciful doubt resting upon hypothesis alone, unsupported by evidence, but a doubt suggested by fairly arising out of, and resting upon, substantial evidence. In reaching this result, of course, much direct, positive testimony must be rejected as incredible under all the circumstances surrounding the case.

As the findings of this court, upon the mere weight of evidence, cannot now be reviewed by the supreme court unless some rule of law has been violated, the claimant is entitled to have the principle of law by which I am guided, stated, so that my ruling in that particular may be corrected, and the finding on that ground set aside, if I prove to have been in error. I therefore state the rule adopted, and which controls the finding. If I am wrong in the rule applied, then the finding should be set aside, and a finding in favor of the claimant adopted. The claimant objected to the rule adopted, and he duly excepts to the action of the court in that particular, and the exception is allowed.

So, also, the evidence of the acts and declarations of Henry Kennedy, soon after the capture of the boat and arrest of claimant and McDermot, and the letter of Goetz, with the addition or postscript by James K. Kennedy, and the letter of Woo Ching, found in the same envelope with the letter of Goetz, were admitted and considered

by the court, under objection to the admission of each, and due exception taken by the claimant.

All this evidence so admitted, including the said acts of Henry Kennedy and said letters, were not only admitted and considered, but great importance was attached to it all. These acts were regarded as wholly inconsistent with claimant's theory of the case, and irreconcilable with much of claimant's direct evidence. It was the preponderating evidence in the case, without which the finding must necessarily have been clearly and beyond reasonable doubt the other way. If, therefore, this testimony was erroneously admitted, the finding should be set aside as having been founded on improper evidence, and a finding for claimant substituted. I state this fact in order that the claimant may have an opportunity to have my action in the premises reviewed, and if erroneous corrected.

I have taken pains to state the entire substance of the evidence upon the doubtful points, in order that the supreme court, on appeal, may see the case, in all its bearings, precisely as it appears to me.

As a conclusion of law, from the ultimate fact as found on the controlling issue, I find that there must be a decree for the government, condemning the opium as forfeited; and it is so ordered.

CELLULOID MANUF'G CO. v. CHROLITHION COLLAR & CUFF CO.

(Circuit Court, S. D. New York. April 3, 1885.)

1. PATENTS FOR INVENTIONS—CELLULOID COLLARS AND CUFFS—INVENTION—INFRINGEMENT.

Letters patent No. 200,939, granted to Rufus H. Sanborn, Charles O. Kanouse, and Albert A. Sanborn, March 5, 1878, for a new and improved fabric for collars and cuffs, *held*, not void for want of novelty and invention, and infringed by use of such fabric by defendants around the button-holes and edges of the collars and cuffs made by them.

2. SAME—WHAT CONSTITUTES INFRINGEMENT.

Where there is a valid patent for a fabric, any one who uses the fabric without a license is an infringer; and it is no defense to urge that he might have used more, or that he uses less than the patentee in making similar articles. If he uses any of the fabric he uses enough to make him an infringer.

In Equity.

William D. Shipman, Frederic H. Betts, and J. E. Hindon Hyde,
for complainants.

Edwin M. Felt and John P. Adams, for defendants.

COXE, J. The complainants are the owners of letters patent No. 200,939, granted to Rufus H. Sanborn, Charles O. Kanouse, and Albert A. Sanborn, March 5, 1878, for a new and improved fabric for collars and cuffs. In the specification the inventors declare:

"The object of our invention is to make an improvement in collars and cuffs, and like articles of wear, which may be worn a long time without soil-

ing, and be easily renovated for continued wear, by producing them of celluloid or other forms of pyroxyline or soluble material of like nature, and a textile or fibrous fabric, in the manner following:

"The celluloid, A, is prepared in thin sheets, and between two sheets is placed a sheet of muslin, or other textile fabric, B, to give increased body, elasticity, and strength to the whole; or, in place of the textile material a substance of the nature of paper may be used, and the same end be answered.

"The union of the celluloid and the inner substance may be effected, as above shown, in sheets, and the articles of wear be cut from this united sheet and fitted for use; or the articles of wear may be cut from the separate sheets, and the three be put together afterwards; and whenever united, the parts together are submitted to suitable pressure for thoroughly incorporating them into one body. In this way collars, cuffs, shirt-fronts, or neck-ties, etc., may be made durable, and of a material sufficiently elastic, and easily kept clean, for the surface may be washed the same as earthenware."

The claim is as follows:

"A fabric for collars and cuffs, or other similar articles, having outer sheets or layers of celluloid and an interlining of textile or fibrous material, substantially as and for the purposes specified."

The defenses are lack of novelty and invention and non-infringement. Prior to the patent the great utility and importance of a cheap and durable material for collars and cuffs, which should have the appearance of linen, and at the same time be capable of continuous wear without washing and ironing, had long been recognized. To supply this want had been the aim and object of a host of inventors. The problem which confronted them was by no means easy of solution. The whole material universe was searched, and a great variety of fabrics and combinations of fabrics were adopted, but still no practical result was attained. Always some important requisite was lacking. At length the discovery of celluloid and other pyroxyline compounds offered, apparently, a solution of the difficulty. Many experiments were made, but the complainants' assignors were the first, so far as this record discloses, to embody in tangible and practical form the idea which had, perhaps, vaguely floated through the minds of others. All before their invention was tentative, impracticable, visionary. They have produced the required fabric,—a fabric having durability, elasticity and lightness, easily cleansed, inexpensive, and of the proper thickness and color. A fabric, in short, which possesses many of the characteristics of linen, and, when made into collars and cuffs, enables the wearer to dispense with the services of the launderer. No one had previously combined all these advantages or any considerable part of them. The novelty of the invention is not negated by any of the patents, American or foreign, introduced by the defendants. They all deal with pyroxyline in a liquid or semi-fluid form, as a paint, as a coating, and not in the solid form used by the complainants. In some of these patents, the inventors state generally that the compound produced by them may be used upon collars and cuffs and other textile materials. They knew, many of them, what was wanted, but they did not know how

to produce it. No one describes with anything like the required accuracy the fabric of the complainants. The burden is upon the defendants to satisfy the court that the prior descriptions contain such a clear, full, and exact statement that a person skilled in the art, with the statement before him, could produce the fabric in question. Not only have the defendants failed in this, but the proof, from the experts as well as from those in the employ of the defendants themselves, is positive and affirmative that the information derived from the prior patents, singly or combined, will not produce a material of the least practical value for collars and cuffs. Liquid pyroxyline cannot, upon this proof, be utilized for such purpose. The law requires something beyond mere suggestion to defeat a patent. Prophecy will not do it. Facts not theories are needed. The conclusion is reached, therefore, that the inventive faculty, and not mechanical skill alone, was required to produce the invention described in the complainants' patent, and that the patent is valid.

Upon the question of infringement there is more difficulty. Upon a cursory examination of the defendants' collars and cuffs, and the evidence relating to the manner of their manufacture, the court might hesitate to declare infringement, but as the inquiry proceeds the more deep seated becomes the conviction that the complainants' rights are encroached upon.

The defendants cut a single sheet of chrolithion, which is a substance essentially the same as celluloid, into the desired shape, but larger than the finished article. A narrow strip of textile or fibrous material is placed around the four edges, which are then folded over, and by heat and pressure made to adhere. The button-holes are strengthened in substantially the same manner. Thus it will be seen that at the seam or outer edge, where increased strength, body, and elasticity are most important, where the principal strain comes, and where the liability to tear and crack is greatest, the invention of the complainants is unquestionably adopted. At these points the defendants use a fabric having outer layers of celluloid and an interlining of textile material. In considering this question it should be remembered that the invention is not for a collar or cuff, but for a fabric. The defendants do not use the fabric for the interior portion of their cuff, but they do use it at the edges and around the button-holes. The contention seems to be that they do not infringe because they do not use as much of the complainants' fabric as the complainants do. The inquiry is, *first*, do the defendants, at the edge and around the button-holes of their collars and cuffs, use a fabric? and, *second*, do they use the fabric claimed in the complainants' patent? If they do, then, *pro tanto*, they are infringers. The testimony upon this subject is quite convincing that there has been a studied effort on the part of the defendants, from the first, to appropriate all the benefits of the complainants' invention, and avoid paying tribute by cleverly devised but insubstantial variations. The defendants might, it is true, have

made their collars and cuffs entirely of the patented material, but where there is a valid patent for a fabric, any one who uses the fabric without license is an infringer; and it is no defense to urge that he might have used more, or that he uses less than the patentee in the manufacture of similar articles. If he uses any of the fabric he uses enough to make him an infringer.

There should be a decree for the complainants.

FOSTER v. CROSSIN and others. (Two Cases.)

(Circuit Court, D. Rhode Island. April 6, 1885.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT OF RECENT PATENT—VALIDITY—PRELIMINARY INJUNCTION.

When the validity of a recent patent has not been judicially decided, a preliminary injunction may, nevertheless, be granted in a clear case of infringement.

2. SAME—DESIGN PATENT FOR JEWELRY—NOVELTY.

Design patents No. 15,049 and 15,050, for designs for jewelry pins, held not void for want of patentable novelty.

Motion for Preliminary Injunction.

W. B. Vincent, for complainant.

J. M. Brennan and W. R. Perce, for respondents.

CARPENTER, J. These bills pray an injunction to restrain the respondents from infringing letters patent, granted to the complainant June 10, 1884, for designs for jewelry pins, and numbered 15,049 and 15,050, respectively. The complainant now moves for a preliminary injunction. The respondents, in the first place, object that the patents are recent, and have not been found by any judicial decree to be valid; and they contend that in such case the court will not look further, but will hold that the complainant must fail for want of a judicial decision establishing the patents, or such a lapse of time—accompanied with the general acquiescence of the public—as may raise an equivalent presumption in favor of his right to recover on final hearing.

There are cases in which the judges have guided their discretion by this rule. Some of them are collected in Bump, Patents, p. 289, § 4921. The following cases to the same effect are cited by the respondents: *White v. S. Harris & Sons Manuf'g Co.* 5 Ban. & A. 571; S. C. 3 FED. REP. 161; *Warner v. Bassett*, 19 Blatchf. 145; S. C. 7 FED. REP. 468; *Jones v. Hodges*, Holmes, 37; *Fales v. Wentworth*, Id. 96; *Jones v. Field*, 12 Blatchf. 494; *Cross v. Livermore*, 9 FED. REP. 607; *Bradley & Hubbard Manuf'g Co. v. Charles Parker Co.* 17 FED. REP. 240. In all these cases it is to be noted, however, that there were other grounds for denying the motion besides that on which the

respondents here rely; and I think very few cases will be found in which an injunction has been refused solely on the ground here urged.

Undoubtedly, the production of the patent alone can in no case raise a presumption in favor of the patentee sufficient to justify the order of a preliminary injunction; and it is, perhaps, usually true that the most satisfactory basis for finding such a presumption will be in a judicial decision or in long uninterrupted use. But I am not prepared to say that the presumption can arise in no other way. It is true that a rule will be found laid down in many cases in terms which, taken by themselves, are broad enough to support the contention of the respondents; but it is also true that in many, if not most, of these cases the rule is stated more broadly than is necessary to the decision. I do not think the present current of decision tends to the establishment of a pointed rule such as is here claimed by the respondents. *New York Grape Sugar Co. v. American Grape Sugar Co.* 20 Blatchf. 386; S. C. 10 FED. REP. 835; *Steam-gauge & Lantern Co. v. Miller*, 8 FED. REP. 314.

I proceed, therefore, to consider whether the complainant has, on this motion, shown such a case as raises a clear presumption that he will be entitled to a decree on final hearing. Infringement is sufficiently proved, and, indeed, is not denied; but the respondents strenuously contend that the patents are void for want of patentable novelty. The distinctive feature of the design is fully stated in the claims of the patents. The claim of No. 15,049 is as follows:

"The design for a jewelry pin herein shown and described, the same consisting of a plate having the shape of a spoon, with the outline edge of the plate turned backward at a nearly uniform distance from its front, and the surface of the handle of the spoon showing an embossed or engraved ornamentation."

The claim of No. 15,050 is the same, with the substitution of the word "table-fork" for the word "spoon." The main feature of the design is described in the words, "with the outline edge of the plate turned backward at a nearly uniform distance from its front." It is suggested that this clause of the claim relates to the method of manufacture, rather than to the design of the finished product, and therefore cannot be sustained in a design patent; but I think the reading of the whole claim shows the true meaning to be that the design claimed consists, not in the method of construction, but in the peculiar rounded and finished form of the edge, like that of a table-spoon, which peculiar form necessarily results from the turning down of the edge of the plate, and is most clearly described by reference to the process of manufacture which produces it. The question, then, is whether this design is new and sufficiently distinctive to be patentable. The respondents read the affidavits of several persons, who testify that they have seen for sale in the market, at various times from July, 1880, down to the present time, jewelry pins made in the form of spoons and forks. Three examples of such pins are produced in evidence.

One of them is distinctly identified as a "specimen" of those sold by the affiant in the year 1881. The others are very imperfectly, if at all, identified as having been actually sold or made for sale, but they are stated by the witnesses to be similar to those which they have seen on sale. All these pins show embossed or engraved ornamentation, but they are all so made that there is a distinctly perceptible angle between the front and the edge of the spoon or fork which forms the pin.

Although the testimony by which these exhibits are verified is not of the most satisfactory kind, nevertheless, if the exhibits were exactly similar to the pins described in the patent, I should be unwilling to order an injunction. It is, therefore, necessary for the complainant to maintain the proposition that the rounded and smoothly-finished edge constitutes such a distinctive feature of the design as will support the patents.

Much light, as it seems to me, is thrown on this question by the affidavits read by the complainant. Seven witnesses, who have been engaged in the jewelry business in New York and Providence for different spaces of time, from 15 to 28 years, testify that so far as they know the pins made by the complainant, according to his design, were the first pins of that description known to the jewelry trade; that they were recognized by the trade as an original design; that the peculiar shape given to the edge by turning back the plate is distinctive and easily observed; that pins made with this shape are readily distinguished from those made like the exhibits produced by the respondents; and that the pins made by the complainant under his patents are in large demand, and have been, as affiants are informed, extensively copied by other persons. There are, indeed, affidavits produced by respondents in which the witnesses, who are in the jewelry trade and are apparently equally well able to judge of the matter, give their opinion that there is no substantial difference in design between the pins made by complainant and those which have formerly been sold. It seems to me, however, to be plain that the distinctive feature invented by the complainant, slight though it be, has been sufficient to create a large demand for the article in question, where there was before, to say the best of it, but a small demand. In view of the affidavits produced by the complainants, I can hardly believe that pins of the fork and spoon design have been generally sold in the jewelry trade before they were introduced by the complainant. Design, of course, relates solely to the appearance of the article to the ordinary purchaser; and, when the question is whether a difference of design be substantial and valuable, surely there can be no test better than the practical test which is furnished by observing the effect of the two designs on the appreciating observation of the purchasing public. I conclude that in this case the design is sufficiently distinctive to support the patents.

Some evidence has been introduced on both sides on the question

whether the complainant be the first inventor of the turned-over edge as applied to jewelry pins. On this point I do not think it necessary to say anything, except that I am clearly satisfied that the complainant is the first inventor.

Let a decree be entered, enjoining the respondents as prayed.

THE G. REUSENS.¹

(District Court, S. D. New York. March 5, 1885.)

1. POSSESSION—JURISDICTION.

In possessory actions a court of admiralty will not take cognizance of or enforce a merely equitable right as against the legal title of a defendant in possession; although it may decline, in its discretion, to enforce even a legal title, as against a meritorious equitable title accompanied by possession, or may give redress against a maritime tort upon an equitable vendee in possession.

2. SAME—TITLE TO VESSEL—SHERIFF'S SALE—SECRET TRUST—CASE STATED.

The libellant B. claimed title to nineteen thirty-seconds of the bark G. R., under a sheriff's sale on an execution issued out of a state court on a judgment against one C. He also claimed that possession was wrongfully withheld from him by R., master of the bark, and filed this libel against the bark, and against R. and C. to obtain possession. R. appeared and denied the libellant's title; showed that he had possession of the bark, and exhibited a complete paper title in himself to twenty-six thirty-seconds, including the nineteen thirty-seconds claimed by libellant. Thereupon the libellant offered to prove that at the time of the sheriff's sale under the execution and during the year preceding, the defendant R. held the nineteen thirty-seconds of the bark sold on execution upon a secret trust for the benefit of C.; also that C. had bought the nineteen thirty-seconds with his own money, and had caused the title to be taken in the name of R. in order to avoid the claims of C.'s creditors. *Held*, that as C., a judgment debtor, never had a legal title or possession, a sheriff's sale upon execution against him did not of itself make a legal title in the vendee. Before such a title could be recognized as a legal one, there must be established some secret trust in the holder of the legal title for the benefit of the judgment debtor that is fraudulent as against creditors. Whether such a secret trust and fraud existed in this case were the only questions herein litigated. *Held*, that such a matter is not a proper subject of inquiry in an admiralty court; and the libel must be dismissed for want of jurisdiction.

3. SAME—THE YACHT AMELIA.

The decision of JOHNSON, J., in the case of *The Amelia*, affirming 6 Ben. 475, and unreported elsewhere, appended.

In Admiralty.

Goodrich, Deady & Platt and *J. Warren Coulston*, for libellants.

Benedict, Taft & Benedict, for claimants.

BROWN, J. This libel was filed to recover possession of the bark G. Reusens by the libellant, as the alleged owner of nineteen thirty-seconds. The defendant Risley, who is master and in possession, claims to be the owner of twenty-six thirty-seconds, including the nineteen thirty-seconds claimed by the libellant.

¹Reported by R. D. & Edward Benedict, Esqs., of the New York bar.

The title of the libelant was made through a certificate and bill of sale, executed by the sheriff in pursuance of a sale under execution in a state court upon a judgment against one A. D. Conover, recovered on the twenty-second of October, 1883. The libelant upon the trial having offered in evidence proof of this judgment, of the execution issued upon it to the sheriff, of the sale under the execution in February, 1885, of nineteen thirty-seconds of this vessel to the libelant, and of the bill of sale executed to him by the sheriff, thereupon proceeded to give certain evidence, and offered other evidence tending to show that at the time of the sale under the execution, and during the year preceding, the defendant Risley held nineteen thirty-seconds of the bark upon a secret trust for the benefit of Conover; that Conover had negotiated for the purchase of these nineteen thirty-seconds in 1882; had paid the purchase price therefor with his own money, and had caused the title to be taken in the name of Risley for the purpose of avoiding the claims of C.'s creditors; that Risley had verbally acknowledged Conover's interest in the vessel, and had executed a bill of sale of these nineteen thirty-seconds at Conover's request, the name of the vendee being left in blank. Objection being made to the competency of this evidence in a possessory action in this court, the question, upon these offers of testimony, was submitted to the decision of the court whether it would entertain jurisdiction of such a litigation.

It is well settled, as a general rule, that in possessory actions a court of admiralty will not take cognizance of or enforce a merely equitable right as against the legal title of a defendant in possession; although it may decline, in its discretion, to enforce even a legal title, as against a meritorious equitable title accompanied by possession, or may give redress against a maritime tort committed against an equitable vendee in possession. Most of the American authorities on this question are cited in the case of *Wenberg v. A Cargo of Mineral Phosphate*, 15 FED. REP. 285, 287, 288. See, also, *The Dauntless*, 7 FED. REP. 366, and 19 FED. REP. 798; *The John Jay*, 3 Blatchf. 69; *The Clarissa Ann*, 2 Hughes, 89, 90; Abb. Shipp. *103, note a.

Counsel for the libelants seek to distinguish the present case from most of the cases referred to, in which the court refused to enforce a mere equitable title as against the holder of the legal title in possession, on the ground that here, through the sheriff's certificate and bill of sale, the libelants present a legal title. But it is plain that where the judgment debtor has never had the legal title or the possession, the sheriff's sale upon execution against him does not of itself make a legal title in the vendee. Before such a title can be recognized as a legal one, there must be established some secret trust in the holder of the legal title for the benefit of the judgment debtor that is fraudulent as against creditors. Otherwise, *prima facie* legal titles might be multiplied *ad infinitum*, through sheriffs' sales upon judgments that were against entire strangers to the property. Had

such a legal adjudication been had prior to the filing of this libel, that adjudication, together with the sheriff's bill of sale, would have presented a legal title proper to be enforced in the admiralty. In this case no such adjudication has been had. And the court is called upon in this action to investigate that question, and to find a secret trust and fraud against creditors, as between Conover, a judgment debtor, and Risley, who all along has been in actual possession, and had the apparent legal title. This is, in fact, the single subject of litigation. The object of the suit is the same as that of a bill in equity for relief against a secret trust and a fraud against creditors. This is precisely such a bill as STORY, J., says, in *Andrews v. Essex, etc.*, 3 Mason, 6, 16, should not be entertained in the admiralty. There is no reason in this case to depart from this established rule. The transactions involved in the inquiry have no reference to maritime affairs, except the accidental circumstance that the property which is the subject of the alleged secret trust and fraud against creditors is a vessel. The purchaser at the sheriff's sale, having never acquired possession, must rely upon his remedies at common law or in equity to establish and perfect his right, if he has any.

This court cannot be made the mere instrument of enforcing the collection of debts against fraudulent judgment debtors by means of a suit like this, which is practically a bill in equity in aid of a purchaser under an execution. Such a proceeding is not only wholly foreign to the objects of an admiralty court, but is unnecessary as a legal proceeding. The rules applicable to the sales of part interests in ships are in general those that apply to other tenants in common. *The Two Marys*, 10 FED. REP. 919, 923. A sheriff selling such part interests upon execution is authorized to take possession of the whole property, and to deliver the whole to the purchaser. *Mersereau v. Norton*, 15 Johns. 179; *Phillips v. Cook*, 24 Wend. 389, 396; *Waddell v. Cook*, 2 Hill, 47, 49, note; *Smith v. Orser*, 42 N. Y. 132; *Atkins v. Saxton*, 77 N. Y. 195. In selling against a judgment debtor not holding the apparent title, he may require full indemnity before proceeding; and lawful owners, whose possession is disturbed by the sheriff, may look to him and to his indemnitors for satisfaction. It is even doubtful whether a sale by the sheriff without thus exercising his lawful dominion over the property sold should be sustained as valid. *Read v. McLanahan*, 47 N. Y. Super. Ct. 275. Such a course directly tends to litigation, and the sacrifice of property through nominal sales for a nominal consideration only. In the present case nineteen thirty-seconds of a vessel, worth several thousand dollars, appears to have been thus sold for \$150. If this court had full discretion to entertain a suit of this character, it would not be inclined to exercise it under such circumstances, but would remit the parties to their legal or equitable rights in other tribunals.

In the case of *The Amelia*, 6 Ben. 475, the libellant presented, as in this case, a bill of sale from one who it was asserted had the equi-

table right. This court regarded the suit as one merely to enforce the vendor's equitable claim, and refused to entertain it. Upon appeal to the circuit the decision was affirmed. The opinion of JOHNSON, J., unpublished, is subjoined hereto.¹

The libel must be dismissed, but without costs.

¹THE AMELIA.

(Circuit Court, S. D. New York. July 19, 1877.)

POSSESSION—LEGAL AND EQUITABLE TITLES.

T. built the yacht A. for D., and thereafter accepted part of the purchase money, and was present when D. sold her to one H. by bill of sale, and performed other acts which indicated that he considered himself no longer the owner of the yacht; but the title had never passed from him by any instrument of transfer, or by absolute delivery, and he subsequently claimed the ownership. On suit brought by H. to recover possession, *held*, that the legal title had never passed from T., and, as against a legal title, an admiralty court will not undertake to enforce an equitable title.

In Admiralty.

JOHNSON, J. The facts found in this case appear in the findings placed on file, and, so far as the material question is concerned, do not differ in substance from those which appeared in the district court. The legal title to the vessel did not pass from Towns, the builder, to Doncomb by any instrument of transfer, nor was there any absolute delivery of the yacht. It was part of the agreement that a bill of sale should be executed when the agreement on the part of Doncomb was fully performed, and this time never arrived. The case, therefore, is substantially, as it is stated in the opinion of the district court, an attempt to enforce an equitable interest as against a legal title. This the court of admiralty does not undertake. When it proceeds in a petitory suit, it proceeds upon legal title. *Kellum v. Emerson*, 2 Curt. 79; *The S. C. Ives*, Newb. 205; *The John Jay*, 3 Blatchf. 67, 69; 2 Pars. Shipp. & Adm. 237, note 2. I do not find, and have not been referred to, any case which has been decided in this circuit, or in the supreme court of the United States, which holds a different doctrine; and I should be very unwilling to undertake to introduce a new and, at the least, a doubtful rule, in a case where my decision could not be reviewed, and would be a controlling precedent. If such a rule existed there could not fail to be numerous cases in which it must have been acted on. In *Ward v. Peck*, 18 How. 267, the claimant's case depended on matters clearly within the admiralty jurisdiction,—the power of a master to sell the ship,—and the libellant's had the legal title unless it had been divested by the master's sale; and their legal title was sustained. There are other cases of this class, but they are not thought to conflict with the views expressed in this case by the district court, and which I have adopted.

The decree must be affirmed, with costs.

THE CHARLES ALLEN.

(District Court, S. D. New York. March 10, 1885.)

1. TOWAGE—EVIDENCE—TOWAGE RECEIPT—CASTING OFF IN GALE.

The steam-tug C. A. took in tow the bark E., bound to sea from the lee of Staten island, to tow her down the bay of New York. The wind was high at the time, and the pilot of the tug, before starting, told the pilot of the bark that if the wind increased the tug would be obliged to cast off before reaching buoy No. 8, at the upper end of the Swash channel, and that the bark's pilot should be on the lookout for that contingency, to which the latter assented. The wind did increase until the tug was in imminent danger of swamping; whereupon she gave several short whistles, to indicate that she was about to leave the bark, and then cast off the hawser. The bark attempted to make sail and get to sea, but grounded on the Romer shoal. This suit was brought against the tug for not having taken the bark "to sea," as it was alleged she agreed to do, and for negligence in abandoning her in an improper and dangerous place. A towage receipt, reciting that the bark was to be taken "to sea for \$20," signed by one G., who procured the towage for the bark, and delivered to the master of the bark, was put in evidence. The \$20 was not paid. *Held*, that no authority was shown on the part of G. to bind the bark, and, moreover, that the receipt was superseded by the subsequent conversation between the pilots.

2. SAME—NEGLIGENCE—PERIL OF THE SEA—ERROR OF JUDGMENT.

Two courses were open to the bark in the place where she was cast off: to anchor, or to attempt to get to sea. She chose the latter, and events proved that it was an error of judgment on the part of her pilot. *Held*, that the tug was liable only on proof of negligence; that is, the want of such reasonable care and skill as the circumstances demanded. No negligence could be attributed to her for starting at the time she did. She continued to tow the bark up to the very last moment that her own safety would permit, and she cast off under an undoubted compulsion from perils of the seas, and in a position where the bark had a fair option to continue under sail or to anchor; and the libel was therefore dismissed.

In Admiralty.

Butler, Stillman & Hubbard and *W. Mynderse*, for libellant.

Benedict, Taft & Benedict, for claimants.

BROWN, J. At about 9 o'clock or a little after, on January 17, 1885, the Swedish bark *Elida*, lying off Staten island ready for sea, was taken in tow by the steam-tug *Charles Allen*, to be towed down the bay. The bark had on board a Sandy Hook pilot, between whom and the pilot of the *Charles Allen* there was a brief conversation in regard to the distance that the tug was expected to go. The pilot of the tug testified that he said to him that if the wind should increase much he would be obliged to cast off before reaching buoy No. 8, which is on the east side of the Swash channel, and that he was to be upon the lookout; and that the pilot of the bark assented. Two or three of the tug's hands confirm this account. The pilot of the bark testified that the pilot of the tug said that he would leave him at buoy No. 8. There was a gale blowing at the time from the south-west, but its severity was not felt in the lee of Staten island, where the vessel was then lying. At a quarter past 10, on reaching buoy No. 13, known as the Elbow buoy, below Staten island, the full force of the gale, which was then from the westward, began to be felt. The

tow kept on about half an hour longer, when she was compelled by the fury of the wind and the sea to cast off her hawser and return. She gave two or three signal whistles during about five minutes before casting off, which were heard by the captain of the bark, but were not heard by the pilot, according to his own testimony; and the cast-off hawser was not taken aboard. At that time only the fore-top-mast staysail and maintop-mast staysail and jib had been set, the crew having been delayed in making sail in consequence of the anchor's fouling with the chain when raised. The bark afterwards passed clear of buoy No. 8, leaving it a length or two only on her port side; but not having sufficient sail set to be wholly manageable, through the force of the westerly gale and the ebb-tide, which sets to the eastward, she grounded upon the Romer shoals, between buoy No. 8 and the stone beacon, somewhat nearer the latter. This libel was filed against the tug for not having taken the bark as far as buoy No. 8, which it is alleged she agreed to do; and also for negligence in abandoning her at an improper and dangerous place.

1. The receipt put in evidence reciting that the bark was to be taken "to sea," is not proved in a manner sufficient to bind the bark. No authority is shown in Gundersen, who signed it, to represent the bark or her owners. As a memorandum made by a person assuming to procure towage for the bark, it was, moreover, superseded by the conversation subsequent thereto between the pilot of the tug and the pilot of the bark. On this point the weight of evidence is clearly to the effect that the tug would cast off whenever compelled to do so by increasing wind; and that the pilot of the bark was to be on the lookout for this contingency.

2. The main controversy in the case has been as respects the place where the bark was in fact cast off; the witnesses from the latter contending that it was about midway between the middle and upper buoys of the Romer shoals (Nos. 8 and 14) and near to the easterly line of the channel. The respondents insist that she was cast off when a little below the tail of the west bank and near the westerly shore of the channel; that is, when near buoy No. 13.

I am satisfied that the place where the bark was cast off has been put by the libelant's witnesses much too near buoy No. 8 and the easterly side, and that it was not to the southward of the upper middle buoy, (No. 14,) north-east of the center of the channel. It was probably about half a mile to the northward of buoy No. 14. The testimony of several disinterested witnesses confirms this; and the bark's reaching buoy No. 8 and passing to the westward of it, under the little sail she made use of, shows that she undoubtedly reached it by coming from the north-west, or north north-west. Had she come down along the easterly side of the channel so as to round the Elbow to the westward of buoy No. 8, there is no reason why she should not have gone down the Swash channel in the same manner, instead of grounding as she did. Having been cast off, as I find,

somewhat to the northward of buoy No. 14, the bark had two courses open to her: either to anchor, or to make sail in the attempt to proceed to sea. In that position I find nothing in the evidence to indicate that she could not have anchored with safety. The pilot chose the other course, of attempting to proceed to sea. The topmast stay-sails, the jib, the spanker, and fore and main top-sails were all set, or most of them, it would seem, before reaching buoy No. 8, though there is a little difference in the testimony of the brig's witnesses on this point. The spanker, however, was taken in, and the main top-sail was blown away before reaching No. 8. The evidence shows that the gale at this time was very violent, marking at the Equitable building 40 miles an hour; between 11 and 12, 41 miles; between 12 and 1, 44 miles. I cannot satisfactorily make out from the pilot's testimony why, after setting the spanker, the foresail was not set, so as to obtain sufficient canvas to make the bark manageable, unless it was by reason of the violence of the gale, which he found greater than he had recognized when the tug cast off. According to his own testimony, buoy No. 8 was not reached for some 20 minutes after the tug had left; and that time, he says, was sufficient to set sail enough to make the bark manageable and follow down the Swash channel. If this view be correct, the proximate cause of the bark's grounding was an error of judgment; I do not say a blamable error, but an error of judgment, nevertheless, in undertaking to make sail and proceed to sea in a gale of unusual violence, and finding only too late that he was unable to do so in time to avoid the Romer shoals, instead of anchoring at once, as he might safely have done when cast off.

The tug can be held liable only upon proof of negligence; that is, a want of such reasonable skill and care as the circumstances demanded. In the case of *The Margaret*, 94 U. S. 494, 497, the court say:

"She was not an insurer. The highest possible degree of skill and care were not required of her. She was bound to bring to the performance of the duty she assumed reasonable skill and care, and to exercise them in everything relating to the work, until it was accomplished." *The Niagara*, 20 FED. REP. 152; *The M. J. Cummings*, 18 FED. REP. 178.

On behalf of the libelants it is urged that when the tug arrived off lower quarantine, at the Elbow buoy, (No. 13,) at a quarter past 10, she was in a position to feel the full force of the gale; and that the anemometer shows that it was then blowing nearly as hard as it did afterwards; and that her pilot ought to have anticipated the greater roughness of the sea further down, and that his boat would be unable to live in it, and was therefore chargeable with want of due care and skill in continuing on beyond buoy No. 13. But since I have no doubt that the bark was in fact cast off above buoy No. 14, she would have gained little or nothing from being cast off at some other point further to the northward, between buoys No. 14 and No. 13. She would have had no wider space to leeward and no better anchorage ground; and

with the intention which her pilot had of taking her out to sea, it was to her evident advantage that the tug should take her as far as possible; and it was the duty of the pilot of the tug to do so, so long as he did not thereby deprive the bark of the alternative of anchoring in safety, if that should be judged necessary.

The evidence satisfies me entirely that the tug did continue towing up to the very last moment that safety to herself and to the lives of those on board of her would permit. No negligence can be attributed to the tug in starting at the time she did. The weather bureau shows that from 7 to 9 the wind abated from 37 miles to 30; between 9 to 10, from 30 to 29; while after they had started, between 10 to 11, it increased again from 29 to 40 miles. In the lee of Staten island, at the time of starting, the wind appeared to be even much less than it actually was. The pilot of the tug not being chargeable with negligence in starting out, and as he cast off under the undoubted compulsion of imminent danger from perils of the seas, and at a place that afforded the bark a fair opportunity and a fair option either to anchor or to continue on under sail, as her pilot might deem expedient, I cannot find any negligence established against the tug, and the libel must therefore be dismissed.

PREMUDA v. GOEPEL.¹

(District Court, S. D. New York. March 14, 1885.)

CHARTER—UNSEAWORTHINESS OF VESSEL—INSURANCE COMPANIES—JUDGMENT OF EXPERTS.

The libelants chartered their ship, the P. B., to the respondents to carry oil to Trieste, and in the charter-party the ship was warranted to be seaworthy. The respondents applied to several insurance companies here and in Europe for insurance on the cargo, but after an inspection by the surveyor of one of the principal marine insurance companies, who reported the vessel unseaworthy, the companies generally refused, and the respondents were unable to obtain insurance, whereupon they threw up the charter, and the owner brought suit against the charterers for the breach of contract. The vessel took another charter and performed the voyage in safety. *Held*, that the warranty of seaworthiness is a warranty that the vessel is in such a fit condition for all the ordinary hazards of the contemplated voyage as to be approved seaworthy in the judgment of impartial and experienced men versed in the business; that the test is not whether the vessel may possibly make one or several voyages without foundering, but whether she is so staunch in her character as to approve herself fit for navigation in the eyes of competent men; that in this case, in view of the almost unanimous refusal to insure on the part of the insurance companies, who are so experienced and competent, and of the direct evidence of serious defects in her hull, the respondents were justified in abandoning the charter; and the libel should be dismissed.

In Admiralty.

This libel *in personam* was filed to recover damages for the respond-

¹Reported by R. D. & Edward Benedict, Esqs., of the New York bar.

ents' breach of a charter-party, in refusing to load the ship Podesta Bazzoni, on the alleged ground of unseaworthiness. The vessel belonged to Trieste. She came to this country in ballast, and arrived at Delaware breakwater in June, where she was left by her owner, who came to New York, and through brokers chartered her to the respondents for a voyage from New York to Trieste to carry 8,000 cases of petroleum. At the time of the charter it was stated to the charterers that she was classed as "A 1½" in the American Lloyds; but this being regarded as a low rank for insurance purposes, the charterers preferred that statement of classification to be omitted from the charter-party; and instead the word "seaworthy" was inserted in writing among the warranties of the owner, no class of rating being stated. The charterers had no previous opportunity of inspecting the ship. On applying for insurance of the intended cargo, difficulty was found on account of the unsatisfactory rating of the ship. On her arrival an inspection was made by the surveyor of one of the principal marine insurance companies, who reported about one-third of her deck-beams in her upper and lower decks, between the fore and mizzen masts, materially decayed; defects in a number of the knees; and the water-ways too much open to admit of caulking; and the defects concealed. She was, accordingly, reported by him as unseaworthy, and insurance was refused. Various other applications were made for insurance in this country, and also by telegraph to insurers in London, Rotterdam, Hamburg, and Trieste. None could be obtained, except on one-fourth of the cargo by the Phoenix company here, and one offer abroad to take one-fifth if the other four-fifths could be placed, which the charterers, with all their efforts, were not able to do. These negotiations and efforts occupied the time from June 30th, when the vessel had arrived in New York and reported her readiness to receive the cargo, to the twentieth of July, when the charterers gave their final refusal to load the vessel. In the mean time repeated requests had been made to the captain to have certain repairs put upon the vessel in dry-dock. The charterers, for that purpose, had offered to advance a portion of the freight. These offers were refused, as well as any repairs, the captain claiming that the vessel was seaworthy, and that any repairs desirable could be made cheaper at Trieste. During this time the market for freight was a rising one. The respondents subsequently shipped the same cargo by another vessel at an increased freight of \$3,200; while the vessel, after this refusal, proceeded to Philadelphia, where she obtained a similar cargo at an increased freight of \$1,600, which in the libel is offered to be offset against claims for demurrage during the delay the ship was put to in this port, and for her expenses in coming and going, until her subsequent charter, amounting, over and above this offset, to \$5,262.90. The cargo mentioned in the charter was of the value of about \$40,000.

Beebe, Wilcox & Hobbs, for libellant.

Jas. K. Hill and Wing & Shoudy, for respondents.

Brown, J. The charter-party contains a warranty that the vessel shall be "seaworthy, and in all respects tight, staunch, strong, and every way fitted for such a voyage." This is not a warranty that the charterers could get insurance, but it is a warranty that the vessel was insurable; that is, a proper subject for insurance at the ordinary rates for such a cargo and such a voyage. *The Vincennes*, 3 Ware, 171, 178. The fact that certain insurance companies refused insurance is not, indeed, conclusive evidence that the ship was not seaworthy; nor is the fact any more conclusive that the ship was seaworthy, that she made a subsequent voyage without foundering. Seaworthiness is, indeed, a fact to be ascertained and determined like any other question of fact. Questions of seaworthiness arise mostly after a loss has happened. But where a well-grounded suspicion of unfitness arises before loading, under a warranty of seaworthiness, a merchant is not required to put his cargo on board and run the risk of her foundering, before determining whether the ship is seaworthy or not, or whether the warranty in the charter-party is complied with. The question must be determined beforehand upon the judgment of those most competent to decide. Such a warranty, moreover, has reference to the necessities of business, and to the universal if not necessary practice of insuring cargoes. Practically, therefore, the warranty of seaworthiness is a warranty that the vessel is in such a fit condition for all the ordinary hazards of the contemplated voyage as to be approved as seaworthy in the judgment of impartial, competent, and experienced men versed in that business. There is no other possible way in which the charterer can determine such a question, or decide whether he may safely load the vessel, or whether he is bound to load her. Such is the practical test which the charterer has the right to apply, and which the ship must bear, or else the charter may be rightly thrown up.

In this point of view, the almost unanimous refusal of the several insurance companies to insure the cargo upon this vessel, not being limited to rate, becomes very strong presumptive evidence of the unseaworthiness of this vessel in the judgment of those most especially called upon to examine and determine such questions. This was followed up by further proof of a careful examination by a surveyor sent for the purpose to determine whether insurance should be taken or not. There is no reason to infer any bias in this case against the ship. The business of insurers is to insure all vessels fit for insurance. There are the same competitions in this business as in others. The examination disclosed a greater amount of decay in the essential parts of the ship than Lord ELDON, in the case of *Douglas v. Scougall*, 4 Dow, 269, considered undoubted proof of unseaworthiness. On this examination the ship's carpenter accompanied the surveyor, and made the borings testified to; and neither he nor any other witness has been called to qualify the surveyor's testimony as to the defects pointed out.

Much additional testimony was given upon this subject on the question of seaworthiness, all of which I have considered; but in my judgment it does not materially affect what has been said above. The test is not whether the ship may possibly make one or several voyages without foundering, but whether she is so staunch in her character as to approve herself as fit for the navigation contemplated, in the judgment of competent men, according to the customs and usages of the port or country; and this, clearly, this vessel was not in a condition to do. *The Vesta*, 6 FED. REP. 532; *The Titania*, 19 FED. REP. 101, 105-107; *Tidmarsh v. Washington Ins. Co.* 4 Mason, 439, 441; *The Orient*, 16 FED. REP. 916; *French v. Newgass*, 3 C. P. Div. 163.

In this case there is no possible suspicion that the respondents were actuated by any other motives than to avoid great risk of loss through their inability to obtain insurance of the cargo, notwithstanding great exertions to do so. It was greatly to their interest to load the vessel, if she were a fair risk, since freights were rising; and they finally effected a new charter in place of this one at a greatly increased cost. The refusal of insurance had reference solely to the unsatisfactory condition of the ship. To hold a charterer, under such circumstances as appear in this case, bound to load the ship and become his own insurer, would in my judgment defeat, in a great measure, the very purpose of the covenant of seaworthiness, and impose upon the charterer an alternative and a risk never intended by this contract. The case of *The Vesta*, *supra*, is applicable here, and commends itself to my judgment. I do not impugn the good faith of the master in his belief that this vessel could actually cross the Atlantic in safety, as she actually did. Nevertheless, I am quite satisfied that she was not in such a sound and staunch condition as to meet the approval of competent and impartial judges as to seaworthiness, and that the respondents were therefore justified in refusing to load her.

The libel must therefore be dismissed, with costs.

THE TITAN.

THE HILLS.

(Circuit Court, S. D. New York. March 20, 1885.)

1. COLLISION—NEGLIGENCE OF PILOT ACTING AS MASTER—INJURY TO DECK HAND—FELLOW-SERVANTS.

A deck hand who was not on duty, and had no part in the navigation of the vessel, may recover for an injury caused by a collision due to the negligence of a pilot who was at the time in command; following *Chicago, M. & S. P. Ry. Co. v. Ross*, 5 Sup. Ct. Rep. 184.

2. SAME—LOOKOUT.

It is only when a lookout would have been of no service in guarding against a collision that his absence can be excused.

3. SAME—PRESUMPTION AS TO OBSERVANCE OF RULES OF NAVIGATION.

While ordinarily a vessel has a right to assume that another vessel is not derelict in the observance of the rules of navigation, this presumption is not to be carried so far as to exonerate her from ordinary precautions on her own part, or to excuse her from the consequences of a mistake, when, by slight exertion and without any peril to herself or other vessels, she could certainly avoid hazard.

4. SAME—LIGHTS—OBSERVATION.

The rule requiring lights may as well be disregarded altogether as to be only partially complied with, and in a way which fails to be of any real service in indicating to other vessels the position and course of the one carrying them.

In Admiralty.

Owen & Gray and Peter Cantine, for appellants.

Peckham & Tyler, for appellee.

WALLACE, J. Upon the proofs it seems perfectly clear that both the Titan and the Hills were in fault for the collision by reason of which the libellant was injured. The collision took place about 7 o'clock in the evening of September 22, 1882, in the Hudson river, about 1,000 feet out from the Jersey shore, somewhat above the Pavonia ferry slip. The tide was ebb, running about three miles an hour; the wind was light, and the night was gray but fairly clear. The Titan was proceeding up the river bound for Hoboken, against the tide, at a speed of about four miles an hour, on a line with the westerly shore but heading in somewhat towards the shore, towing the float Mohawk, which was heavily loaded with two rows of railway cars, and was lashed to her starboard side. The float as lashed projected some 20 feet beyond the bow of the Titan, and had an umbrella or shed roof which sloped on each side to within about six inches of the top of the cars. This umbrella obscured the green light on the starboard side of the Titan so that it did not show a uniform and unbroken light from right ahead to two points abaft the beam on the starboard side, and there was no green light on the starboard side of the float. The Hills had left the New York side at Twenty-third street bound for Jersey City, light, and proceeded on her course down the river and bearing to the westward at a speed of about 15 knots with the tide. She had no lookout, but her pilot, who was acting at the time as master, and was at the wheel in the pilot-house, saw the Titan when nearly half a mile away. He was able to see the vertical white lights of the Titan and the white light of the float, but he was unable to see the green light of the tug because it was obscured from view by the cars and the umbrella of the float. Not seeing the green light he assumed the tug and float were going down the river, and kept rapidly approaching them at full speed. Soon after seeing the tug and float he observed the ferry-boat Gould, which had left her ferry at Hoboken and was coming by to the westward of the Titan about 150 feet away, and passed across the Titan's bow, but as he supposed across her stern. The Gould gave a signal of two whistles to the Hills and the Hills responded by a like signal. The Titan supposing the signal of the Hills in answer to the Gould was a signal to herself answered the Hills signal with two whistles, but the pilot of the Hills supposed

these were a signal to the Gould. The Hills starboarded somewhat for the Gould and passed her on her port side a couple of hundred feet away, and then her pilot when within 100 feet of the Titan, still assuming that the Titan was going down the river and seeing that a collision with her was imminent, hard ported his wheel to go under her stern. The result was that the Hills came into collision with the bow of the float, and the shock was so severe that the libellant, who was on the Hills, was thrown down and his skull was fractured. The Hills could have avoided the collision with proper effort at the time she came abreast the Gould, being then about 100 yards away from the Titan. She maintained her full speed from the time her pilot first saw the Titan to the time of the collision.

If the pilot in charge of the Hills was warranted in assuming that the Titan was going down the river as he was overtaking and intending to pass her, he assumed the responsibility of passing her safely, and unless he allowed ample distance for the purpose, he was bound to slacken speed, and if need be to reverse in order to avoid collision. In this behalf it was his duty to maintain a diligent observation in order to govern himself as circumstances might require. Instead of doing this, he found his vessel within 100 feet of the Titan, bearing upon her float amid-ships, and sought to save a collision by the maneuver *in extremis* of hard porting his wheel. For a distance of nearly half a mile his view was unobscured, except for the brief interval when the Gould was between him and the Titan. Probably he relied upon his first observation when he concluded the Titan was going down the river, and relying upon this he permitted his attention to be distracted by watching the Gould. Undoubtedly the appearance of the Titan and her float with their vertical white lights apparently in a cluster, while the vessels were approaching each other, with no background by which to determine readily in which direction the lights were moving, and no green or red light to indicate that she was approaching, was well calculated to mislead the pilot of the Hills. But it seems impossible to believe that the real situation would not have been discovered if proper diligence had been exercised. The Hills should be held in fault for not having a lookout.

It is only when a lookout would have been of no service in guarding against a collision that his absence can be excused. The situation here was peculiarly one in which the observation and judgment of a lookout might have been useful. It was one of those doubtful situations in which different points of observation might suggest different conclusions and in which two men might form a different opinion from the same stand-point. There was enough in the rapidity with which the vessels were approaching each other to attract attention and suggest the probability that they were not going in the same direction. The Hills was also in fault for pursuing such a high rate of speed at night, and with the tide, upon waters customarily traversed by numerous vessels, when she was rapidly nearing a tow.

The situation required a high degree of vigilance and circumspection, yet she disregarded every rule of prudent navigation in reliance upon an hypothesis which might be erroneous, and proved to be so. While ordinarily a vessel has a right to assume that another vessel is not derelict in the observance of the rules of navigation, this presumption is not to be carried so far as to exonerate her from ordinary precautions on her own part, or to excuse her from the consequences of a mistake, when by a slight exertion and without any peril to herself or to other vessels she could certainly avoid hazard. There was ample room, plenty of time, and no intervening obstacles in the way of perfect safety if the Hills had slackened speed while she was passing the Gould. After this, it was obvious that the danger of collision with the Titan was imminent, and she should have been stopped and reversed. Instead of doing this, the pilot took the chances of a maneuver which could only be justified by the certainty that he was correct in supposing the Titan was going away from him.

The Titan was in fault for so locating her starboard light that it was not visible, as required by the rules. No doubt is entertained that it was obscured by the umbrella of the float and by the cars on the float forward of the place on the tug where it was located, so that it was not visible to the pilot of the Hills. The rule requiring lights may as well be disregarded altogether as to be only partially complied with, and in a way which fails to be of any real service in indicating to another vessel the position and course of the one carrying them.

The libellant was a deck hand upon the Hills, but was not at the time on duty, and had no part in her navigation. The pilot was in command. Within the case of *Chicago, M. & St. P. Ry. Co. v. Ross*, 5 Sup. Ct. Rep. 184, decided recently by the supreme court, he was not a fellow-servant of the libellant; and the latter is entitled to recover for the injuries he sustained by the collision against the Hills as well as the Titan. Treating the pilot as the master, he was responsible for the management and navigation of his vessel. He was negligent in failing to have a lookout stationed where he ought to have been, and negligent otherwise. The collision was solely the result of his negligence, and the libellant had no part or lot in it.

The decree of the district court is affirmed, with interest and costs of the appeal.

KELLY v. HOUGHTON.

(Circuit Court, D. California. April 20, 1883.)

1. REMOVAL OF CAUSE—ALLEGATION OF CITIZENSHIP.

As a party may be a resident of a state without being a citizen thereof, a simple averment that a party seeking to remove a cause is a resident of a certain state is not sufficient.

2. SAME—REV. ST. § 639, CL. 2.

Rev. St. § 639, cl. 2, has been repealed by the act of March 3, 1875; following *Hyde v. Ruble*, 104 U. S. 407.

On Motion to Remand.

SAWYER, J. This case will have to go back to the state court, on the ground, if on no other, that it is not alleged in the petition or in the pleadings of what state the plaintiff is a citizen. It is alleged that Wetherbee is a citizen and resident of Boston, Massachusetts, but it does not allege of what state the plaintiff is a citizen. It is averred that he is a resident, but does not state that he is a citizen, of California. He may be a resident and not a citizen of California. It is defective in that particular. The petition to remove the case is expressly based on clause 2, § 639, of the Revised Statutes, and the supreme court held last winter, in the case of *Hyde v. Ruble*, 104 U. S. 407, that that section is repealed by the act of 1875. Thus the petition to remove is not based upon an act in force at the time. The application to remove, in express terms, is limited to section 639, which the supreme court hold is repealed.

On these two grounds the case must be remanded. I am not certain that it ought not be remanded also on the other ground that the motion to remove was not made in time; but an opinion on that point I shall reserve till some other occasion. I am inclined to think, however, where the rules of the court provide that a calendar shall be made up, and cases go upon the calendar for trial at the beginning of each month, that each month ought to be regarded as the beginning of a new term. There are no technical terms of the courts under the present constitution and laws of California. Where the rules provide that a trial calendar shall be made up at the beginning of each month, I am inclined to think that the several months, when new calendars are made out and taken up, should be regarded as terms within the meaning of the act of congress. Now this case passed over a good many of such monthly terms after suit was brought, before the application to remove was made. It is true that the law does not contemplate that there shall not be reasonable time for preparing the pleadings and forming the issues, settling preliminary questions of law, and so forth; but it does intend that there shall be reasonable expedition, and that attorneys shall bring on a trial as soon as can reasonably be done in the regular course of proceedings in court, and not delay. If they so delay beyond the time when it

could be brought to issue, and tried in the regular course of proceedings in the court, it is their fault, and not the fault of the law or of the court. This case went over from month to month, for many months, while the preliminary proceedings—demurrers and amended proceedings—were pending and dragging slowly along, and I am not certain that the case ought not to be remanded on that ground.

The case is remanded, with costs.

PERKINS v. HENDRYX and others.

(Circuit Court, D. Massachusetts. April 9, 1885.)

1. EQUITY PRACTICE—BILL FOR DISCOVERY AND GENERAL RELIEF—ADEQUATE REMEDY AT LAW—REMOVED CASE.

Complainant filed a bill in the state court, alleging that defendant had been granted a license to make and sell bird-cages, patented by him, and praying that defendant be compelled to disclose the amount of license fees due, and the number of cages made and sold since a date named, and that complainant be granted such other and further relief as his case might require. The case was removed to the circuit court, where defendant demurred to the bill. *Held*, (1) that, so far as the bill was one for general relief, the court had no jurisdiction, as there existed an adequate and complete remedy at law; and (2) that, so far as it was a bill of discovery, it was open to the objection that it contained no allegation that a suit at law had been brought, or was about to be brought, in which the discovery was material.

2. REMOVAL OF CAUSE—PRACTICE ON REMOVAL—CASE AT LAW OR IN EQUITY—REPLEADER.

Where the suit in the state court unites legal and equitable grounds of relief or of defense, as authorized by the state statute, it may, in the federal court, be recast into two cases, one at law and one in equity, and in such a case a repleader is necessary.

On Demurrer to Bill.

J. McC. Perkins, for plaintiff.

J. L. S. Roberts, for defendants.

COLT, J. This bill in equity was originally brought in the state court and removed to this court. The present hearing was had upon a demurrer to the bill.

The bill alleges, in substance, that the complainant, being the owner of an undivided half interest in a certain patent for hanging bird-cages, granted an exclusive license, during the life of the patent, to the defendants to manufacture and sell the same; that, in consideration thereof, the defendants agreed to pay the complainant one cent for each bird-cage spring made and sold by them under said license; that certain sums of money, as license fees, were paid to the complainant on the first day of each and every month, from October, 1876, down to January 1, 1883, but that the complainant has no means of knowing whether or not the defendants have rendered true accounts of the number of springs sold; that the complainant has no means of know-

ing the number of springs sold since January 1, 1883, but has reason to believe that a much larger number has been sold since that date than before, and that the full sum of \$2,000 is due complainant. The bill prays a disclosure of all license fees due complainant since January 1, 1883, and of all bird-cage springs made and sold by defendants from October 4, 1878, to January 1, 1883, and for such other and further relief as the case may require.

The main object of the bill is for discovery; but, having added a prayer for general relief, it becomes a bill for relief as well. Story, Eq. Pl. § 313. So far as the bill is one for relief, it is clear that this court has no jurisdiction to grant it. The action is brought to enforce a contract, and there exists a plain, adequate, and complete remedy at law. So far as the bill seeks a discovery, it is open to the objection that there is no allegation that a suit at law has been brought, or is about to be brought. In order to support a bill of discovery it must appear that the discovery is asked for the purpose of some suit brought, or intended to be brought, otherwise it will not be entertained, as courts of equity grant discovery to aid some legal proceeding. Story, Eq. Pl. § 321. If a bill in equity seeks relief which the court has no power to grant, and also seeks a discovery, the defendant may demur to the whole bill, if it does not aver that a suit at law is pending, or is about to be brought, in which a discovery may be material. *Mitchell v. Green*, 10 Metc. 101.

But the complainant contends that this case having been removed from the state court, and that court having authority to grant relief in the form here asked for, this court, under the statutes relating to the removal of causes, can proceed and give the same relief. It is sufficient here to observe that in the United States courts the distinction between legal and equitable causes of action is still maintained, and that this applies to causes removed from the state courts, as well as to causes originally brought here. Where the case made by the pleadings in the state court is, in its nature, a law action, it must, when removed to the federal court, proceed as such. Where the suit in the state court is, in its nature, a suit in equity, it must proceed as an equity cause on its removal into the federal court. Where the suit in the state court unites legal and equitable grounds of relief or of defense, as authorized by the statutes of the state, it may, in the federal court, be recast into two cases, one at law and one in equity, and, in such a case, a repleader is necessary. Dill. Rem. Causes, §§ 43, 44, 45.

The demurrer is sustained, but without prejudice to the complainant to amend or replead in this court.

HAMILTON, Trustee, v. WALSH and others.*(Circuit Court, D. Rhode Island. April 16, 1885.)***INJUNCTION TO STAY PROCEEDINGS IN STATE COURT—REV. ST. § 720.**

While an action of replevin, instituted by H., was pending in the state court, he filed a bill in equity in the United States court to reform the chattel mortgage under which he claimed the property. Judgment was rendered against him in the state court, and suit brought on the replevin bond, whereupon he filed a supplemental bill in the United States court, praying an injunction. On motion for a preliminary injunction to stay proceedings in the suit on the bond until final decree on the bill, *held*, the injunction could not be granted.

On Motion for Preliminary Injunction.*Wilson & Jenckes*, for complainant.*Wm. H. Baker*, for respondent.

CARPENTER, J. The complainant commenced an action of replevin in the state court of Rhode Island, wherein he based his title to the property replevied on a certain chattel mortgage. The respondent denied that the mortgage had the effect to convey the property in dispute, and the decision of the suit depended on the interpretation which should be given to the terms of the mortgage. While that suit was pending, the complainant filed his bill in this court, in which he prays a reformation of the terms of the mortgage. The suit in the state court then proceeded to final judgment for the defendant, and he thereupon commenced suit on the replevin bond in the state court. The complainant now files his supplementary bill in this court, in which he alleges the commencement and prosecution of the suit on the replevin bond, and prays an injunction; and he now moves for a preliminary injunction to restrain the respondent from prosecuting the suit on the bond until final decree on the bill for reforming the mortgage.

The statute, in terms, prohibits the granting of an injunction to stay proceedings in a state court, except when authorized in bankruptcy proceedings. Rev. St. § 720. This statute has been held, however, to apply only to cases where the proceedings are first commenced in the state court. *Fisk v. Union Pac. R. Co.* 10 Blatchf. 518; *French v. Hay*, 22 Wall. 250; *Dietzsch v. Huidekoper*, 103 U. S. 494. The complainant points out that the suit on the bond has been commenced since his original bill was filed in this court; and he claims that, upon the rendering of final judgment on the replevin writ, the state court ceased to have jurisdiction of the subject-matter, and that the proceeding in that court was at an end. I cannot agree with this view of the case. The action on the bond is for the purpose of enforcing, or perhaps more properly of securing, the fruits of the judgment in the replevin suit, and is the appropriate process for that purpose. It takes the place of the levy of a writ of execution in an action on the case; and it must for this purpose be taken to be part of the original proceeding in the state court.

The motion is denied.

MEANS, Assignee, v. MONTGOMERY and others.

(Circuit Court, W. D. North Carolina. December Term, 1884.)

1. FRAUDULENT CONVEYANCES—PREFERRING CERTAIN CREDITORS IN ASSIGNMENT.

At the common law an insolvent debtor has the right to make an assignment in trust for the benefit of his creditors, and he may give a preference to *bona fide* creditors to whom he feels under special and honest obligations for previous favors conferred, or for any other honest and meritorious consideration.

2. SAME—RULE IN NORTH CAROLINA—EVIDENCE—QUESTION FOR JURY.

The courts in North Carolina have always been very cautious in finding fraud in a written instrument *as a matter of law*, and where presumptions of fraud arise upon *the face of the deed* they have uniformly held that the parties are entitled to introduce evidence to explain suspicious transactions and rebut presumptions of fraud; and in cases at law such questions must be determined by the jury.

3. SAME—DEED OF TRUST FRAUDULENT AS MATTER OF LAW, WHEN.

To render a deed of trust fraudulent as matter of law, there must appear upon its face some plain and express provision for the personal benefit of the grantor, or some stipulation which is wholly irreconcilable with an honest and legal purpose of paying, within a reasonable time, the debts of the grantor.

4. SAME—RETENTION OF POSSESSION WITH POWER OF DISPOSITION RENDERS DEED VOID, WHEN.

If there is a provision in a duly-registered deed of trust that the property conveyed shall remain in the possession of the grantor, and that *he shall have the control and disposition of the same*, the questions whether the deed is fraudulent on its face, or is presumptively fraudulent, depend upon the purposes and facts that clearly appear from a fair construction of the express terms of the deed. If provisions are made in the deed for the continuance of the possession of the property in the grantor for an unreasonable time, or for the express benefit of the maker or his family, or for any other purpose which is manifestly wrong or inconsistent with the honest exercise of his legal right of making preferences among his creditors, then the deed is fraudulent in law on its face. Where the dishonest purposes of the grantor are not expressly declared in the deed, or cannot be clearly inferred from the terms and acts set forth, but the terms and acts afford reasonable ground to suspect an evil and unlawful intent, then the parties interested in sustaining the deed must rebut the presumptions of fraud which arise from a fair construction of the instrument. If the provisions of the deed manifest a real purpose of making satisfaction to *bona fide* creditors, in the order mentioned, in a reasonable time, in a convenient manner, with no unlawful intent towards other creditors, and without any substantial benefit to the grantor, then no presumption of fraud can arise on the face of the deed.

5. SAME—CHARACTER OF BUSINESS.

There is nothing suspicious or inconsistent with honesty and fair dealing, or prejudicial to the legal rights of creditors, in a provision in a deed of trust allowing the grantor of a stock of miscellaneous merchandise, which is not consumable in the use, to remain in possession and continue to sell the goods for cash, and deposit the proceeds under the supervision and control of the trustee, with a view to wind up the business in a convenient time, to the best advantage of the creditors.

6. SAME—SURPLUS TO BE PAID GRANTORS.

A provision in a deed directing the surplus, after payment of debts, to be paid over to the grantor, is not fraudulent, and does not give rise to a legal presumption of fraud, as such rights would arise to the grantor by implication of law.

7. SAME—PREFERENCE.

An insolvent debtor, or one so greatly embarrassed that an immediate sale under execution would necessarily result in injury to many of his creditors, who executes a deed of trust for the benefit of all of his creditors, or to give a preference to his sureties, to prevent one creditor by legal process from obtaining full satisfaction of his debt, to the injury of other creditors, commits no fraud.

8. SAME—SCHEDULE OF DEBTS AND CREDITORS.

Under the statute in North Carolina, or at common law, it is not necessary for a grantor in a deed of trust to set forth a schedule of the property conveyed, where there is a sufficient general description of such property, or to attach to such deed a schedule of debts and creditors.

9. SAME—RELATIONSHIP OF PARTIES.

A person who assails a conveyance on the ground of the relationship of the parties must show that the debts secured are not *bona fide*, or that there is something feigned or simulated, or that the parties were influenced by some sinister motive.

10. SAME—FRAUDULENT INTENT.

The burden of proof is upon a party attacking such a deed to establish a fraudulent intent.

11. SAME—CONCURRENCE AS TO INTENT.

To render a deed founded on a valuable consideration void for fraud, both parties must concur in a fraudulent intent, or the grantee must have notice of such intent, or must in some way be privy to the wrongful design.

12. SAME—DEED SUSTAINED.

Upon examination of the evidence and circumstances of this case, and upon a construction of the deed in controversy, held that the deed should be sustained.

In Equity.

Jones & Johnston and A. Burwell, for plaintiff.

Bynum & Grier and Platt D. Walker, for defendants.

DICK, J. The questions of law involved in this case have been frequently debated and considered in the state and national courts, and there has been much fluctuation of opinion and conflict of decision. This want of uniformity of judicial decisions has been produced to a considerable extent by the peculiar facts and circumstances of the adjudged cases, by diversity of views as to public policy, and the varying innovations made in the doctrines of the common law by statutes of fraud in the several states.

The counsel on both sides have carefully prepared printed briefs and arguments, in which they have cited, arranged, and commented upon the leading authorities on the subject. The decisions cannot be reconciled, and I will not attempt to follow the counsel in the course pursued in their elaborate arguments, or cite in this opinion the authorities relied upon, as they are so fully set forth in printed briefs.

In forming my opinion I have been influenced by what I regard as well-settled principles of justice and sound public policy, and have endeavored to follow the decisions of the supreme court of this state, as far as such decisions are applicable to the facts and circumstances of this case. Upon questions of the character involved in this controversy, I feel bound to follow the decisions of the highest court of this state, and I do so willingly, as I concur in the opinions expressed.

The plaintiff, as assignee in bankruptcy of the defendant bankrupts, *Montgomery & Dowd*, seeks to have a deed declared invalid as fraudulent in law on its face, or as fraudulent in fact, because executed with a fraudulent intent on the part of the bankrupt grantors; and that such fraudulent intent was known and acquiesced in by the defendant grantees, or might have been ascertained by them upon

the reasonable inquiry which they ought to have made under the admitted facts and circumstances of this transaction.

The deed of trust was executed on the twenty-fourth of April, 1876, and was recorded on the eleventh of July, 1876. The petition in bankruptcy was filed against the defendant grantors on the twenty-first of December, 1876. As the deed was executed more than six months before the filing of the petition in bankruptcy, the provisions of the bankrupt act as to matters of fraud in the execution of deeds giving a preference to creditors do not apply, and this case must be determined by applying the doctrines of the common law as settled in this state. The deed in trust purports to convey all the stock of merchandise and firm property of the grantors to the defendants A. B. Davidson and C. Dowd, in trust for all the creditors of the firm, but gives a preference in payment to certain specified *bona fide* creditors. It does not appear that the grantors had any other property that could be reached by process of execution.

At the common law an insolvent debtor has the right to make an assignment in trust for the benefit of his creditors; and he may give a preference to *bona fide* creditors to whom he feels under special and honest obligations for previous favors conferred, or for any other honest and meritorious consideration. Most men feel that they are under strong moral obligations to indemnify and save harmless their sureties against liabilities incurred to enable them to carry on their business; and if such liabilities are *bona fide*, and such indemnity is made without any object of private advantage and with a legal and honest purpose, then there are no elements of fraud in such a transaction. Indemnity to sureties is usually afforded by securing the debts upon which they are liable; and the mere fact that the sureties to *bona fide* obligations are relatives of the principal debtor and grantor should not throw even a suspicion of fraud upon the transaction.

Nearly every deed of trust has the effect of delaying creditors in the enforcement of their claims by the ordinary process of the law, but such hindrance and delay is regarded by the law as incidental and unavoidable, and not as fraudulent, within the meaning of the statutes against fraudulent conveyances. By reference to many decisions it will be found that the supreme court of this state has always been very cautious in finding fraud in a written instrument as a matter of law; and in all cases where presumptions of fraud arise upon the face of the deed, the court has uniformly held that parties are entitled to introduce evidence to explain suspicious transactions, and rebut even strong legal presumptions of fraud, and in cases at law such questions must be determined by a jury. To render a deed of trust fraudulent as matter of law there must appear upon its face some plain and express provision for the personal benefit of the grantor, or some stipulation which is wholly irreconcilable with an honest and legal purpose of paying, within a reasonable time,

the debts of the grantor. Under the registry laws of this state deeds of trust and mortgages are required to be registered in the proper county before they are valid as against creditors and purchasers. The object of registry laws is to enable debtors to make an honest and beneficial use of their property in securing creditors and indorsers in the course of business; to prevent secret incumbrances and transfers of property; and to repel presumptions of fraud which might arise by the grantor's remaining in possession and dealing with property as apparent owner. Full notice is thus given of incumbrances and the purposes for which such deeds were executed, and no false credit can be gained by apparent ownership.

A deed of trust for the benefit of creditors is in the nature of a mortgage, and both are placed together in the provisions of our registry laws, and in many respects the same principles of law are applicable to both kinds of such conveyances. A regular mortgage of personal property is a transfer of the legal title upon condition as a security for the payment of a debt, or the performance of some other obligation; and if the condition is not complied with, the title of the mortgagee becomes absolute at law, and he has the right to take immediate possession.

A deed of trust is an assignment of property to a trustee for the purposes therein declared. It is usually made by a debtor who is in failing circumstances, with a view of securing all of his creditors equally, or giving some creditors a preference over others, and it is seldom practicable or prudent to make provision for the immediate sale of the property conveyed. In both kinds of conveyance the payment of the debts secured is usually deferred to some future day, and the mortgagor or trustor nearly always remains in possession until the mortgagee is entitled to have his money, or the trustee is bound by the terms of the deed to take possession of the property and make sale for the purposes of administering the trusts declared. This retaining of possession by the grantor is not sufficient evidence of fraud, as such conveyances are not valid against creditors and purchasers until they are registered, and registration gives publicity and notice of the transaction. Registration is generally held by the courts to be equivalent to the delivery of possession to the mortgagee or trustee.

In the absolute sale of a personal chattel, if the vendor retains the possession, the transaction is generally regarded as fraudulent as to persons who have been misled to their prejudice by such apparent ownership. But the difference is a marked one between a conveyance which purports to be absolute and a conveyance which, from its nature and design, or by its express terms, leaves the possession in the grantor under certain declared restrictions and incumbrances.

If there is a provision in a duly-registered deed of trust that the property conveyed shall remain in the possession of the grantor, and that *he shall have the control and disposition of the same*, the questions whether the deed is fraudulent on its face, or is presumptively

fraudulent, depend upon the purposes and facts that clearly appear from a fair construction of the express terms of the deed. If provisions are made in the deed for the continuance of the possession of the property in the grantor for an unreasonable time, or for the express benefit of the maker or his family, or for any other purpose which is manifestly wrong or inconsistent with the honest exercise of his legal right of making preferences among his creditors, then the deed is fraudulent in law on its face. Where the dishonest purposes of the grantor are not expressly declared in the deed, or cannot be clearly inferred from the terms and acts set forth, but the terms and acts afford reasonable ground to suspect an evil and unlawful intent, then the parties interested in sustaining the deed must rebut the presumptions of fraud which arise from a fair construction of the instrument.

If the provisions of the deed manifest a real purpose of making satisfaction to *bona fide* creditors, in the order mentioned, in a reasonable time, in a convenient manner, with no unlawful intent towards other creditors, and without any substantial benefit to the grantor, then no presumption of fraud can arise on the face of the deed.

We will now proceed to apply these principles of law in construing the deed set forth in the plaintiff's bill. Among others, there are the following provisions:

"The said parties of the first part are to remain in possession of the said property and choses in action, and continue to sell the goods for cash only, and to collect under the direction and control of the parties of the second part; the proceeds to be deposited weekly in the Commercial National Bank of Charlotte, N. C., and applied, under the direction of the parties of the second part, to replenish the stock by such small bills as may be agreed upon, and to the payment of the debts of said firm as follows."

There is nothing suspicious or inconsistent with honesty and fair dealing, or prejudicial to the legal rights of creditors, in a provision in a deed of trust allowing the grantor of a stock of miscellaneous merchandise, which is not consumable in the use, to remain in possession, and continue to sell the goods for cash in the usual course of trade, and deposit the proceeds under the supervision and control of the trustee, with a view to wind up the business in a convenient time to the best advantage of the creditors. He is familiar with the business, understands the run of trade, and knows the best methods of dealing with his regular customers. Common experience has shown that the best means of disposing of an old and broken stock of merchandise is to replenish the stock to a small extent with new articles in frequent demand and staple commodities which are calculated to induce new trade and the continuance of former custom. I cannot see how the provisions which we are considering could result in injury to the creditors of the firm, as the best method known to common experience was provided for rapidly disposing of the trust property to the advantage of creditors, and the proceeds of sale are se-

cured by being deposited weekly in bank, to be applied under the direction of the trustees to the payment of debts. The trustees, by accepting the trusts declared in the deed, assumed the duty and liability of having them faithfully executed.

By the arrangements made the grantors became the agents of the trustees, and as such agents they were legally entitled to fair compensation for services rendered in winding up the business for the benefit of creditors, although there was no stipulation for that purpose in the deed. If the compensation allowed by the trustees was excessive, then a proper deduction can be made when an account is taken for the purpose of adjusting and administering the trusts. This subsequent matter of fact can in no way affect the validity of the deed as matter of law, or give rise to any legal presumption of fraud; but it may be considered as a circumstance tending to show a concurrence of fraudulent intent in the execution of the deed. The same rule applies to other transactions between the grantors and trustees subsequent to the execution of the deed. If such transactions have caused prejudice to the rights of creditors, the trustees may have incurred liabilities for which they may be held responsible to account upon their adjustment and settlement of the trust fund, and may afford some evidence of a secret and collusive agreement with the grantors at the time of the execution of the deed.

There is a provision in the deed about which I have had some difficulty in forming a satisfactory opinion. The grantors had a clear right to provide for the payment of the notes in the bank, or the renewals of the same, upon which the trustees were indorsers, and if they agreed to pay 12 per cent. interest upon such loans, in common fairness and honesty the agreed interest ought to be paid. I am not so well assured of their right to stipulate for the payment "of any other notes that may hereafter be given by said firm, and indorsed by said parties of the second part, or either of them." This provision seems to contemplate the continuance of the firm business for the benefit of the grantors. This provision is not fraudulent as matter of law, but gives rise to a presumption of fraud which, after careful consideration, I think, is rebutted by the facts and circumstances developed in the evidence in the cause.

The grantors believed that they were solvent at the time of the execution of the deed, provided they could sell their firm property at a fair value and realize a reasonable amount from the collection of accounts and notes due them. The depreciation of property, the dullness of the market, and the failure in collection of the debts due them disappointed their reasonable expectations, and they found in a short time that they were insolvent. I am satisfied that by the stipulation for future advances their purpose was to render their assets more available to satisfy the trusts declared, and that they did not contemplate any personal benefit until all their debts were paid. I am confirmed in this opinion by the fact that the grantors did not make any

new debts, but proceeded to reduce expenses and to sell their stock as rapidly as possible, with a view of winding up the business and paying their debts. The provision in the deed directing the surplus, after the payment of debts, to be paid over to the grantors is not fraudulent, and does not give rise to a legal presumption of fraud, as such rights would arise to the grantors by implication of law.

The last provisions in the deed, authorizing the trustees upon certain contingencies to take actual and personal possession of the goods, and make sales, etc., are not fraudulent, as they are not inconsistent with good faith towards the creditors, and are not so unreasonable or unusual in their character as to give rise to suspicion of wrong. Upon a careful consideration of the express terms of the deed, and the facts and circumstances which they set forth, I am of the opinion that upon a fair construction of the whole instrument it is not fraudulent in law. I am also of opinion that the legal presumptions of fraud which arise on the face of the deed have been fully rebutted by the evidence in the cause.

I will now proceed to examine and consider the allegations of the plaintiff, the answers of the defendants, and the evidence presented, for the purpose of determining the question of fact whether the deed was executed with a fraudulent intent on the part of the grantors, which was known and acquiesced in by the trustees. There is a well-settled rule of law that the burden of proving fraud in fact is upon the party who alleges it; and the proof is insufficient unless it creates a clear and full impression that the allegation is true. When legal presumptions of fraud arise on the face of a deed, then the party who claims under the deed must rebut such presumptions by satisfactory evidence, and his mere declaration of a want of fraudulent intent is not sufficient proof.

I will now consider the specification of the badges of fraud set forth in the brief, and forcibly urged in the argument of the counsel for the plaintiff:

(1) "The fact that the execution of the deed was concealed." (4) "Failure to record the deed for more than two months."

The evidence does not show any unusual effort to keep the execution of the deed from public notice. It was executed in the presence of a subscribing witness, who was not requested to keep the transaction a secret. The deed affected no one but the parties, and no one else had any interest in the matter. It deprived no creditor of any right until it was registered. The failure to register only enlarged the time for creditors to pursue the ordinary legal remedies for the collection of their debts. As to them, the deed had no valid existence until it was recorded, and they had no legal right to know of its existence until it affected their interests.

(9) "The deed made when the suit by Calvin Chestnut was pending against the assignors, and only recorded in time to anticipate the judgment in said suit."

A debtor who is unquestionably solvent, and has the means and resources from which enough might be realized to pay all of his debts, commits a fraud if he executes a deed of trust for the purpose of gaining time at the expense of creditors, in order to dispose of property to advantage and prevent a sacrifice by a sale for cash under process of law; but this rule does not apply to an insolvent debtor, or one so greatly embarrassed that an immediate sale under execution would necessarily result in injury to many of his creditors. Under such circumstances, it is an act of duty and not of fraud for a debtor to execute a deed of trust for the benefit of all creditors, to prevent one creditor, by legal process, from obtaining full satisfaction of his debt to the injury of other creditors. *Reed v. McIntyre*, 98 U. S. 511. The same principle will apply to a deed of trust in which the insolvent debtor honestly exercises his right at common law in giving a preference to sureties, or his *bona fide* creditors, whom he regards as worthy of such special favors. The honest exercise of a clear, legal right does not show an illegal intent.

The evidence shows that the defendant grantors were largely insolvent, and that they believed that they would be unable to meet their indebtedness if they were harassed with the costs and inconveniences of numerous suits, and their property was sacrificed by forced sales under legal process. They hoped to save their creditors from loss and themselves from financial ruin. They stipulated for no benefit for themselves until all the debts were paid, and their object seems to have been to make their property bring the best prices possible for the primary advantage of their creditors.

"No schedule of debts or of creditors attached to the deed, and no inventory taken."

Under the provisions of the bankrupt act bankrupts were required to set forth a schedule of all debts and creditors, and an inventory of their property, but I am not aware of any provision or principle of our state statute or common law that requires a grantor in a deed of trust to set forth a schedule of the property conveyed where there is a sufficient general description of such property, or to attach to such deed a schedule of debts and creditors. The debts and names of creditors who are in preferred classes are set forth in this deed, and then there is a general provision for all other creditors; and this is sufficient certainty of description for the purpose of the trusts declared.

It appears from the evidence that an inventory was taken, just before the deed was executed, in April, and another was taken some months afterwards. It seems to me that prudent and cautious trustees would have taken an inventory for their own protection, and as a means of making a ready settlement of the trusts which they had assumed. But I do not regard the failure, under all the circumstances of the transaction, as evidence of fraud in the execution of the deed. The trustees became personally liable for all the property conveyed,

and their failure to make an inventory manifests a high confidence in the honesty of the grantors, for whom they were indorsers for a large amount in the banks, and for whose misapplication of the property they would have suffered injury as indorsers, and have been responsible as negligent trustees.

"The relationship of the defendants."

I have already briefly referred to this matter, but I will further state the general principle of law, that a person who successfully assails a conveyance upon this ground must show that the debts secured are not *bona fide*, or that there is something feigned or simulated, or that the parties were influenced by some sinister motive or design. The trustees in this deed are relatives of the grantors, but they have no direct interest as creditors, and the debts secured upon which they are indorsers are admitted to be *bona fide*, and were incurred for the benefit of the firm. There is no direct evidence, or any inferences which may fairly arise from the alleged discrepancies or contradictory statements of the defendants, that they entered into any collusion in executing the deed for the purpose of defrauding the creditors of the grantors.

"The defendants' belief that the firm was solvent."

The decided preponderance of evidence shows that the defendant trustees were not satisfied as to the solvency of the defendant grantors, and they were desirous of having the debts secured upon which they were indorsers. The answers of the defendant trustees are directly responsive to the charges of the bill, and are evidence for them which will be sufficient for their protection, unless contradicted by full and satisfactory evidence on the part of the plaintiff, who alleges fraud. Fraud in fact cannot be presumed or inferred without proofs, and the party who makes the charge must prove it by direct evidence, or by circumstances which strongly indicate fraud. The trustees in their answers deny all knowledge or notice of any fraudulent purpose of the grantors, and of all facts from which they could reasonably infer such purpose. Their declarations would not be sufficient to rebut any legal presumption of fraud arising upon the face of the deed, but, upon the question of fact as to a fraudulent intent of the parties in the execution of the deed, the responsive answers are entitled to their full weight as evidence. The burden of proof is upon the plaintiff to establish a fraudulent intent, and the proof he offers is not sufficient to contradict or overcome the responsive answers to the charges of the bill. To render a deed founded on a valuable consideration void for fraud, both parties must concur in a fraudulent intent, or the grantee must have notice of such intent, or must in some way be privy to the wrongful design.

The evidence shows that the grantors represented themselves as solvent at the time of the execution of the deed of trust, and it also shows that they knew that they were greatly embarrassed, their cash sales were small, they could not readily collect the money due them, and were unable to meet their debts at maturity. Their belief of solvency

appears to have been induced by the plausible and eager anticipations—generally entertained by debtors in failing circumstances—that by indulgence and good management in making sales of their goods at fair prices, and collecting the debts due them, they would be able in a short time to relieve themselves from financial embarrassments. The evidence further shows that their property was overestimated in value, and they did not have the means and resources from which enough could be realized to pay all their debts under forced sales by execution, and that their purpose in gaining time to dispose of their goods without ruinous sacrifice was for the primary benefit of creditors, and not for their personal advantage.

Upon a careful review of all the facts and circumstances developed by the evidence, I am of opinion that the plaintiff by his proofs has failed to sustain the allegations of fraud against the defendants, as stated in his bill. I deem it unnecessary to consider the motion of the defendants' counsel to dismiss the bill for the defects and irregularities specified in the brief and argument. Let the bill be dismissed.

BOND, J., concurs.

STACHELBERG and others v. PONCE.

(Circuit Court, D. Maine. February 23, 1885.)

TRADE-MARK—USE BY ASSIGNEE OR PURCHASER—DECEPTION—INFRINGEMENT—INJUNCTION.

An assignee or purchaser of a trade-mark from the original proprietor must in the use thereof indicate that he is assignee or purchaser, or he will not be entitled to protection in the use of the mark so assigned.

In Equity.

Clarence Hale, for complainants.

William Henry Clifford, for defendant.

COLT, J. In this suit the complainants claim the exclusive right to the use of the trade-mark "La Normandi," or "Normandi," which is applied to a brand of cigars, and charge the defendant with infringement in using the words "E. P. Normanda," or "Normanda," or "Normandie," upon a brand of cigars made and sold by him. The complainant Stachelberg obtained, by assignment from one Asher Bijur, of New York, the exclusive right to use this trade-mark, and he subsequently conveyed the right to the firm of Stachelberg & Co., the complainants. It appears that Bijur was the originator of the trade-mark, and had used it for some years, building up quite an extensive sale for this brand of cigars by reason of their good quality. The original trade-mark bore the name of the maker, "A. Bijur," and

also the initials "A. B." Upon the assignment of the trade-mark to Stachelberg, he substituted his own name, "M. Stachelberg," and the initials "M. S." In this form the trade-mark was registered by Stachelberg & Co. in 1876, under the United States law, which has since been declared unconstitutional. *Trade-mark Cases*, 100 U. S. 82. In this case, therefore, the complainants stand on their common-law rights.

The defendant denies the charge of infringement, and rests his defense on various grounds. Whatever may be thought of the remaining defenses, there is one point which we think is well taken, and therefore fatal to any relief prayed for in the bill. In the use of the trade-mark the complainants do not state that it was obtained by assignment or purchase from A. Bijur. Bijur originated the trade-mark, and it thus became a sign of the quality of the article he sold, and an assurance to the public that it was the genuine product of his manufacture. A trade-mark must, either by itself or by association, point distinctively to the origin or ownership of the article to which it is applied. *Canal Co. v. Clark*, 13 Wall. 311. It imports that the article is made by the original proprietor, and therefore genuine, and the law protects the original proprietor, not only as a matter of justice, but to prevent imposition on the public. *Manhattan Medicine Co. v. Wood*, 108 U. S. 218; S. C. 2 Sup. Ct. Rep. 436.

Now, in order that the public may not be deceived, it is essential that an assignee or purchaser of the original proprietor should indicate in the use of the trade-mark that he is assignee or purchaser,—*Sherwood v. Andrews*, 5 Amer. Law Reg. (N. S.) 588,—otherwise the public are misled into purchasing the goods of another manufacturer or vendor as those of the original proprietor. If these complainants have any right of action against the defendant, it is upon the ground that, by copying the trade-mark "La Normandi" in substance, he is misleading the public by false representations into the purchase of his cigars as those made by A. Bijur, the original proprietor of the trade-mark. *Canal Co. v. Clark*, *supra*. And so these complainants, in failing to give notice that they are the purchasers and assignees of the trade-mark from A. Bijur, are practicing the same deception towards the public which they charge against the defendant. The fact that the name "M. Stachelberg" is attached to the trade-mark can no more relieve the complainants of the charge of misrepresentation as to the public than the use of the name "E. Ponce" or "E. P." can relieve the defendant of such a charge. It is the use of the fanciful words "La Normandi," or words of substantial similarity, that is calculated to mislead. The supreme court, in *Manhattan Medicine Co. v. Wood*, *supra*, declare that the object of a trade-mark being to indicate by its meaning and association the origin or ownership of the article, it would seem that when a right to its use is transferred to others, either by act of the original manufacturer or by operation of law, the fact of transfer should be stated in connection with its use, otherwise a de-

ception would be practiced upon the public, and the very fraud accomplished, to prevent which courts of equity interfere to protect the exclusive right of the original manufacturer.

Under the rule laid down in *Manhattan Medicine Co. v. Wood*, the complainants have no standing in a court of equity, and the bill must be dismissed.

HILLS and others v. STOCKWELL & DARRAGH FURNITURE Co.

(Circuit Court, W. D. Michigan, S. D. March 4, 1885.)

1. FRAUD ON CREDITORS—CHattel MORTGAGE—PREFERRING CREDITORS.

In Michigan an insolvent debtor has a legal right to secure one or more *bona fide* creditors in preference to others, where no fraud is intended; and the mere fact that a chattle mortgage given for that purpose operates incidentally to hinder and delay other creditors in collecting their debts does not affect the security.

2. SAME—FRAUDULENT INTENT—QUESTION OF FACT.

The Michigan statute declares that the question of fraudulent intent is one of fact and not of law.

3. SAME—RETENTION OF POSSESSION WITH POWER OF SALE.

Provisions in a chattel mortgage that the mortgagor shall continue in possession of the property, and continue sales thereof at wholesale and retail, with an omission of a stipulation to apply the proceeds of sales to pay the secured debts, do not make out constructive fraud or fraud in law.

4. SAME—CONVEYANCE WHEN VOID IN LAW.

When a court says the law declares a conveyance void for fraud, or imputes to it fraud, what is meant is that the law will not sanction a conveyance, against the claims of creditors, when its provisions are illegal or are not reconcilable with an honest purpose, and then declares it void upon its face because no evidence could change its character; as, in case of a deed made by a debtor for his own support or benefit, or for the benefit of those dependent upon him for support, or without consideration, and the like.

5. SAME—ATTACHMENT DISSOLVED.

Chattel mortgage executed by a manufacturing corporation to secure indorsers of its paper, most of whom were its directors, containing a provision that the mortgagor should retain possession of the property and sell it at wholesale and retail, construed, and held not fraudulent as matter of law, and ground for an attachment.

Assumpsit. Order *nisi* for the dissolution of an attachment.

Smiley & Earle, for plaintiffs.

R. W. Butterfield, for defendant.

WITHEY, J. On the twenty-second of December last the plaintiffs sued out a writ of attachment against the property of the defendant, based on an affidavit that the latter had disposed of its property with intent to defraud its creditors, and seized part of the personal property which, in August previous, the defendant had chattel mortgaged to Wilder D. Stevens, in trust to secure five persons, indorsers of its paper, aggregating about \$87,000, and also to secure its employes for labor debts, due and to come due. The mortgage covered the entire stock in trade of the company, including lumber, furniture, and per-

sonal effects, and all additions and accretions. It permitted the company to continue in possession and carry on its business, but restricted sales to such as should be made in the ordinary course of the wholesale and retail business of the company. The company manufactured furniture. The mortgagees' interest in the property was to be kept insured in not less than the amount of the insurance at the date of the instrument, but the company might reduce the insurance in proportion as the value of the property should be reduced from time to time. All but one of the indorsers were stockholders and directors in the company. The secretary and president are indorsers of part of the paper of the company secured by the mortgage, and executed the mortgage under the authority of a vote of both the stockholders and board of directors.

The instrument recites the date and amount of each piece of paper, when due, and the name of the indorser or indorsers; that the company is indebted to the persons in its employ, and desires that they shall continue in its employment, and desires to secure to them the payment of sums due and to come due to them, and also desires that the said indorsers of its paper shall continue to indorse renewals of its paper up to at least the first day of January, 1885, which they are willing to do if secured. The company agrees "to take up and pay all such paper subsequently coming due and not renewed; to pay all renewals and all such paper now past due on or before January 1, 1885, unless the same can be renewed, and in that case to pay the renewal or renewals thereof, and to save harmless the said indorsers on such paper from all loss and damage by reason of such indorsements." In case the company does not pay according to the terms of the instrument, and keep harmless the indorsers, the mortgagee may take possession of and sell the property at private or public sale.

The plaintiffs, by an order *nisi*, were ordered to show cause why the writ of attachment should not be dissolved and the property discharged. It is incumbent on them to make out that the mortgage was executed with intent to hinder, delay, or defraud creditors. The proofs show (in addition to what has already been stated) that at the date of the instrument the defendant corporation was unable to pay its debts as they matured, and had asked the plaintiffs to extend the debt on which this suit is brought. It had received notice from the bank where it transacted its principal banking business, and which held \$30,000 of the company's paper, that ten or more thousand dollars, soon to mature, would not be renewed, and the indorsers on that paper had also been notified of such intention on the part of the bank. The company owed more than \$12,000 of unsecured debts. One of the officers of the company, produced by the plaintiff, testified in substance that there were three immediate reasons for giving the mortgage: (1) The company had got behind with the men in its employ and they were getting uneasy; (2) the only indorser of the compa-

ny's paper not a director, and two of the directors who were indorsers, demanded security if they continued to indorse; (3) defendant's bank had given notice to it and to the indorsers that certain paper would not be renewed; but it was believed, notwithstanding, that the bank would be satisfied if all the paper it held against the company was secured, and that was the purpose in giving the mortgage. "We thought," says the witness, "we could then, aided by the time thus obtained, go on and pay what we owed. We had no idea but what our debts would be paid. Our general indebtedness had, within a short time, been largely changed to the banks by borrowing of them on indorsed paper. We had been accustomed to take our drafts to our bank and have them credited up to us. About this time the bank refused to do this. We had thirty or forty thousand dollars of accounts, half of which were collectible. There is no question made as to the *bona fides* of the indebtedness intended to be secured by the mortgage."

It is insisted by the plaintiffs that the mortgage is fraudulent in fact, and fraudulent upon its face as against the general creditors of the defendant. I am unable from the evidence before me to discover any intention on the part of the officers of the corporation to hinder, delay, or defraud creditors. The indebtedness existed and was *bona fide*; the defendant was unable to pay promptly its debts, due and to fall due, and the indorsers of its paper demanded security before renewing their indorsements. It does not affect the question if the company could never pay its debts in full; for the legal right of an insolvent debtor to secure one or more creditors in preference to others, where no fraud is intended, is settled in Michigan by many decisions. The mere fact that the security operates incidentally to hinder and delay other creditors in collecting their debts does not affect the security. Both facts may and should be considered in determining whether fraud was intended.

The statutes of Michigan relating to chattel mortgages and to conveyances fraudulent against creditors, as construed by the supreme court of the state, constitute rules of property, binding as well upon the national as upon the state courts. This mortgage did not hinder or delay creditors, within the meaning of the statute, unless it was made with a fraudulent intent; and if it was not made with a fraudulent intent, its execution was no ground for an attachment of the defendant's property. The statute declares that the question of fraudulent intent shall be a question of fact, and not of law, and I find there was in fact no fraudulent intent. The mortgage was given to secure indorsers of *bona fide* indebtedness of the company, and of persons to whom *bona fide* debts were owing, and nothing in all that was done indicates a purpose inconsistent with honesty and fair dealing on the part of the officers of the corporation, or any of the beneficiaries under the mortgage. The corporation contemplated continuing in business through the assistance the mortgage would incident-

ally afford, enabling it to obtain renewals of its paper, and giving it time through such credit to convert its stock and work out. It does not matter whether such hope was justified by the circumstances; if such was the purpose, and nothing more, a fraudulent intent can not be predicated of the facts.

But the principal contention by the plaintiffs is that the instrument is constructively or presumptively fraudulent, for two reasons: (1) That it neither fixes nor contemplates a time certain within which the indorsed indebtedness of the corporation is to come due and payable; (2) that the mortgage is executed by the president and secretary of the company, who on the face of the instrument are beneficiaries of its provisions. It is also true that other of the beneficiaries are directors in the corporation. There is no agreement to renew any part of the indorsed paper, but in case any of it should be renewed, then such renewals are to be paid.

The mortgage recites that the company desires to have the indorsers renew paper, and that they were willing to do so if security was given for their indorsements. Legally, therefore, whenever the holder of any of the paper should refuse to renew, or whenever any indorser should refuse, that particular paper would be due and payable. This was part of the arrangement to enable the company to avoid suspension, and to enable it to go on manufacturing and selling its goods. I do not regard such an arrangement constructively fraudulent, but a fact to be considered, like any other fact, tending to show the intention of the parties in making the mortgage. Even if its provisions do, incidentally, hinder or delay creditors, it does not follow that fraud was intended. The provisions that show the mortgagor was to continue in possession of the property, and was to continue sales at wholesale and retail, together with the omission of a stipulation to apply the proceeds of sales to pay the secured debts, do not make out constructive fraud, or fraud in law; and it has been so ruled in this state. They are to be considered as other facts and circumstances on the question of fraudulent intent. The terms of the mortgage as to renewals, leaving it uncertain when the indebtedness was to be paid, are to be scrutinized, but, like the other provisions alluded to, constitute no conclusive evidence of a fraudulent intent.

Again, the fact that the officers who executed the mortgage, and the directors, are among the beneficiaries of its provisions, calls for the closest scrutiny, but, in my opinion, raises no conclusive presumption that there was an intent to hinder, delay, or defraud creditors. The law seldom imputes fraud in reference to a conveyance made under a statute which declares "the question of fraudulent intent, in all cases arising under this, or either of the last two preceding chapters, shall be deemed a question of fact and not of law."

I apprehend, when a court says the law declares a conveyance void for fraud, or imputes to it fraud, what is meant is that the law will not sanction a conveyance, against the claims of creditors, when its

provisions are illegal or are not reconcilable with an honest purpose, and then declares it void upon its face because no evidence could change its character; as, in case of a deed made by a debtor for his own support or benefit, or for the benefit of those dependent upon him for support, or without consideration, and the like. *Oliver v. Eaton*, 7 Mich. 108; *Bagg v. Jerome*, Id. 145. See, also, *Brett v. Carter*, 2 Low. 458; and *Hughes v. Cory*, 20 Iowa, 399.

The case of *Robinson v. Elliott*, 22 Wall. 513, is much relied on by the plaintiff's attorneys, and if that case had arisen in this state, the decision would seem to control this case on the question of the effect of leaving the mortgagor in possession of the property, and render the instrument void for fraud; but the chattel mortgage in that case was made in Indiana, and does not, therefore, control my judgment when passing upon a mortgage in Michigan, governed by its laws as uniformly interpreted by its courts. It was also there determined that a mortgage which by its terms permits or contemplates the indefinite prolonging of the debt secured by the mortgage, is void as against existing creditors. It is argued here that, as the Michigan supreme court has never passed upon that question, this court should follow the doctrine on that subject applied in *Robinson v. Elliott*. That case was decided on its own facts, or on the provisions of the mortgage under discussion therein, and under a statute of Indiana that had not been expounded by the supreme court of the state; but here is a mortgage with different provisions, and, under the decisions of this state, ought not to be decided by the reasons and conclusions expressed by Mr. Justice Davis in *Robinson v. Elliott*, upon either question ruled in that case. That was a suit in equity; this is an application to dissolve a writ of attachment by virtue of which the defendant's goods have been seized and are held on the charge that the defendant has disposed of its property with intent to defraud its creditors. Under this application to dissolve the attachment, the court has no power to decide anything more than whether this mortgage was made with a fraudulent intent, and discharge or sustain the seizure that has been made. A court of equity could decree so as to protect, not alone the plaintiffs, but all the creditors, including the directors who are indorsers, by a distribution of the proceeds *pro rata* to all the defendant's creditors. A court of equity will preserve legal rights, but it will not permit them to prevail to the exclusion of equitable rights and considerations. If the plaintiffs had a judgment, and should file a bill in equity to restrain the mortgagee taking possession of, selling, and appropriating the property, because the officers and directors have made themselves beneficiaries under the mortgage, to the exclusion of other creditors, there are cases deciding that in such suit the officers and directors would not be permitted to take undue advantage of their position by securing themselves to the exclusion of other creditors; but, even then, the beneficiaries under the mortgage, not officers or stockholders, might be entitled to the bene-

fit of the mortgage as a security. *Bradley v. Farwell*, 1 Holmes, 433; *Coons v. Tome*, 9 FED. REP. 532; *Gas-light Co. v. Terrell*, L. R. 10 Eq. 168. Among cases that hold somewhat different views are *Stratton v. Allen*, 16 N. J. Eq. 232; *Whitwell v. Warner*, 20 Vt. 444; *Railroad Co. v. Claghorn*, 1 Speers, Eq. (S. C.) 561, 562. See Ang. & A. Corp. § 233; also *Buell v. Buckingham*, 16 Iowa, 284, 291.

But I am not called upon to decide, as in a court of equity, the effect of the mortgage upon the distribution of the defendant's property, and the rights as between the general creditors and the officers of the corporation as to the mortgaged property. The question before me is whether a creditor, who attaches property under a statute giving to him the right, upon making and annexing to the writ an affidavit that the defendant therein has disposed, or is about to dispose of, his property with intent to hinder, delay, or defraud his creditors, and being required to show cause why the attachment should not be dissolved, can maintain the seizure without showing fraud in fact, or, at least, that the necessary result is fraud, shown by the production of the mortgage and which no evidence could change, in view of the statute making the question of fraudulent intent one of fact and not of law.

The ultimate fact turns upon whether the directors, in directing the mortgage to be made to a person in trust to secure outside creditors, and at the same time indemnify themselves against indorsements for the company, under the circumstances and for the objects stated, must be held necessarily to have intended fraud. I cannot see that they did. It is not competent in this proceeding to predicate constructive fraud upon the mere fact that they availed themselves of their superior advantages to obtain indemnity against their indorsements.

I call attention to *La Belle Iron Works v. Hill*, 22 FED. REP. 195, wherein Mr. Justice MILLER, in a trial involving the validity of a writ of attachment under the statute of Missouri providing that the plaintiff in any civil action may have an attachment "where the defendant has fraudulently conveyed or assigned his property or effects so as to hinder or delay his creditors," held that a deed of trust given by the defendants "did not hinder and delay creditors, within the meaning of the Missouri statute, unless it was made with a fraudulent intent, and that its execution was no ground for an attachment unless there was fraud in fact, and that fraud in law was not sufficient." He said to the jury: "If you believe that deed of trust to be an honest instrument,—if you believe it was made for an honest purpose, you will find for the defendants; but if you believe it to have been made for a dishonest purpose, you will find for the plaintiff."

The deed of trust was made to secure the payment of debts, but provided that none of the property conveyed should be sold within two years. There was a contemporaneous agreement that the trustee should conduct the business of defendants in the firm name, and

only such creditors as should sign the agreement were to share in proceeds of the sales of the personal property, but all were privileged to sign. One of the defendants testified that the deed was made with the hope that the personal property would suffice for the payment of the firm debts, and they hoped to save the real estate.

The attachment of the property in question is dissolved. The defendant has appeared and plead, which saves the suit in court for recovery at the proper time of the plaintiffs' damages upon their claim.

PRUDENTIAL ASSUR. CO. v. ÆTNA LIFE INS. CO.

(Circuit Court, D. Connecticut. April 14, 1885.)

LIFE INSURANCE—REINSURANCE—ORAL PROMISSORY REPRESENTATION.

The failure of an insurance company that procures reinsurance to comply with an oral promissory representation in regard to its future conduct, made without fraud or falsehood, before the policy was issued, and not alluded to therein, is not a valid defense against the insurer's liability upon the policy.

At Law.

E. C. Henderson, for plaintiff.

Charles J. Cole, for defendant.

SHIPMAN, J. This is a demurrer to the second defense in the defendant's answer to the plaintiff's complaint upon a policy of life insurance. The facts admitted to be true, for the purposes of pleading, are as follows: In the year 1854, the National Loan Fund Life Assurance Society, which in the year 1839 had issued to Edward Lawson its policy of insurance upon his life for £3,000, applied to the defendant to reinsure \$5,000 of said risk, which was still outstanding. On making said application, the society represented to the defendant, in order to induce it to issue a policy of reinsurance for said sum, that the risk was a good one,—a most excellent risk,—and they were willing rather to keep \$10,000 at risk on the life than buy the policy; and thereupon, upon the faith and credit of the representation that the society would keep \$10,000 at risk on said life rather than buy the policy, the defendant issued to said society a policy of reinsurance on Lawson's life for the term of seven years. In the year 1861, on the expiration of this term, the society, the name of which had been changed to the International Life Assurance Society, desired to renew said policy for the term of life. The defendant required a new medical examination of Lawson, so as to show his physical condition at that time, and, the same being furnished, upon the faith and credit thereof and of the previous representations made at the time of issuing the original reinsurance policy, the policy in suit was issued.

In the year 1866 the society reinsured £500 of its said risk in the Royal Insurance Company of London. In the year 1869 the society ceased business and went into liquidation, and a liquidator thereof was duly appointed. On or about March 30, 1871, the society reinsured the entire risk on Lawson's life. Lawson died in May, 1879, having shortly before his death, and in the same year, surrendered to the plaintiff, for £690, the policy issued to the International Society upon his life. The plaintiff alleges that on March 30, 1871, the official liquidator of the society assigned to the plaintiff, for a valuable consideration, the defendant's policy on Lawson's life, now in suit. This is denied by the defendant. It is agreed that from March 30, 1871, until Lawson's death, the premiums on said policy were regularly paid to the defendant by the plaintiff.

It is not denied that the representations in regard to the character of the risk were true, nor is the willingness of the society, at the time of making the application, to keep \$10,000 at risk denied. An interpretation of the language of the society, in regard to its willingness to keep the specified sum at risk, is that it was then willing or then wished to pursue that course. The defendant interprets the meaning to be that the society represented that it would keep \$10,000 at risk rather than buy the policy. The non-performance of its representations is alleged to consist in the reinsurance of £500 in 1866, and a reinsurance of the whole risk in 1871, after it went into liquidation.

Assuming that the construction which the defendant places upon the language of the original insurer is correct, and that it promised to keep the specified sum at risk, not only through the life of the policy which the defendant issued in 1874, but during the life of all subsequent policies which it might issue on Lawson's life, and that it promised that, upon going into liquidation, no reinsurance should be effected, the question arises, is the failure of the assured to comply with an oral promissory representation in regard to its future conduct, made without fraud or falsehood, before the policy was issued, and not alluded to therein, a valid defense against the insurer's liability upon the policy?

This subject has been considered recently by the supreme court in *Insurance Co. v. Mowry*, 96 U. S. 544, and by the supreme court of Massachusetts in *Kimball v. Etna Ins. Co.* 9 Allen, 540. The extended discussion which was given in these cases to the subject of oral promises made without fraud, prior to the written contract, precludes the necessity of any lengthy argument.

The authorities generally notice the distinction between an untrue representation of a material existing fact, which makes the contract a nullity because the minds of the parties never met and there was no agreement, and an oral promissory representation made, without fraud, before the written contract, in regard to the intention, purpose, or future conduct of the promisor. The latter class of repre-

sentations, unless incorporated in the policy, are of no importance, "because the written instrument is the expression and the only evidence of the duties, obligations, and promises to be performed by each party while the insurance continues. To make the continuance or termination of a written contract, which has once taken effect, dependent on the performance or breach of an earlier oral agreement, would be to violate a fundamental rule of evidence." *Kimball v. Aetna Ins. Co.* 9 Allen, 540. Mr. Justice GRAY, who delivered the opinion in this case, further says:

"But an oral representation as to a future fact, honestly made, can have no effect; for if it is a mere statement of an expectation, subsequent disappointment will not prove that it was untrue; and if it is a promise that a certain state of facts shall exist or continue during the term of the policy, it ought to be embodied in the written contract."

The insurer is at liberty to compel an observance of promises in regard to future conduct, by incorporating them into the written contract, if it regards a performance as important, but the promise, unless embodied in the contract, is not a part of it. All things to be done by one or the other during the continuance of the written agreement, upon the doing of which the life of the contract depends, must appear in the agreement. *Alston v. Mechanics' Ins. Co.* 4 Hill, 329; *Mayor of N. Y. v. Brooklyn Ins. Co.* *43 N. Y. 467; *Bryant v. Ocean Ins. Co.* 22 Pick. 200; *Insurance Co. v. Mowry*, 96 U. S. 544.

The case of *Traill v. Baring*, 10 Jur. (N. S.) 377, and 3 Bigelow, Ins. Cas. 233, is not inharmonious with the authorities that have been cited. The facts of that case as stated in the syllabus in Bigelow's Cases are as follows:

"Insurance company A., (having previously granted a policy of reinsurance to insurance company B., on the life of L. I., for £3,000,) on the tenth of May, 1861, offered to insurance company C. £1,000 of the risk, stating that insurance company D. had agreed to undertake £1,000, and that they (company A.) would retain £1,000. Company C. accepted the proposal without the usual investigation or inquiries into the age, health, or habits of the insured, as a partnership risk. The policy granted by company C. was dated and the premium was paid on the eighteenth May, 1861. Company D., on the fifteenth May, 1861, came to a resolution not to, and they did not in fact, retain any portion of the risk, but this resolution and the course of action upon it was not communicated to company C. In 1862 the insured died of the heart disease. Held, that the policy granted by company C. was void and must be delivered up to be canceled."

The gist of the case, as shown in the opinion of the vice chancellor and of the judges upon appeal, was that when the contract was perfected the representation which had been made was not true, and that the change of intention which took place before the contract was entered into, should have been communicated to the other contracting party. The circumstances bring the case within the principle that an untrue representation of a material, and then existing, independent or collateral, fact, affecting the risk, vitiates the policy.

I have not thought it necessary to consider whether, upon a fair

construction of the representations made in 1854, the policy in suit, which was issued in 1861, was properly affected by them, or whether there was any breach of the promise.

The demurrer is sustained.

In re TONG AH CHEE.

(District Court, D. California. November 14, 1883.)

CHINESE IMMIGRATION—ACT OF 1882.

A Chinese laborer, who left the United States after the act of May 6, 1882, went into effect, and who deliberately, and with full knowledge of the law, omitted to apply for his certificate, for the reason that he had no expectation or hope of ever returning to the United States, is not entitled to return.

On Habeas Corpus.

S. G. Hilborn, U. S. Atty., for the United States.

Messrs. Van Duzer and Teare, for petitioner.

HOFFMAN, J. The petitioner in this case claims the right to re-enter the United States on the ground that he was a resident of the United States at the date of the treaty, and is therefore protected by its second article. He admits that he is a Chinese laborer; that he left the United States after the law of May 6, 1882, went into effect; and that he voluntarily omitted to procure the certificate in that law mentioned, for the reason that he had no expectation of returning to the United States. The third section of the act of May 6, 1882, is as follows:

"That the two foregoing sections shall not apply to Chinese laborers who were in the United States on the seventeenth day of November, 1880, or who shall have come into the same before the expiration of ninety days next after the passage of this act, and who shall produce to such master, before going on board such vessel, and shall produce to the collector of the port in the United States at which such vessel shall arrive, the evidence hereinafter in this act required of his being one of the laborers in this section mentioned."

Under this section it has recently been held by this court that the Chinese laborers referred to were those who were in the United States at the periods mentioned, and who might leave the United States after the act went into effect, but that the act could not be construed to require the production of the certificate from those laborers who left the United States before the passage of the law or before it went into effect. It was considered by the court that the second article of the treaty secured to Chinese laborers in the United States at the date of the treaty the right "to go and come of their own free will and accord," and that it could not have been the intention of congress to deprive them of this right by exacting from them as a condition of its exercise the production of a certificate which it was impos-

sible for them to procure. But it was also considered that Chinese laborers leaving the United States *after* the law went into effect, and who might wish to avail themselves of the privilege of returning, secured to them by the second article of the treaty, might properly, and without a violation of the letter or spirit of the treaty, be required to procure the certificate, which the act directs shall be furnished to them without charge, as a means of identification, and as furnishing the test, if not the only method, of preventing evasions of the law.

In the case at bar the petitioner deliberately, with full knowledge of the law, omitted to apply for his certificate, for the reason that he had no expectation or hope of ever returning to the United States. He has thus by his own act of omission renounced the right secured to him by the treaty, by neglecting to procure the evidence of that right which the law requires, and which it was entirely within his power to obtain. I am therefore of opinion that the application of the petitioner should be denied.

In re TREADWELL and others, Bankrupts.

(District Court, D. California. May 16, 1883.)

BANKRUPTCY—COMPENSATION OF ATTORNEY OF ASSIGNEE.

As the attorney of the assignee appears to have saved to the estate \$30,000, after protracted litigation, *held*, that \$5,000 should be allowed as a fair and reasonable compensation for such services as had been rendered and as should be required as incidental to the final closing up of the estate.

In Bankruptcy.

Lloyd Baldwin, in propria persona.

T. Z. Blakeman, for opposing creditors.

HOFFMAN, J. Considering that by the efforts of the attorney for the assignee the sum of \$30,000 was saved to the estate after a protracted litigation in this court, and in the circuit court on appeal.

2. That more than half the creditors have expressly in writing assented to the allowance to the attorney of \$5,500; that creditors to the amount of \$99,175, who have not signed the assent, were present at the creditors' meeting, and offered no objection to the allowance, and do not now object to the same, and the creditors who now except represent only one-eleventh of the total amount of unsecured debts, viz., \$368,854.61.

3. That the attorney for the objecting creditors proposed at the beginning of the litigation to compromise the same by paying \$5,000 in satisfaction of the claim of \$30,000, which offer was declined by the claimants, and that by the final decree of the court the whole claim has been rejected.

4. That the claim, if allowed, would have absorbed the whole as-

sets of the estate then remaining undisturbed in the hands of the assignee; and that the services of the attorney in resisting and finally defeating the claim were rendered with no certain assurance of compensation; and that such compensation was practically contingent on the result of the suit.

5. That the claim of Amos Ranke against the estate for \$27,000 was defeated after argument and reargument on demurrer; and that other claims were presented, in opposing which the services of the attorney in opposition to them were necessary and were rendered.

6. That numerous attendances in court, consultations with the assignee, communications, oral and in writing, with creditors occurred, which must necessarily have occupied a considerable portion of the attorney's time, and for which he is entitled to compensation.

In view of the foregoing, I allow the sum of \$5,000 as being in my judgment a fair and reasonable compensation for the services of the attorney rendered since March, 1881. I have reduced his claim by \$250 on the grounds (1) that the fees claimed for preparing the petition, orders, etc., for a sale of remaining assets of the estate, amounting to \$364, is in my opinion excessive; (2) that I am doubtful whether the assignee can charge against the estate any sum for fees paid to his attorney for drawing a bond which by order of the court he was required to give.

It is understood that the sum hereby allowed includes compensation for services, if any, which may hereafter be rendered by the attorney incidental to the final closing up of the estate.

WATSON v. CINCINNATI, I., ST. L. & C. RY. CO.

(Circuit Court, D. Indiana. March 30, 1885.)

PATENTS FOR INVENTIONS—GRAIN-CAR DOORS — PATENTS NOS. 203,226, 78,188—
INFRINGEMENT.

Patent No. 203,226, granted to Chauncey R. Watson, on April 30, 1878, for an improvement in grain-car doors, construed and compared with patent No. 78,188, issued May 26, 1868, to Martin M. Crooker; and *held*, that defendants were not guilty of infringement.

In Equity.

C. P. Jacobs, for complainant.

Geo. Payson, for defendant.

WOODS, J. This action is brought against the defendant company for the infringement of letters patent No. 203,226, granted to complainant for an improvement in grain-car doors, bearing date the thirtieth day of April, 1878. The bill alleges that the complainant's invention consists in the combination in an ordinary freight car of the solid sliding outside door, and an inner flexible door, called a grain-door,

which is adapted to slide up overhead, when not needed for use, on rods or other equivalents; this grain-door being of a height to fill not all, but only about half the door-way opening. The answer of the defendant denies the value and novelty of Watson's invention; denies infringement, and alleges that the grain-car doors used by the defendant, as charged in the bill, were made under and in conformity with letters patent No. 78,188, issued May 26, 1868, to Martin M. Crooker. In further exhibition of the prior art, reference is made to other patents, including No. 118,514, issued August 29, 1871, to Horace L. Clark. General replication.

It is admitted by stipulation between the parties "that before the commencement of this suit the defendant hauled over its line of road, in the state of Indiana, freight cars belonging to the Chicago, Rock Island & Pacific Railway Company, having a solid outside door, like an ordinary freight car, and an inner flexible sliding grain-door, of less height than the opening in the side of the car, the grain-door sliding in grooves, like the grooves shown in the patent of Martin M. Crooker, of May 26, 1868, and the slats composing the door being attached to each other by being strung upon wires passing through the slats."

The complainant's claim, as contained in his letters patent, is of the following tenor:

"The combination with a car of an inside flexible or yielding sliding grain-door, having staples, *c*, and the vertical and horizontal bent guiding-rods, *C*, extending from the floor of the car upwardly and under the roof of the car, as herein shown and described, whereby said door, when not in use, can be carried up on the horizontal portions of said guiding-rods out of the way, substantially as specified."

His specification contains the following statements:

"This invention relates to improvements in the class of grain-doors for cars; and the invention consists in the combination with a car of an inside vertically-sliding flexible or yielding door and guiding-rods, whereby the door, when not in use, may be carried up and placed on the horizontal portion of said guiding-rods, so as to be out of the way, all as substantially hereinafter described. Referring to the accompanying drawings, *A* represents the body of a car, having guiding-rods, *C*, at either side of the door-way, fastened at their lower ends in the floor of the car, which rods extend upwardly and parallel with the inner frame of the car, to within a short distance of its top, where they are curved and suitably braced to the central roof-timber, *B*. *D* represents the grain-door, constructed of longitudinal sectional pieces, *d*¹, *d*², *d*³, hinged together, as shown at *e, e*. The upper and lower sections thereof, *d*¹ and *d*³, are provided with staples, *c, c*, which encompass the guiding-rods, *C*, and serve to direct the movement of the doors when it is desired to place them out of the way at the top of the car. The guiding-rods at their lower ends may be provided with screw-threads, which work into metal plates provided with female threads, which latter, when affixed to the floor of the car, serve to hold the rods firmly thereto, and in proper position to admit of the desired movement of the grain-doors. The grain-doors, when at the top of the car, may be securely held there out of the way by a hook, *f*, locking into a staple on the upper section of *d*¹.

"The great desideratum to be obtained in the use of a grain-door is that,

while it may serve its proper purpose when the car is loaded with grain, it may with facility be moved out of the way when the car is empty or loaded with other freight, without being detached from the car, whereby its loss or injury is rendered improbable; and it is always in such position that its use as a grain-door may be resorted to whenever needed. The bottom section, d^3 , of the door may be shod with an iron plate, to prevent injury thereto when being raised to allow of the egress of the grain.

"I am aware that a car-door of similar construction, sliding in grooved ways, is old, and such I do not desire to claim, broadly, as my invention. Said door, however, constitutes an outside or closing car-door proper, and the car could not be loaded or used for bulk grain, unless the grain is put in from the roof of the car, as the door completely closes the door-way or opening. Furthermore, said door is obviously objectionable for other reasons, viz: the grain will lodge or get in the grooved ways in which the door slides, binding or locking it so as to prevent its being raised; and also, being an outside door, the grain pressing against it would force or bulge the door outward, producing a similar effect as the grain lodging in the grooved ways; whereas my door, being an inside door, and reaching the top of the door-way or opening, admits an open space at the top for loading in the grain, with an ordinary outside door, to be locked or otherwise secured after the car is loaded. By also employing guiding-rods for the door to slide upon, and being an inside door, the defects incident to the grooved ways and an outside door before referred to, are entirely obviated."

The record shows that the complainant's application for a patent was rejected, and after amendment was again rejected by the examiner, because it did not present patentable novelty over Crooker's patent, granted 10 years before; but on appeal the examiner in chief reversed this decision, saying:

"The invention in this case is small, and the claim is correspondingly limited. It consists of a combination of various instrumentalities not found in either of the references. Applicant's car, as a whole, is adapted, by convertibility, to uses not compatible with the cases cited, without injury. In this case, the flexible door is applied in addition to the usual slide-doors; and, where coarse freight is to be carried, the flexible shutters are secured in place at the top under the roof of the car."

Counsel for complainant, as understood by the court, in both his oral and printed argument, admits or concedes that the sliding door, described in his patent, does not differ essentially from the sliding door described by Crooker, but insists that the patent consists in the combination in an ordinary freight car of the solid sliding outside door and an inner flexible door. In his brief he says that "until the date of Watson's invention nobody conceived the idea of combining in the same freight car a flexible grain-door with a solid outside door." I do not think this a proper construction, nor, if it were, that the patent could stand upon it. There is nothing in either specification or claim concerning "*ordinary* freight cars," nor *solid sliding* outside doors, and in the claim nothing about *outside* doors at all, unless inferred from the description given of an *inside* door. If, however, such an inference is permissible, and the patent must or may be construed to consist in such a combination of inside and outside doors, as is asserted, it cannot be upheld, because it does not involve invention, but

consists in a mere aggregation of parts, each to perform its separate and independent function, substantially in the same manner as before combination with the other, and without contributing to a new and combined result. The outside door certainly remains unaffected in construction and in use; and the inner door is the same as the Crooker door, with a few slats left off, or taken off, by design, or by accident; and whether done in one way or the other, the change cannot reasonably be called invention, unless the distinction between mere mechanical skill and inventive genius is to be disregarded.

Flexible and rigid doors, outside and inside doors, were all known; and rigid doors, outside and inside, had been used in combination, the inside door being made to fill only part of the opening in order to facilitate the loading of grain; and yet it is now insisted that the mere substitution, in this known combination, of the flexible sliding inside door, in itself not new, constituted invention. If that is the meaning of the decision of the examiner in chief, with due respect, I am constrained to dissent. If it be conceded that the complainant's "car, as a whole, is adapted by convertibility to uses not compatible with the cases cited without injury," the adaptation, so far as it consists in the combination of the inside and outside doors, of whatever form of construction, was either not new, or, if new in respect to the use of the flexible door, did not involve invention. It is not true, however, that this convertibility to different uses is confined to the complainant's car. The Crooker car, in a measure, manifestly has the same capability, whether it has ever been so used or not. In the first place the Crooker door, as described in his specifications, and as shown in the model, is constructed and moved in grooves on the inside of the car, and therefore may be used with an outside door. It is not liable, under pressure of the grain, to bulge outward, as suggested in complainant's specification; and it is evident that one of these doors (although filling the entire opening) might be used as an inside grain-door upon any car, the grain being loaded from the opposite side, over another door filling only part of the opening; and, with the grooves extended from one side to the other of the car, the single door could be shifted as convenience of loading and unloading should require. And if the Crooker door, at full height, can be so used upon either side of a car, and to that extent accomplish the same kind of results and advantages to a degree which are effected by the use of complainant's contrivance, it is plain that without invention it may be separated in the middle, and one piece used upon one side of the car and the other upon the other side. It is conceded, and whether conceded or not it is certainly true, that the Crooker door, made as described in his patent, may be used as an inside door, at the same time with, or in combination with, the ordinary outside door. The suggestion embraces nothing patentable, and, this much done, it is an easy process of reasoning—and reasoning is not invention—to extend the grooves continuously from side to side of the car, divide the

slatted door into two, and have the car used by the defendant, which is claimed to be an infringement. With the *Crooker* and *Clark* patents in view, and with a knowledge of the difficulties to be overcome, it is a plain process of reasoning, involving but moderate mechanical skill, to devise the defendant's car; and unless the complainant's combination embraces something more, it was not patentable.

Indeed, it seems to me too clear almost for discussion that if the complainant's patent can be upheld upon any construction whatever, it must be restricted to the particular devices described, combined in the manner stated in his specification; and, so restricted, even though it be deemed to embrace the outside as well as inside door in the combination, it has not been infringed, because the inside doors used by the defendant are held and moved in grooves, without the presence or aid of the rods and staples which are described as a part of the complainant's device, and expressly embodied in his claim. It may be that there is no essential difference, mechanically, between the grooves and the rods and staples; but, if so, the complainant is estopped from saying it, because he has expressly claimed one and disclaimed the other; and this alone is a sufficient ground to rest the decision of the case upon. By the terms of his specification and claim he has made the rods and staples a part of his combination, and has expressly disavowed the use of grooves as an equivalent, and consequently may not now, whatever otherwise might have been his right, insist that the grooves are an equivalent of the rods, or that the rods and staples are not essential to his combination. This being so, the defendants have not used the entire combination, and consequently have not infringed.

Bill dismissed.

ROEMER v. NEUMANN.

(Circuit Court, S. D. New York. March 29, 1885.)

PATENTS FOR INVENTIONS—VIOLATION OF INJUNCTION—SUIT FOR INFRINGEMENT.

Where a defendant has infringed a patent after the granting of an injunction in a suit by the patentee, the fact that the patentee might, if he chose, proceed against him for contempt in violating the injunction awarded in the former suit, will not affect his right to sue for such infringement.

In Equity.

Briesen & Steele, for complainants.

Betts, Atterbury & Betts, for defendant.

WALLACE, J. The infringement of complainant's patent by the defendants, since the interlocutory decree in the suit between the same parties in the district of New Jersey,¹ creates a new cause of action

¹ 19 FED. REP. 98.

in favor of complainant, and he can proceed at law or in equity to enforce it. His right to do this is not impaired by the circumstance that he can also, if he chooses, proceed against defendants for contempt in violating the injunction awarded him by the decree in the former suit. The plea of another suit pending is bad.

THE NEREUS.¹

THE JAMAICA.¹

NASSAU FERRY CO. v. THE NEREUS, etc.¹

METROPOLITAN S. S. CO. v. THE JAMAICA, etc.¹

(District Court, S. D. New York. March 5, 1885.)

1 COLLISION—SIMULTANEOUS WHISTLES—ANSWER—INSPECTOR'S RULES—DEPARTURES.

Steamers must be held to the same care and skill in the use of their whistles as in the use of the helm or engine. In the night-time, when the puffs of steam that accompany steam-whistles cannot be seen so as to correct any imperfections in the hearing of simultaneous signals, pilots have no right to rely upon simultaneous signals as an "answer" to each other under the inspector's rules. They are not an equivalent to an "answer," because attended by uncertainties in hearing, to which an "answer" is not subject. Departures from the rules are at the risk of those who adopt them.

2. SAME—CROSSING COURSES—CONFUSION OF SIGNALS—CASE STATED.

As the steamer N. was coming down the East river, shortly after dark, the ferry-boat J., about 400 yards ahead of her, left her slip, in a strong flood-tide, to cross from Brooklyn to Houston street, New York, and gave the N. a signal of two whistles in order to go ahead of the N. The N., at about the same instant, gave one whistle to the J., meaning that the J. should go astern. The court found that one blast from each boat was drowned by the other's whistle, so that the J. did not hear the N.'s one whistle at all; and the N. heard only the J.'s last blast about a second after her own, and treated it as an assent to her one whistle to go astern. The N., a few seconds after, gave a signal of two whistles to some other boats much further down river, which the J. interpreted as an assent to her own previous signal of two whistles, and went ahead. A collision ensued. *Held*, that the collision was due to the confusion and misunderstanding of signals; and, specially, to the N.'s last two whistles which induced the J. to go ahead; that the N.'s pilot knew, or ought to have perceived, that the J.'s one whistle, heard by him about a second only after the N.'s one whistle, came too quick to be a possible answer to his own whistle, but must have been a contemporaneous, original signal from the J.; that the liability of simultaneous signals in the night-time to be imperfectly heard made it incumbent on the N.'s pilot to repeat his signal, and to "answer" the known original signal of the J., as required by the inspector's rules, and also bound him to take special caution not to mislead the J., as he did, by giving, unnecessarily, the two whistles to the other distant boats, at the moment when an answer to the J. was due; and that the N. was answerable for these faults in the use of her whistles.

3. RULE 20—KEEPING OUT OF THE WAY—BURDEN NOT SHIFTED BY ASSENTING WHISTLES—DANGEROUS MANEUVERS.

Two whistles given in reply to a signal of two whistles from a steamer bound

¹ Reported by R. D. & Edward Benedict, Esqs., of the New York bar.

to keep out of the way, mean only assent to the latter's course, at her own risk, and an agreement to do nothing to thwart her. It does not relieve the latter of her statutory duty to keep out of the way. But when collision becomes imminent, both are bound to do all they can to avoid it, whether the previous signals were of two whistles or one. If imminent risk of collision is involved in the maneuver assented to, and the maneuver was unnecessary, both are responsible for agreeing upon a hazardous attempt.

4. SAME—MISJUDGMENT OF DISTANCE.

The J. being by rule 20 bound to keep out of the way, and being safe at her slip, *held* that, considering the nearness of the N., it was rash and unjustifiable in the J. to leave her slip and attempt to cross the N.'s bows, even on apparently assenting signals, because thereby a collision could not be avoided, except by the N.'s immediately stopping and backing, a concession not implied by assenting signals, and one so unusual and extraordinary in a large steamer having the right of way that the J. had no right to exact or to expect it; that the J. was liable for attempting this maneuver unnecessarily, and in violation of her duty to go to the right; that the attempt was based on a great misjudgment as to the distance of the N., for which the J. was also responsible.

5. SAME—IMMATERIAL FAULTS—SUBSEQUENT CORRECTION—BURDEN OF PROOF.

The rule that previous faults, not directly involving risk of collision, will not be deemed proximate or material if, notwithstanding such faults, there was ample time and opportunity to avoid the collision by the use of ordinary skill and judgment, has no application to situations almost in *extremis*, or within the limits of an excusable error of judgment. The burden of proof is upon the vessel that seeks to exempt herself from the consequences of a previous fault, to show timely notice to correct it and ample means of doing so by the use of ordinary judgment and skill. The N. not having proved such means at the time of her subsequent one whistle to the J., *held*, that both steamers were in fault, and the damages were divided.

In Admiralty. Collision.

The above cross-claims were filed by the respective owners of the steam-ship *Nereus* and the ferry-boat *Jamaica*, to recover their damages arising out of a collision between these boats in the East river, about opposite North Second street, Williamsburg, at about half past eight o'clock, on the evening of June 6, 1883. The ferry-boat was crossing from Grand street, Williamsburg, to Houston street, New York, nearly directly opposite. She was not quite half-way across the river, and was still heading slightly up stream, when she was struck by the stem of the *Nereus* on the axis of the shaft of her starboard wheel-house, and her machinery immediately stopped, broken, and twisted, causing large damages, for which \$10,250 is claimed. The stem of the *Nereus* was twisted by the blow to starboard, and her alleged damages amount to upwards of \$5,000. At the time of the collision the tide was strong flood; the evening mild, a little hazy, but otherwise clear; the wind light, from the south-west, and it was not yet quite dark.

The *Nereus* was a wooden-built right-handed propeller of 1,167 tons, 228 feet long, and 40 feet deep, bound from Boston to New York by way of Long Island sound. In coming down the river, she passed a short distance to the eastward of the Tenth-street buoy, and thence, upon her usual course under a wheel slightly ported, she headed a little towards the New York shore, being a little upon the Brooklyn side of the middle of the river. Shortly before the *Jamaica* left her slip, the ferry-boat *George Law* left the slip adjoining to go to Grand v.23f,no.9—29

street, New York. She drifted up the river somewhat with the strong flood-tide, and crossed the course of the Nereus at the estimated distance of 150 to 200 yards below her. A few seconds afterwards the pilot of the Nereus, seeing the Jamaica moving out of her slip, gave her one whistle, indicating that she should go astern of him. According to the testimony of the Nereus, one blast of the whistle of the Jamaica was heard in reply, and only one. But the testimony of several witnesses from the Jamaica shows that the signal given by the Jamaica was a signal of two blasts, and that no whistle at all was previously heard from the Nereus. Directly afterwards the Nereus gave a signal of two blasts of her whistle designed for the ferry-boat Commodore, the companion of the George Law, which had left the Grand-street ferry, New York, and was then about half a mile below coming up the river on the New York side. These two whistles were understood by the Jamaica as an assent to her own previous signal of two whistles given to the Nereus. As the Jamaica went out of her slip, the strong flood-tide swept her bows as usual up the river. She started with engines at full speed, and with a wheel hard a-starboard, as usual at that time of tide, so as to counteract as quickly as possible the upward sweep caused by the tide. According to the testimony for the Nereus, when the Jamaica was about 150 or 175 feet above the Grand-street pier, and about 150 feet out from the end of it, and when her bows were pointing directly for the Nereus, the latter again gave one blast of her whistle, to which the Jamaica immediately replied with two blasts, and kept on at full speed, under a hard a-starboard helm as before. The Nereus, upon signaling the George Law, had slowed her engine and continued under a slow bell until the contrary signals above stated, when her engines were stopped. A few seconds afterwards the Jamaica gave several short blasts of her whistle as a danger signal; whereupon the Nereus reversed, full speed, as soon as possible, and her engine was backing at the collision. Her own witnesses testify that at the time of the collision she was going backward by land, so that the street lights of North Second street, which had before been passed and closed in, again opened before the collision, as the Nereus receded backwards. Whether this was, in fact, before the collision, or after, is doubtful. The flood-tide was then running at the rate of about three or three and a half knots. It is not claimed that the Nereus had any backward motion through the water.

On the part of the Jamaica it was contended that the Nereus at the time of the collision was still going forward by land, and struck the Jamaica with great force; that her port wheel thwarted the effort of the Jamaica to keep out of the way; that the exchange of contrary signals took place when the Jamaica had nearly reached the line of the course of the Nereus; that the two whistles given by the Nereus directly after the two whistles of the Jamaica, on starting from the slip, justified the pilot of the Jamaica in his belief that they were de-

signed as a reply to the previous two whistles of the Jamaica, and bound the Nereus to act accordingly; and that had the Nereus thereupon either not ported or reversed in time, as she might easily have done, the collision would not have happened.

Wm. G. Choate, for the Jamaica.

R. D. Benedict, for the Nereus.

BROWN, J. The direct cause of this collision was, doubtless, the confusion and misunderstanding of whistles. Taking all the evidence together, I have no doubt that the pilot of the Nereus gave one whistle only to the Jamaica when she started from her slip, and heard one, and only one, blast in supposed reply; thereby understanding that the Jamaica would go to the right and astern of him. Neither have I any doubt that this signal of one blast from the Nereus was not heard on the Jamaica; nor that the Jamaica, on starting, did give two blasts of her whistle, indicating that she would pass ahead and not astern, and that she almost immediately afterwards heard two whistles from the Nereus apparently in reply, which she had a right to understand as an assent and agreement to this mode of passing each other. Thus the whistles, as *heard* by each, and supposed to be in reply, were in fact directly contrary to those actually given and intended by each for the other; and this mistake, as I have said, was evidently the principal cause of the collision. That this mistake actually occurred on both sides does not rest upon the naked statements of the witnesses as to the whistles given and heard. The navigation of each vessel at the time was clearly in accordance with the signals as heard from the other; while, on the other hand, it is not credible that either vessel would have maneuvered in the way she did, had the signals of the other been heard and understood as given and intended.

As this mistake in the whistles led to the collision, it is necessary to inquire by whose fault the mistake arose. If it arose through any negligence of the pilot of either in attending to the whistles of the other, or in managing his own whistles, such negligence would be necessarily held a fault. In a crowded harbor like this the use of signals is indispensable. They constitute a language by which navigation is controlled. They are one of the chief means adopted in order to avoid collisions. Necessarily, they control and supersede, in some degree, the general rules applicable in the absence of signals; and, considering what is at stake in life and property, it is manifest that due care, attention, and skill are as necessary in the use of signals as in the use of the helm, engine, or sails; and any negligence as to the former is as perilous and as blamable as negligence in regard to the latter. The Jamaica had no lookout forward, but her pilot in the pilot-house above had the Nereus in full view from the start. He was giving attention to her, and heard her two whistles directly after his own; so that there is no reason for supposing that the single whistle of the Nereus, which was given after he started, was not heard in consequence of any want of a lookout forward, or of any inatten-

tion on his part. On the Nereus there was a proper lookout, both forward and in the pilot-house, and yet only one blast of the Jamaica's whistle was heard, although two were given. The failure of each to hear one of the blasts of the other was doubtless the result of a single cause, all the requisite conditions of which here existed, and which may be explained as follows:

The Nereus was at that time probably about opposite North-Fourth street, or between that and North Fifth street, and from 1,000 to 1,200 feet distant from the Jamaica. Sound will traverse this distance in a second or a little over. The ordinary signal blasts are about a second long; and where more than one is given, they are separated by about a second's interval. Each pilot testifies that his own first signal to the other was given as the Jamaica was just leaving her slip; the Jamaica's being given when her colored lights were just outside the rack. If the Jamaica's signal of two whistles was given one second before the signal of the Nereus, the Jamaica's first blast would reach the Nereus at the same moment with the one blast of the Nereus, and would therefore be drowned by it so as not to be heard. In the same way the single blast of the Nereus would reach the Jamaica so as to be exactly contemporaneous with the second blast of the latter, and therefore not heard at all on board the Jamaica; while the second blast of the Jamaica would reach the Nereus one second after her own single blast, and accord with the testimony of the Nereus that only one blast from the Jamaica was heard in reply. The two whistles immediately afterwards given by the Nereus, but designed for the Commodore and a tow half a mile down the river, would naturally be understood as a reply of the Nereus assenting to the Jamaica's signal of two whistles. I think the weight of evidence is that it was so near dark that puffs of steam accompanying the whistles could not be seen, and were not seen by either vessel. It seems impossible, therefore, to ascribe the mistake as to the signals heard to any negligence or inattention in the pilots. If this account of the failure to hear the whistles as given be correct, and no other has been suggested as possible, it necessarily follows that the second blast of the Jamaica's first signal must have been heard on the Nereus only about a second after her own single whistle. This was too soon to have been a possible reply to the signal of the Nereus, at the distance the two vessels were then apart. The time necessary to give signals and obtain a reply must have been perfectly familiar to the pilot of the Nereus, as a practical fact of constant observation; and it ought, therefore, to have been observed and noted by the pilot of the Nereus that the Jamaica's whistle could not possibly have been given in reply to his own; and if not given in reply to his own whistle, he had no right to accept it, or to act upon it as a reply.

It is immaterial, however, whether the explanation above given of the failure of each to hear the other's signal as actually given, be strictly correct or not. The evidence leaves no reasonable doubt of

the fact that one blast from each was drowned, so as to prevent the hearing of it by the other pilot, by his own whistle. Neither signal was, therefore, a reply to the other. Each was an independent signal given to the other; and in that sense they must be treated as contemporaneous signals. The two blasts from the Jamaica, given in the ordinary way, were so near together that the first blast being drowned by the single blast of the Nereus, her pilot, as I have said, must have known, or ought to have known, that the second blast, that came immediately after, could not possibly be an answer to the signal of the Nereus, but must have been an original, contemporaneous whistle of the Jamaica. The most simple illustration, such as two taps a second apart, will show even to one unfamiliar with such observations that a second whistle, so soon after the first, could not possibly have come as an answer to the first, a fifth of a mile distant. The fact, which the pilot of the Nereus must therefore be taken to have known, that the Jamaica's whistle was an independent signal, contemporaneous with his own, ought to have suggested to him, in the night-time, when no puffs of steam could be seen, that his own whistle might not have been heard at all, and that the Jamaica's signal might have been imperfectly heard by him. Ordinary prudence, therefore, required him to repeat his signal, and also carefully to avoid giving any different whistles to other boats at the same time that might mislead the Jamaica. Rule 2 of the inspectors' regulations expressly requires that steamers approaching, like these, in an oblique direction "shall pass to the right, and that the signals by whistle shall be given and *answered* promptly." Rule 6 requires, in general, an "answer" to all signals to each other, whether passing to starboard or port. See *The B. B. Saunders*, 19 FED. REP. 118. The pilot of the Nereus did not *answer* at all to the blast that he heard from the Jamaica; but at the time when such an answer naturally would and should have been given, he gave a signal of two whistles to other boats a considerable distance below. There was danger from the Jamaica, which was coming out of her slip and close at hand, unless an understanding with her were had at once; there was no present danger from the boats so far below, and no urgency for immediate signals to them. In this situation the Nereus was in fault for not *answering* the known original signal from the Jamaica, and for not repeating her former signal; and still more for giving the signal of two whistles designed for other boats, just at a time when an answer to the Jamaica's signal was due. These two whistles were calculated to mislead the Jamaica. They did mislead her, and induced her to go ahead, and thus brought about the collision. The pilot of the Jamaica, on the other hand, had no knowledge or notice of any previous whistle of the Nereus; he was therefore fully justified in treating her two whistles, coming immediately after his own, as intended to be a reply and an assent to his own signal of two whistles, authorizing him to go ahead.

It is urged, however, that contemporaneous whistles in the crowded

navigation of this harbor are of common occurrence; that they are constantly acted upon and treated as a compliance with the inspectors' regulations, requiring an "answer;" and that it is not necessary that the answer be given afterwards, but only that the two steamers shall agree upon the same signal. There was no evidence before me as to the actual practice of pilots on this subject. Doubtless, however, if the two vessels do really agree upon the same signal, and each understands and knows the agreement, the object of the rule is accomplished, and no harm could arise from the want of a literal observance of it by a strictly answering signal. In the day-time pilots watch the vessels they are signaling. By the accompanying puffs of steam, they see the whistles as well as hear them. They rely upon sight, also, to identify the whistle heard with the vessel that gives it. In the case of contemporaneous whistles they perceive and know, by means of sight, the whole signal given, whether fully heard or not. Thus sight, in the day-time, may possibly be relied on to correct with certainty any imperfections of hearing. But in the night-time there are no such means of correcting any imperfect hearing of contemporaneous whistles. When known to be contemporaneous, the liability of misunderstanding in the night-time, through imperfect hearing, is manifest. The object of the inspectors' regulations is to give each steamer knowledge—i. e., a certain knowledge—of the intended movements of the other. To allow contemporaneous whistles in the night-time to stand as "answers" to each other, when the signals under such circumstances are necessarily liable to be wholly or partly drowned by each other, and therefore imperfectly heard, would be to sanction a departure from the rules requiring answering signals that would defeat their very object. The undoubted rule of law is that every departure from the literal observance of prescribed regulations is at the risk of the vessel adopting it. She must show affirmatively that her departure from the rule could have made no difference in the result. In the case of *The Pennsylvania*, 19 Wall. 125, 135, it is said: "The bark had no right to substitute any equivalent for the signal required by the navigation rules. In the case of *The Emperor*, [Holt, Rule Road 38,] it was said, 'It is not advisable to allow these important regulations to be satisfied by anything less than a close and literal adherence to what they prescribe.'" Had an answer been given by the *Nereus* as required, this collision would not have happened. Her previous contemporaneous whistle was not an equivalent, or a lawful substitute, for an "answer," in the night-time, as the circumstances of this case forcibly demonstrate. To sanction such a departure as a substantial compliance with the rule would be as contrary to legal authority as it would be dangerous in practice.

2. The *Jamaica*, having heard the two whistles by the *Nereus* as an apparent assent to her own, with no notice of any previous dissenting signal, is entitled to whatever benefit, as a defense, such assenting signal could give her; but it is not, in my judgment, sufficient

to justify her navigation. At the time she came out from her slip, the Nereus, as the weight of evidence shows, was not above 1,200 feet distant, or about off North Fourth street; or possibly a little above. The witnesses for the Nereus make her much nearer. In the strong flood-tide, the Jamaica would necessarily run up to North Second street, or at least half way up to the Nereus, before she could cross her course. The Jamaica, having the Nereus upon her own starboard hand, was bound to keep out of the way; and all she had to do to effect that was either to remain in her slip a half minute longer, or, if she started out, to go to the right, as required by the inspectors' regulations. By either course all danger would have been avoided.

The Jamaica's proposal to cross ahead of the Nereus in so short a space as was available to her was, therefore, clearly rash and hazardous. It was courting danger by running needlessly directly into it. Had the pilot of the Jamaica realized how near the Nereus was, his starting out of the slip and proposing to run ahead of her, without the slightest necessity or occasion for doing so, must have been judged unjustifiable and foolhardy in the extreme. His proposal to do so, by the two whistles given, was, however, based upon a wide miscalculation as to the distance of the Nereus at that time. He testifies that he judged her to be opposite North Eighth or North Ninth street, or nearly twice the distance she actually was. He is responsible for so great an error in judgment. The Nereus was in fact so near that any attempt to pass her bows in that manner was dangerous and unjustifiable, whether on agreed signals or not; and if there had been actually assenting signals between the two vessels agreeing upon this mode of passing each other, it would have been at the risk of both, because a grossly hazardous undertaking, adopted without necessity, and in direct disobedience of the rule to go to the right. *The City of Hartford*, 11 Blatchf. 72, 75.

A steamer bound to keep out of the way of another steamer by going to the right, under the inspectors' regulations, has no right, when under no stress of circumstances, but merely for her own convenience, to give the other steamer a signal of two whistles, importing that she will go to the left, unless she can do so safely by her own navigation, without aid from the other, and without requiring the other steamer to change her course or her speed. Otherwise she would be imposing upon the latter steamer more or less of the burden and the duty of keeping out of the way, which by statute is imposed on herself. When two blasts are given under such circumstances, the steamer bound to keep out of the way thereby in effect says to the other: "I can keep out of your way by going ahead of you to the left, and will do so if you do nothing to thwart me; do you assent?" A reply of two whistles, in itself, means nothing more than an assent to this course, at the risk of the vessel proposing it. Such a reply does not of itself change or modify the statutory obligation of the former to keep out of the way as before, nor does it guaranty the

success of the means she has adopted to do so. *The City of Hartford, supra; The Vanderbilt*, 20 FED. REP. 650.

But from the moment that such an attempt apparently involves risk of collision, both steamers are equally bound to do all they can to avoid a collision; and under rule 21 they may each be bound to slacken speed, or to stop and reverse, according to the circumstances. But this general obligation under rule 21 applies equally whether the previous signals were of two whistles or of one. The precise acts which either is bound to do, when immediate danger of collision arises, must depend upon the particular circumstances, and of these circumstances the previous understanding as to the course or intention of each vessel is one of the most important. But where the circumstances are such that a course proposed by a signal of two whistles would, if assented to and adopted, require at once, as in this case, immediate and strong measures to avoid a collision, there can be no question that such a proposal is wholly unjustifiable, and a gross fault, when proposed by a steamer that is bound to keep out of the way, and is under no constraint of circumstances, but free to pursue other safe methods of doing so.

The *Nereus* was a large steamer coming down nearly in the middle of the river, and having the right of way. The *Jamaica* was in a safe place in her slip. Clearly, she could not be justified in starting out and crossing the *Nereus'* course, when this would almost certainly bring on a collision unless the *Nereus* should at once adopt the unusual and extraordinary course of immediately stopping and backing in order to let the *Jamaica* run ahead of her. The pilot of the *Nereus* clearly had no such expectation; for he supposed the *Nereus* far enough off to enable him to pass without any such extraordinary concession from her. The answer of two whistles did not, therefore, import to him any such concession. It was no part, therefore, of the supposed agreement between them, as the *Jamaica* actually understood it; and whatever be the fault of the *Nereus*, it does not exempt the *Jamaica*.

As respects the charge of fault against the *Jamaica*, the only inquiry is whether she did perform, or could perform, the apparent agreement as she actually understood it, and had an apparent right to understand it. Her supposed agreement by the two whistles imported, as I have said, that she would avoid the *Nereus* by going ahead of her, if the latter did nothing to thwart her. The slight porting of the *Nereus* was not, in my judgment, sufficient to affect the result; and the *Jamaica* did not and could not avoid her in the way she proposed and undertook. Had she appreciated the actual nearness of the *Nereus* at the time when her signals were given, that course would not have been proposed by her; because her pilot would have known that it was clearly hazardous, and that it involved an unjustifiable interference with the *Nereus'* right of way, and an imminent risk of collision, unless the *Nereus* immediately stopped and backed,—an ex-

traordinary maneuver, which, under the circumstances, the Jamaica would have no right to ask, or to seek to impose upon her. Tested by what her pilot actually judged and understood, the Jamaica cannot be justified; because she did not and could not keep out of the way of the Nereus by going ahead of her, though the latter did nothing to thwart her; but, on the other hand, gave her some aid by backing, which the Jamaica did not expect, and had no right to exact. And, on the other hand, if judged according to the fact of the actual nearness of the Nereus, the Jamaica is responsible for gross error in judgment as to the distance of the Nereus, and for undertaking a most hazardous maneuver, in violation of the regulations requiring her to go to the right, without any exculpating reasons for such a course.

8. On the part of the Nereus, however, it is claimed that, though she be treated as having originally agreed to the Jamaica's proposal, because her two whistles might have been so understood by the Jamaica, still, the whole damages from the collision should be charged upon the Jamaica, because after the Jamaica had got out into the stream the Nereus gave her a signal of one whistle to go astern, and that there was then sufficient time and opportunity for the Jamaica to do so; but that, notwithstanding, the Jamaica rashly persisted in her original attempt, replied again with two whistles, and kept on with unabated speed until the collision took place. If the evidence fairly warranted this contention, and showed clearly that there was abundant time and opportunity after this last signal whistle of the Nereus for the Jamaica to go astern of her, and that that course would, without question, have been adopted under the circumstances by a person of ordinary skill and judgment, then the question would be fairly presented whether the Jamaica under such circumstances should be charged with the full responsibility. Previous errors, indeed, not directly but only remotely connected with the collision, are deemed immaterial when there is ample time and opportunity to correct these faults, and when the collision, notwithstanding such faults, might have been avoided by the use of ordinary skill and judgment. This may, perhaps, be accepted as a substantially correct statement of the rule of law. *The Dexter*, 23 Wall. 69, 76. The only difficulty lies in its application. Substantially the same rule has frequently been applied in this court in cases of vessels navigating in parts of the river forbidden by statute. *The E. A. Packer*, 20 FED. REP. 329; *The Maryland*, 19 FED. REP. 556, and cases there cited. See, also, *The Eliza & Abby*, Blatchf. & H. 435, 442; *The Union*, 2 Biss. 18. The same rule has recently received a very interesting discussion in the house of lords in the case of *Cayzer v. Carbon Co.* L. R. 9 App. Cas. 873, where the same result is arrived at, reversing the decision of the court of appeal. But in all these cases the facts were clear, and the proximate cause of the collision and its remote cause were separated by a very clear and broad line of division. But where the earlier cause and the later cause are both proximate and direct,

both vessels are liable; for it is unreasonable that a fault in one vessel tending directly to a specific collision should go blameless, merely because it was the first fault, or merely because the other vessel did not do all that she might have done to avert the consequences of the other's fault. In such cases both are deemed in fault, and the damages are divided. *The Sapphire*, 11 Wall. 164; *The A. Denike*, 3 Cliff. 117, 122; *The Commerce*, 3 W. Rob. 287; *The Sunnyside*, 91 U. S. 208, 214-228; *The Pegasus*, 19 FED. REP. 46.

Unfortunately, however, the evidence of the different parties bearing upon the application of this principle in this case is in irreconcilable conflict. If the evidence on the part of the *Jamaica* is regarded as approximately true, her situation when the exchange of contrary whistles took place was a situation *in extremis*, in which the collision could not possibly have been avoided by her through any attempt to stop or go astern.

In applying the above rule in particular cases, whenever it is sought to relieve a vessel from the consequences of a previous fault tending to produce a collision, the burden of proof is certainly upon her. She must satisfy the court beyond any reasonable doubt, not merely that the collision, notwithstanding the previous fault, might possibly have been avoided by the other vessel, but that the mode of avoiding it suggested was timely, and would have been adopted, under the particular circumstances, by a pilot of ordinary skill and judgment. The rule certainly has no application to a situation *in extremis*; nor can it be justly applied where the situation is such, all the circumstances being considered, that any reasonable doubt might exist as to the best course to be pursued on the part of those in charge of the other vessel. In short, all situations in which the final failure to avoid the collision comes within the limits of excusable error of judgment by persons of ordinary skill and coolness, must be excluded from the application of this rule. A vessel which has brought another, either wholly or partly by her own fault, into a dangerous situation, must bear the responsibility of a mere error of judgment made subsequently in the endeavors to avoid a collision. This is a familiar rule applied to errors *in extremis*. *The Genesee Chief*, 12 How. 461; *The Favorita*, 18 Wall. 603; *The Elizabeth Jones*, 5 Sup. Ct. Rep. 468; S. C. 112 U. S. 514.

At the time of the last contrary signals, the evidence on the part of the *Nereus* is to the effect that she was off North Second street, about 850 feet from shore; and that the *Jamaica* was about 150 feet out from her pier, and about the same distance above it, and about 500 feet distant from the *Nereus*, and heading for the latter's pilot-house. According to the *Jamaica's* evidence she was at the time of these two whistles about one-third of the way across the river; and within from 100 to 200 feet of the line of the *Nereus's* course, heading nearly across the river. There are such difficulties in reconciling the relative situation of the two boats, as alleged by the *Nereus*,

with the other testimony of her own witnesses, as well as such improbabilities attending it, that I am obliged to reject it as altogether mistaken. If the relative situation of the two boats was such as the Nereus alleges, it would, moreover, seem almost incredible that the pilot of the Jamaica, on hearing the signal of one whistle from the Nereus, should not have acquiesced, replied with one, and immediately ported his wheel. In the situation alleged that alone would probably have easily carried the Jamaica astern of the Nereus; if not, backing, in addition, would most certainly have done so. This mode of avoiding danger was so evident, and the risk of the opposite course so great, that the pilot of the Jamaica, with his long experience, is fairly entitled to the benefit of the *prima facie* assumption that he would not have persisted upon a course evidently hazardous upon contrary signals when there were so simple means of escape.

It must be borne in mind that the time that elapsed between the collision and the time when the Jamaica gave her first whistle as she was passing the end of her pier did not probably exceed one minute; for from that point to the place of the collision, about 850 feet off North Second street, she traversed, even in her winding path, not exceeding 900 feet. The tide during this time would set her up 300 feet; and, very shortly after starting at the full speed of her engines, she had acquired her full headway of from eight to nine knots. From the other testimony it is evident, also, that the first whistles between the Nereus and the Jamaica were not more than a quarter of a minute after the signal given by the Nereus to the George Law. The signal to the George Law was given just as the Nereus had cleared the Tenth-street buoy, which is opposite North Sixth street, and in range between that and Tenth street, New York, and is upwards of 1,000 feet above North Second street, the place of collision. If the second whistle to the Jamaica was given when the latter was but 150 feet above her pier, it must have been given in less than half a minute after her first whistle, and the Nereus could not have then reached North Second street where her captain alleges she then was, unless she had been going during this half minute at the rate of 12 knots, which was at least double her actual speed by land. Her captain testifies that he slowed as he passed the Tenth-street reef, on signaling the George Law, and was previously going at the rate of about five and one-half knots by land. The pilot of the George Law testifies that when the Nereus whistled to the Jamaica, the Nereus was "a little below Tenth street." This would place her bows certainly above North Fourth street when she first signaled to the Jamaica; and during the minute that followed, until the collision, she must have traversed upwards of 400 feet. The position thus assigned her is, I think, indirectly confirmed by the testimony of the Tenth-street pilot, who testified that she was in the range of North Sixth street when the whistles of the Jamaica were given. I think he is mistaken as to the whistle he refers to, and that it was the whistle given

to the George Law, and not that given to the Jamaica, that was then given. Thus interpreted, it certainly confirms the other testimony to the effect I have stated.

But not only is it impossible that the Nereus could have got down to North Second street by the time the Jamaica was some 200 feet only from her pier, but in that situation, and with the previous understanding, to which the pilot of the Nereus testifies, that the Jamaica was going astern of him under an understood signal of one whistle, there was no reason for the Nereus to repeat her previous signal, as there would then be no reason to suppose the Jamaica would not go astern of him in accordance with that supposed understanding. Again, he says that when he gave two whistles to the Commodore,—the first heard by the Jamaica,—he shut off steam at the same time. This would be an unaccountable order, so far as I can understand, in that situation. Finally, he testifies that the order to reverse the engines was given when the Jamaica's two whistles were heard, his boat being then "at a dead stop," and that his engine backed from one to one and a half minutes before the collision. The engineer estimates that he got about 45 revolutions backward, her previous speed forward being 56 revolutions to the minute. All these statements I am obliged to deem mistaken, because incompatible with the other testimony concerning the relative situations of the Nereus and the George Law, as to which there is less liability to mistake in the testimony. The distance even between the George Law and the Nereus, as the former passed, is probably estimated by Capt. Lockwood too small when he states it at 500 or 600 feet. If the Nereus was then just passing, or had just passed, the Tenth-street buoy, as Capt. Coleman states, and as is confirmed by the Tenth-street pilot, then the bows of the Nereus must have been at least 750 feet distant from the George Law. The Jamaica passed nearly in the track of the George Law; that is, probably not over 100 feet above her, and certainly not more than one and one-fourth or one and one-half minutes behind her. The pilot of the Jamaica says that when he started from his slip, the George Law was about one-third of the way across the river. The rest of the testimony agrees with this, as a rough estimate. Had the Nereus been slowed, stopped, and backed in any way approximating that testified to on her part, prior to the collision, she could not have traversed the distance that separated her from the George Law in the short interval up to the time when the Jamaica passed a little above the George Law's track.

On the other hand, supposing the Jamaica to have crossed the line of the Nereus 100 feet higher up the river than the path of the George Law, the Nereus must have come down the river from 400 to 600 feet to reach the point of collision; and assuming that the Nereus slowed as she passed the Tenth-street buoy and whistled to the George Law, as her pilot testifies, in order to have reached the point of collision at all, she could not have commenced backing until a very few

seconds before the collision. It may be assumed as natural and probable that, upon the contrary signal of two whistles given by the Jamaica, and the several toots signifying danger that immediately followed, she did begin to back; and as this, for the reason above stated, could not have been but a few seconds before the collision, it follows that the Jamaica must have been far more nearly in the situation alleged by her own witnesses than in that testified to by the witnesses of the Nereus. This is further confirmed by the nature and extent of the damage done both to the Jamaica and to the Nereus. It is difficult to believe that so serious damage would have been inflicted on both if the Jamaica was merely drifting up with the tide, and if, as the Nereus alleges, she herself was also backing by land. The injuries were such as would seem only probable if the Nereus still had a considerable forward motion by land. In referring to these various details in which I think the testimony on the part of the Nereus is mistaken, I design no reflections upon the general integrity of her witnesses. The time and space within which the occurrence took place were so small, and the changes so rapid, that these mistakes are easily accounted for by erroneous recollection as to the sequence of events merely, and as to the precise order of similar occurrences.

The situation of the two vessels at the time of the contrary whistles, as stated by the witnesses on the part of the Jamaica, while not agreeing in minute particulars, are, nevertheless, in the main consistent. If the Jamaica was only from 100' to 300 feet to the eastward of the line of the course of the Nereus, and the Nereus was under considerable headway, as their witnesses assert, and as I think the other evidence justifies, then there was no chance of escaping a collision at the exchange of contrary whistles, except possibly by the Nereus' star-boarding. Had this been done, as I think the Nereus could not have been then backing, her bows would have swung to port, and might possibly have escaped the Jamaica.

The testimony of the witness Lockwood, the pilot of the George Law, is such as to suggest great doubt in my mind whether the contrary signals he refers to were really the first or the last. He speaks of the contrary signals attracting his attention. Now, the first exchange of whistles between the Nereus and the Jamaica were really contrary whistles. He was as near the vessels then as he was afterwards, and no reason appears why he should not have noticed those whistles as well as the latter contrary ones. He says these two whistles from the Jamaica were just as she got out of her slip, and that is about where she was when her first two whistles were given to the Nereus, and those first two would have been audible to him. In interviews had with him at the time, and in his recollection afterwards, he was in evident perplexity in regard to the whistles heard. It is pretty clear either that he did not hear both sets of contrary whistles, or that he got them in some way confounded in his recollection. He considered that the Jamaica ought to have stopped and

backed at the time he heard the contrary whistles. But this judgment was based upon the position of the Jamaica at that time in his mind as being near to her pier. That was her situation at her own first two whistles. On account of this evident confusion, and the perplexity which marks his testimony, as well as his readiness to accede to the statement made by the officers of the Jamaica's line at the time of the transaction, no conclusive weight can be given to his testimony.

For these reasons I do not think the Nereus has sustained the burden of proof that is upon her, to absolve herself from her previous fault by showing that her subsequent signal of one whistle was given in sufficient time to charge the whole blame for not complying with it upon the Jamaica. But the previous fault of the Jamaica being also clear, the damages must be divided between them.

THE MANGALORE.

(District Court, D. California. December 5, 1882.)

SHIPPING—LIABILITY OF SHIP FOR DAMAGE TO CARGO—BILL OF LADING—EXCEPTED PERILS.

On examination of the evidence, *held*, that the vessel was liable for the damage to the cargo.

In Admiralty.

William Barber, for libelants.

Milton Andros, for claimants.

HOFFMAN, J. After some hesitation I have reached the conclusion that the claimants have not, by a preponderance of proofs, shown that the damage to the goods was caused by one of the excepted perils. A very attentive examination of the log-book has led me to the opinion that the voyage was perhaps of less than ordinary severity, and if the weather and seas encountered by the Mangalore can be received as an excuse for bringing into port a cargo so extensively damaged as this was, and for decks in the condition in which her decks were found, almost every ship that comes around the Horn could set up a similar excuse. The court is asked to infer "straining" from the condition of her decks alone, no other trace of it being elsewhere visible, so far as disclosed by the proofs, and this in the face of testimony by very competent experts (though it is not uncontradicted) that no iron vessel could strain so as to open her seams as those of the Mangalore were opened, without showing the effects of it in her rivets. I cannot exonerate the ship on the ground that some of the damage was caused by her hatch being stove in by a sea, for several reasons:

1. The damage, if any, from this cause cannot be distinguished from damage from causes for which the carrier is responsible.

2. The construction of the hatch seems to have been faulty. Very considerable additions to its strength were ordered by the surveyor, and in fact made, before she was permitted to sail from this port.

3. I do not believe that any appreciable amount of water could have been admitted to the cargo through the hatch, inasmuch as the tarpaulins with which it was covered were intact and were in fact retained in use when she sailed from this port.

One undisputed fact seems to have some significance: no one on board appears to have had the least suspicion that the ship had strained so as to open her seams and admit water to her cargo until after her discharge had been commenced. The usual washing of the decks was continued even after her arrival, and until it was discovered that the water leaked freely into her hold. The theory that she had "strained" appears to have been then for the first time adopted. It does not appear that any examination of her planks and rivets was made, which on that theory would be natural, if not indispensable. All that was done of any consequence was to repair and strengthen her hatch and recalk her decks.

I think the libellant is entitled to recover.

THE MANGALORE.

(District Court, D. California. June 12, 1883.)

SHIPPING — INJURY TO CARGO — MEASURE OF DAMAGES — REBATE AT CUSTOM-HOUSE.

Where a cargo has been injured by the negligence of the vessel, the measure of the damages is the difference between the market value of the damaged goods at the time and place of delivery and what their value would have been if uninjured, less any rebate allowed at the custom-house.

In Admiralty.

William Barber, for libelants.

Milton Andros and *Charles Page*, for claimants.

HOFFMAN, J. The only question raised by the exceptions which, as it appears to me, admits of doubt, is whether the damage to the shipment was confined to 164 bales, or extended to the whole consignment. Mr. Gallego wishes it to be understood that the damage estimated by him at one and three-quarters to two cents per bag pervaded the entire lot of 300 bales, containing 1,000 bags each. But his testimony is quite obscure, and his memory by no means distinct. His examination of the shipment was made in conjunction with the customs officers, who took, as their duty required, notes of the results of their inspections in order to determine the rebate of duty to be al-

lowed on the damaged appraisement. There does not appear to have been at the time any difference of opinion between them and Mr. Gallego as to the results of the survey. There was allowed at the custom-house a rebate of \$1,016 on the duties otherwise leviable on 164 bales. The remainder were charged the full duty as on sound, dutiable value. No objection or protest appears to have been made by the shippers, and the duties were adjusted and paid on this basis. The prices subsequently obtained (though not until the next season, and after certain expenditures made by the shipper for repacking, repairing, etc., were incurred) tend to strengthen the impression that the damage was subsequently confined to the 164 bales. Accepting, then, Mr. Gallego's estimate of damage per bag to 164 bales, or 164,000 bags, as one and three-quarters, we have total damage of \$2,870. The payment of this sum would have placed the owner in the same condition as if his goods had arrived sound; but by reason of their damaged condition he was able to obtain them by the payment of duties less by \$1,016 than he would otherwise have paid. Deducting this sum from \$2,870, we have \$1,854, which, with interest, is the damage sustained. The commissioner has reached substantially the same conclusion by computing the difference between the sound market value of the goods (eight and seven-eighths cents per bag) and the market value of the 164 injured bales, (seven and four-tenths cents per bag.) This amounts to \$1,049, and to this he has very reasonably added \$200 as an allowance for bales damaged to so small an extent as under custom-house rules is not considered. This allowance would amount to nearly 2 per cent. on the sound, duty-paid market value of the remaining 136 bales constituting the balance of the shipment.

I think the sum of \$1,854, with interest from August 8, 1881, allowed by the commissioner, is as just and reasonable an estimate of the damages as can be arrived at.

OLYPHANT v. ST. LOUIS ORE & STEEL Co. and others.¹

(Circuit Court, E. D. Missouri. March 26, 1885.)

1. PARTIES—FORECLOSURE SUIT—MORTGAGE ON PROPERTY NOT EMBRACED IN MORTGAGE TO COMPLAINANT.

B., a corporation, mortgaged its property to X. Subsequently it consolidated with the owner of some mining property, and the consolidation was called C. C. gave a mortgage upon all its property to Y., and afterwards gave a mortgage to Z. upon all its property except that covered by the mortgage to X. Upon default Z. instituted foreclosure proceedings against B., and made X. and Y. parties. Upon X.'s demurring, *held*, that he is a proper party.

2. MORTGAGES—SEPARATE FORECLOSURE PROCEEDINGS BY PARTIES HOLDING MORTGAGES ON DIFFERENT PIECES OF PROPERTY.

Semble, that though X. is a proper party to said suit, he is entitled to leave to institute separate foreclosure proceedings and have the property covered by his mortgage sold by itself, in the absence of equitable reasons estopping him from insisting on such right; and the fact that some of the principal bondholders under the first mortgage have mining property which is in interest antagonistic to the mining property belonging to the consolidated company, does not constitute any equitable reason for denying them that privilege.

In Equity. Foreclosure suit. Demurrer to bill.

E. T. Allen, for complainant.

Noble & Orrick, for demurrants.

BREWER, J., (*orally*.) In the case of *Olyphant against Ore & Steel Co.*, where a demurrer has been filed by the trustees of the first mortgage, a mortgage given by the old Vulcan Company upon its plant in south St. Louis, the facts are that in 1875 the Vulcan Company, owning the plant here in south St. Louis, executed a million dollar mortgage to Edgar and Lackland, trustees. That mortgage covered its property, and it had but this property. The bonds secured by that mortgage become due on the fifteenth of next month. The interest due last fall is unpaid. Some years after that mortgage had been given, the mortgagor consolidated with the owner of some mining properties, thus forming the "Ore & Steel Company." That consolidated corporation bound itself to pay the mortgage on this south St. Louis plant. After the consolidation, a mortgage was given to the Farmers' Loan & Trust Company, a New York corporation, on the entire properties. Subsequent thereto a mortgage was given to Messrs. Olyphant and Hitchcock on the properties, excluding the property in south St. Louis, upon which the old Vulcan mortgage was given. So it stood in this condition: The Farmers' Loan & Trust Company had a mortgage on all the properties, a mortgage subsequent to the Lackland mortgage on the property in south St. Louis, and prior to that to Olyphant and Hitchcock on all except the south St. Louis properties. Now, while the mortgagees in this first mortgage are not necessary parties, yet it would seem to us that they were proper parties; that the Farmers' Loan & Trust Company mortgage is a connecting link that

¹Reported by Benj. F. Rex, Esq., of the St. Louis bar.

binds the interests all together; for, when this Vulcan property is sold to pay its first mortgage, if there be a deficiency, whether that deficiency stands as an indebtedness against the other property, subordinate to the mortgages already existing thereon, or prior thereto, is a question which of course ought to be determined, and will affect the value of these mortgages and the property sold. So, as far as the demurrer is concerned, we think it may be properly overruled. But the question that lies back of that, perhaps the real and substantial question in the case, is whether these first mortgagees of the south St. Louis property should be delayed in the foreclosure of that mortgage, and compelled to abide the sale of the entire properties, and as an entirety.

Generally speaking, if a mortgagee loans money on a single piece of property, he has a right when default comes to have that property by itself sold, and for obvious reasons. Take the case at bar. Here is a mortgagee who loans a million of dollars on manufacturing property. Default has occurred. Why should he not be at liberty to foreclose his mortgage on that property on which he made his loan, if it fails to pay his debt? He may say, "I will take that property." Why should he be compelled to put his hands in his pocket and advance two or three millions more to buy other properties, which he may not want, which he never loaned his money on, and which he had no thought of at the time he made his loan. He dealt with the mortgagor owning the particular piece of property; he made his loan upon that particular piece of property; and now says to the mortgagor, it not paying: "I want the property sold; if I have to buy it in, well and good. At any rate, I don't want to be mixed up in the other matters, and have that property put up for sale with a large bulk of property which I may not be able to buy, and which I might not want to buy if I was able." It seems to us that he would have such a right as that, unless, of course, as Mr. Allen suggested, there may be equitable reasons estopping him from insisting on such right. In the case at bar, the bondholders, represented by the mortgagee in the first mortgage, may have so conducted themselves at the time of consolidation in respect to it that there may be equities against their apparent present right. But if there be such equities, they are not now disclosed to us. It stands before us simply upon the fact that here is a mortgage upon a single property, given before any other properties belonged to the mortgagor, which has come to default, and which the mortgagee says he wants to have sold to pay the debt.

It has appeared incidentally, in the course of this litigation, that some of the principal bondholders in this first mortgage—this Vulcan mortgage—have mining properties, or ore properties, which are in interest antagonistic to the ore properties which belong to this consolidated company. So be it. I do not see any equitable reason, in that, why they should not have this manufacturing property on which they loaned sold. Very naturally, if they have ore properties, they

may say, "We don't want any of the ore properties of this Ore & Steel Company. All we do want is this manufacturing property, and that we loaned our money on, and that we can, if we buy, unite with our ore properties, and thus make those properties valuable." So, whatever conflict of interest there may be between the ore properties now held by the Ore & Steel Company and those owned by the bondholders in the original Vulcan mortgage furnish no ground for saying, "You cannot buy this manufacturing property without you buy the entire properties subsequently accumulated by the mortgagor." Hence, we say, while the demurrer to the bill is overruled, there is also a petition for leave to foreclose that prior mortgage speedily, and the order will be that, unless by the eighteenth of April reasons are shown which make it inequitable,—something which raises what you may call an equitable estoppel on the mortgagees,—they will be permitted to proceed with the foreclosure of that separate mortgage upon the Vulcan property,—the south St. Louis property; such foreclosure and sale to be subject to the order of the court, in order that there may be nothing done which will go against the equities of any of the parties connected with this Ore & Steel Company. Whatever may be said, as was said by counsel, as to the default in interest last fall having been brought about by the action of these bondholders in issuing attachments and other proceedings, even assuming they were guilty of wrong in that, now the principal is due, and certainly they ought not to be deprived of or postponed as to that because of any interference which they may have been guilty of in respect to the mere matter of interest six months ago.

My brother TREAT suggests, and I think the interests of all parties will be promoted in so doing, that in view of what has been decided, and with the expectation that the property will be sold at an early day, full notice should be given immediately, and the information disseminated, so that all parties interested in such properties may commence to make arrangements accordingly.

Mr. Noble. Do I understand notice of foreclosure under the deed?

The Court, (TREAT, J.) No. The suggestion is this: The order of the court, as stated by Brother BREWER is, unless by the eighteenth of April the principal and interest is paid, you proceed to foreclose according to the terms, but in the mean time—and it is a mere suggestion—let it be known that the property will be in the market, by advertisement.

Mr. Noble. The Bessemer steel process belongs to the Vulcan property, and is to be sold at the same time. The order should include that, that the property may be sold together with the Bessemer steel process.

The Court, (TREAT, J.) Your right to do that?

Mr. Noble. I will prepare an order in regard to that.

Mr. E. T. Allen. If I understand the suggestion of the court, it was, unless cause was shown by the eighteenth of April why some such order should not be made, on that day that such an order would then be made. I apprehend there will be cause shown before that time why such an order should not be made, and that we will ask the court to consider. If I understand Judge BREWER, if we do not, there will be an order entered as of this date in reference to this transaction?

The Court, (BREWER, J.) It makes little difference which way you get at it. The order goes, unless good reasons to the contrary are shown.

Mr. Noble. I understand it to be that it is now ordered, unless cause be shown on or before the eighteenth of April next to the contrary, that the trustees, Lackland and Edgar, have leave to proceed to sell under the powers of the deed of trust all the property therein described, together with the Bessemer steel process referred to in their application?

The Court, (BREWER, J.) So far as appears to us now, on the general legal rights of the parties, we think they have the right to proceed, and the order is that you go on, and give the other side to the eighteenth of April to make such a showing as would justify the court in postponing the proceedings.

Mr. Allen. Permit me to call your honors' attention to the fact, so far as the plaintiff in this case is concerned in this Bessemer process, the demurrer was the only matter before the court at the time of the hearing. No arguments, in effect, were addressed to your honors in reference to this particular subject-matter, in regard to which the court has made a limited order. I only desire to call the attention of your honors to the fact that the reasons urged hitherto by the complainant why such course should not be taken, were not brought to your honors' attention.

The Court, (BREWER, J.) You have until the eighteenth of April to bring it to our attention, if the matter don't appear on record. The matter is in the hands of the court until that time.

WELLS, FARGO & CO. v. NORTHERN PAC. RY. CO.

(Circuit Court, D. Oregon. November 19, 1884.)

1. EXPRESS COMPANY—RIGHT OF WELLS, FARGO & CO. TO DO BUSINESS IN WASHINGTON TERRITORY—REV. ST. U. S. §§ 1924, 1889.

A corporation, created under a special act of Colorado, whereby it is authorized to engage in the express business, and to draw drafts and bills of exchange, or sell and buy the same, in the course of such business, is not prohibited (Rev. St. U. S. §§ 1924, 1889) from carrying on such business in Washington Territory on the ground that it is a banking corporation or that it was not organized under a general incorporation law.

2. SAME—"INDUSTRIAL PURSUITS."

The express business is an "industrial pursuit" within the meaning of Rev. St. U. S. § 1889.

3. SAME—EXPRESS FACILITIES—DUTY OF RAILROAD COMPANY—COMPLIANCE WITH STATE LAWS BY EXPRESS COMPANY.

It would seem that a railroad company cannot refuse express facilities to an express company on the ground that it has not complied with the laws of the states or territories in which it demands such facilities.

4. SAME—INTERSTATE COMMERCE.

An express company that is engaged in transportation from one state to another, is engaged in an interstate commerce, and no territory or state can impose upon it any conditions by way of license, or otherwise, to engage in this commerce by passing through its limits, but such company will have no right to do a mere local business within a state or territory without complying with the territorial or state law.

5. SAME—NORTHERN PACIFIC RAILROAD COMPANY—MANDATORY INJUNCTION.

Wells, Fargo & Co. v. Oregon Ry. & Nav. Co. 8 Sawy. 600, S. C. 15 FED. REP. 561, followed as to the duty of a railroad company to furnish express facilities to an express company, and a mandatory injunction granted, requiring the Northern Pacific Railroad Company to furnish such facilities to Wells, Fargo & Co. on its road, from Oregon to St. Paul, Minnesota, and connecting lines, as it furnishes other express companies, on condition that Wells, Fargo & Co. execute a bond for \$25,000 to pay all costs, charges, and damages which the railroad company may incur.

In Equity. Suit for injunction.

This cause came on to be heard on the bill and answer thereto, and the affidavits of plaintiff and defendant, upon motion for a preliminary injunction to compel the defendant to furnish the plaintiff express facilities over its lines of railway northward between Portland and Tacoma, and eastward between Wallula junction and St. Paul.

M. W. Fechheimer, for plaintiff.

James McNaught and *C. B. Bellinger*, for defendant.

DEADY, J., (orally.) This is a suit brought to restrain or constrain the defendant to furnish the plaintiff with express facilities upon its railway from Portland to Tacoma, and from Wallula junction to St. Paul, and branches between those points. It is brought by Wells, Fargo & Co., a corporation organized by a special act of the territory of Colorado in 1866, whereby it is authorized to engage in the express business, and to draw drafts and bills of exchange, or sell or buy the same in the course of such business. The act itself, section 1, provides:

"That Ben Holladay, David Street, Bela M. Hughes, S. L. M. Barlow, and John E. Russell, and their associates, successors, and assigns, be and they are hereby declared to be a body corporate and politic, by the name of the Holladay Overland Mail & Express Company, and by such name shall have continual succession, with power to sue and be sued, plead and be impleaded, complain and defend in any court of law or equity; to adopt and use a common seal, and change the same; to purchase, hold, mortgage, and convey any estate or property, real or personal, for the use and benefit of said corporation; to take, to hold, and dispose of any mortgage on real or personal estate; to establish, maintain, and operate any express, stage, or passenger, or transportation route or routes, by land or water, for the conveyance of persons, mail, or property of any kind, from, to and between any place or places in Colorado territory, and any place or places beyond the limits thereof; to erect, or hire and maintain warehouses or other structures for the safe keeping of goods, wares, merchandise, or other chattels or effects, and the transaction of business; and for the purpose of facilitating exchange between the several places at which said corporation may transact business, the said company shall have power to draw, accept, indorse, guaranty, buy, sell, and negotiate drafts and bills of exchange, inland and foreign; to receive coin, money, silver, and gold, in any form or other, and any kind of valuables on deposit at its offices, and make orders for the payment and delivery of the same, or an equivalent, at any other place whatsoever; to buy, sell, and dispose of gold and silver coin and bullion, gold-dust, money, and securities for money, and to do a general exchange and collection business; and to invest surplus or unemployed funds in bonds or notes, secured by mortgage on real estate, stocks of the government of the United States, of any of the United States, or otherwise, as the board of directors may designate."

The bill alleges that this plaintiff has been in the express business in Oregon, Washington, Idaho, Montana, and places to the eastward thereof, for many years; that the defendant is furnishing express facilities to the plaintiff over its road from Kalama northward, and from Wallula junction eastward to Missoula; but that it has refused, and still refuses, to furnish express facilities over its road to the plaintiff from Portland to Kalama, and from Missoula eastward. The answer of the defendant substantially admits the facts upon which the plaintiff grounds its right; that is, the incorporation of the plaintiff, its express business, the ownership and operation of the Northern Pacific Railway and its branch lines by the defendant, and the refusal on the part of the defendant to furnish express facilities to the plaintiff within or between the points named. But, as a defense or reason for this refusal, the defendant sets up several matters; and, first, it says plaintiff is a banking corporation, and by section 1924 of the Revised Statutes it is prohibited from doing business in Washington Territory, and therefore, as an express company, cannot come into that territory; nor can it rightfully or lawfully demand any privileges or facilities or conveniences from the defendant over its railway lines within that territory. Section 1924, of the Revised Statutes referred to, is section 6 of the act of March 2, 1853, (10 St. 172,) organizing the territory of Washington, and it provides:

"The legislative assembly of Washington shall have no power to incorporate a bank, or any institution, with banking powers, or to borrow money in the

name of the territory, or to pledge the faith of the people of the same for any loan whatever, directly or indirectly. No charter, granting any privileges of making, issuing, or putting into circulation any notes or bills in the likeness of bank-notes, or any bonds, scrip, drafts, bills of exchange, or obligations, or granting banking powers or privileges, shall be passed by the legislative assembly; nor shall the establishment of any branch or agency of any such corporation, derived from other authority, be allowed in the territory; nor shall the legislative assembly authorize the issue of any obligation, scrip, or evidence of debt, by the territory, in any mode or manner whatever, except certificates for service to the territory."

In *Rapalje & L. Law Dict.*, under the word "Bank," occurs this definition of a bank:

"(1) A place for the deposit of money. (2) An association or corporation whose business it is to receive money on deposit, cash checks or drafts, discount commercial paper, make loans, and issue promissory notes payable to bearer, called 'bank-notes.' (3) The building, apartment, or office where such business is transacted. Banks are of three kinds: banks of deposit, which include savings banks, and all others which receive money on deposit; banks of discount, being those which loan money on collateral or by means of discounts of commercial paper; and banks of circulation, which issue bank-notes payable to bearer. But the same bank generally performs all these several operations."

Now, I think it is too plain for argument that the plaintiff is not a bank or a banking corporation in any of these senses; though it is undoubtedly true that it possesses some of the powers or facilities which may be used by a bank, and are commonly used by banks in the transaction of business; still, banking is not the object of its incorporation. The object of its incorporation is the transportation of packages, including money, from place to place; and, so far as money is concerned, this is also done at this day by telegraph, bills of exchange, drafts, and otherwise. It may be very convenient and very proper for Wells, Fargo & Co. to receive \$1,000 in gold to be transmitted to New York, and to do so by giving a draft on New York, or by making a telegraphic transfer, and then transporting the coin to New York at its convenience, or keeping it here, if that should be more convenient, for the time being. I do not think I can better dispose of this objection than in the language of Mr. Justice GREENE, in the able and exhaustive opinion (1884) delivered by him in the case between these same parties in Washington Territory. He says:

"It has been stated in argument that plaintiff is doing a purely banking business at different points in the United States, notably at San Francisco and New York city. Possibly, it may be doing what is beyond its lawful powers. The prime object of its pursuit, according to its charter, is not banking, nor the doing of those things wherein banks and bankers are principally or peculiarly engaged, but the reception, transmission, and delivery of parcels and values, and executing other commissions. For a person whose proper vocation is not that of a banker to do for himself, solely in furtherance of his own particular vocation, the things that a banker does, is not 'banking,' nor is it, as it seems to me, the exercise of 'banking powers.' If plaintiff, under its charter, does things that banks do, it does them as ancillary to its main business, just as a merchant incidentally, in his own behalf,

in his mercantile transactions, may do every one of those things which plaintiff is empowered to do, and yet do them without being in name or fact an expressman or a banker. Not for the purpose of doing a banking business in any phase, but 'for the purpose of facilitating exchange between the several places at which said corporation may transact business,' are the particular powers of plaintiff given.

"For the safe and convenient transmission of value, and for no other purpose, a token of value is taken from a sender at one place, and a corresponding token is produced to a recipient at another place. It is all the same as if a parcel of goods to be sent were received at one end of a line of transportation, and a like or equivalent parcel were, by consent or stipulation of the shipper, to be delivered at the other end. A business consisting of such details is not 'banking,' nor are powers limited to carrying it on 'banking powers.' In one department or another of banking the receiving of deposits, or the buying and selling of gold and silver and mercantile paper and securities, or the drawing, paying, and collecting mercantile paper, is the principal thing, and the exchange of values between localities, thereby sometimes effected, is subsidiary or accidental; but in this part of the express business the principal thing is the transfer of value from place to place, and the buying, selling, drawing, paying, collecting, depositing, and receiving are all accessory. Every milling, or mining, or other productive corporation, has to do some or all of these things for the convenience of itself in its own business, to a greater or less extent, and if it could not, would be cramped almost or quite to death. Between such a corporation and plaintiff there is a difference arising from the fact that the requirements of plaintiff's business make the doing of such things a matter of great convenience and frequency, and so prominent and important as to deserve especial mention and definition in the charter. But in the particular now under discussion, the two are otherwise alike.

"I do not understand that congress demands or contemplates that section 1924 be so applied as to bar out from our territory any foreign corporations except those who carry on a business in which the things essential to banking are done for banking's sake, or, in other words, as the main, as distinct from an incidental and ancillary, affair. Only such are banks, or have the power to do banking. Wells, Fargo & Co. is not, in my opinion, though it may be in its own, a corporation of that description. See *People v. River Raftin, etc., R. Co.* 12 Mich. 389. Looking further at this section, the intent of it seems to be, not to exclude a corporation simply because so fortunate or unfortunate as to be clothed with banking powers, or powers used in banking, even so as to be exercised in chief, but rather to exclude one exercising or claiming to exercise them in fact. The section seems to be leveled, not at abstract or dormant power, but at actual deed or endeavor. In the record before me there is nothing to show that plaintiff is doing or undertaking anything unlawful. It is not under compulsion of any absolute necessity of its express business to exercise the interdicted powers. Values can be expressed between distant places without traffic in precious metals or valuable paper. If such traffic be unlawful for plaintiff, it is freely, though perhaps not conveniently, separable from plaintiff's business. And, although one may say that it is to be presumed that plaintiff is doing all that its charter purports to authorize, and that is convenient to be done, yet the stronger and overcoming presumption is that it is not disobeying any law, organic or otherwise."

I think myself that, apart from the question as to whether this corporation can be abstractly called a "bank" by virtue of its act of incorporation and powers conferred by that act, the only question, if

there be any question, is, "What are the powers it is exercising in this territory, and what is the business in which it is engaged?" It may have, in my judgment, many interdicted powers, or more than one, considered with reference to the locality of Washington Territory; but if it goes there, exercising only the powers which are permitted as to the interdicted ones, they do not exist. Whoever alleges it is exercising, or attempting to exercise, interdicted powers, and, therefore, is unlawfully in that territory, must prove the allegation to be true. There is no presumption, as Mr. Justice GREENE says, that "it is there, violating or intending to violate the laws of the territory."

Another objection is made to the relief demanded in this bill, on the ground of the inability of the plaintiff to exercise the powers claimed by it in Washington Territory; and that is, that it is created by a special act of Colorado. This objection is founded upon section 1889 of the Revised Statutes, which is applicable to all territories, and reads as follows:

"The legislative assemblies of the several territories shall not grant private charters or especial privileges; but they may, by general incorporation acts, permit persons to associate themselves together as bodies corporate for mining, manufacturing, and other industrial pursuits, or the construction or operation of railroads, wagon roads, irrigating ditches, and the colonization and improvement of lands in connection therewith, or for colleges, seminaries, churches, libraries, or any other benevolent, charitable, or scientific association."

Now, it is argued, first, that because a corporation cannot be organized in Washington Territory by a special act of the legislature, but must be organized under the general law, therefore a corporation existing before this restriction was made, under a special act of a sister state or territory, cannot come into that territory and exercise the powers, although they are in no way excluded by the law of the land, or contrary to the public policy. The ground is that it is not brought into being in the peculiar or particular way in which the general law now requires corporations to be formed in Washington Territory; but I cannot see that there is anything in this objection. There is nothing in this section (1889) to prevent any corporation exercising its powers in Washington Territory in particular cases. Everybody who is familiar at all with the history of the growth and organization of corporations in the United States knows that this rule, requiring corporations to be organized under a general law, is the growth of some years, and has grown out of the confusion, corruption, the partial and inequitable legislation that was the result of allowing parties to go before the legislature, and ask for a special charter. The time of the legislature was unnecessarily consumed by it; the integrity of the members of the legislature was unduly exposed; or, through the ignorance or carelessness of the legislature, and the astuteness and diligence of designing and overreaching men, there were constantly coming to light obscure clauses in these acts of the legislature, giving

powers and granting privileges which were unjust, inequitable, and which would never have been done with the knowledge of the legislature.

Therefore, owing to the evils resulting to the territory of Washington, to the people, and to the legislature, this act was passed, and has no reference whatever to the fact whether a corporation, otherwise formed, might exercise powers in that territory not prohibited or contrary to its public policy. It is a matter of no moment whatever to Washington Territory, that corporations in Colorado are created by special act. The people of the latter territory are not corrupted by it; the legislature is not corrupted by it; their time is not taken up with it. The only interest that they have in the matter is the interest that any portion of the people in the United States have in the welfare of all the other people in the United States. See, also, on this point, the remarks of Mr. Justice FIELD in *Cowell v. Springs Co.* 100 U. S. 59. With reference to the effect of this limitation upon the power to form corporations within the territory, I quote again from the opinion of Mr. Justice GREEN:

"Again, defendant urges that, under the second clause of section 1889, the territorial legislatures can, by general incorporation acts, authorize the formation of corporations for those purposes only which are specified in that clause; that plaintiff is not a corporation within the limitation, unless its business be an industrial pursuit; that to be within the limitation its business must be, not only industrial, but of a character like mining and manufacturing; that its business is neither of that character nor industrial; and that, therefore, since its like could not, by private or general statute, be formed within the territory, its admission to do business in the territory is prohibited by the spirit of the section. But this clause refers merely to the formation of domestic corporations, and has nothing to do with domestic recognition of foreign corporations. Besides, I think plaintiff's pursuit is industrial. It is such, according to ordinary usage of words."

It is objected that this corporation is unable to come into Washington Territory to do business there, because it is not a corporation engaged in "industrial pursuits." The objection hinges about these words: What is the character of "mining, manufacturing, and other industrial pursuits?" It is maintained that this express company is not engaged in an "industrial pursuit;" and that if it is engaged in an industrial pursuit in the abstract sense of the words, it is not engaged in such an industrial pursuit as mining and manufacturing; and that the words "industrial pursuit," being coupled with "mining and manufacturing," are restricted in their signification to the general scope covered by those words, "mining and manufacturing." I think, myself, that this is entirely too narrow a signification to be given to those words. "Industrial" is a very large word, and, although it is associated with the words "mining and manufacturing," it would be, it seems to me, contrary to the manifest purpose of congress in this passage, to so restrain it as that the pursuit must be literally, or almost literally, a mining one or a manufacturing one.

Could not a corporation in Washington Territory be formed under this law to engage in raising wheat? This is neither mining nor manufacturing in any literal sense of the word; it is producing. Could not a corporation be formed under this law, or under a law passed by Washington Territory, to engage in navigating Puget sound? I do not think there is a specific provision for a navigation company; there are for wagon roads and railroads, but there is none for steam-boats. But I suppose it is hardly questionable that the legislature might provide, by a general law, for the incorporation in Washington Territory of a company to navigate Puget sound. An "industrial pursuit," it may be said also, in the case I put of farming, is covered by the words "colonization, and improvement of lands in connection therewith;" but these are limited by the words "railroads, wagon roads, irrigating ditches," and it is doubtful whether the colonization of lands, and the improvement of lands, standing by itself, includes farming, raising wheat, flax, hops, and corn.

I want to add here that I am not prepared to say that this section (1889) expressly, or by fair construction, prevents the territory of Washington from providing for the incorporation of a company to carry on an express business within its limits; but that it is a sufficient indication of the public policy, by the law-making power of that territory, to overcome the presumption that, by comity, this plaintiff is allowed to transact its business there. I repeat, if this act could be fairly construed as inhibiting the legislative assembly of Washington Territory from providing for the incorporation of an express company in that territory, I think it would be such a manifestation of public policy by the law-making power (the supreme power there) as would exclude this plaintiff from doing business in the territory; at least, on the ground of comity. It would have no right, as a matter of comity, to do a business there, as a corporation, which the territory itself is prohibited from authorizing a corporation to engage in. But I think the express business is an industrial pursuit, and one which the territorial legislature could provide for the formation of corporations to engage in.

The next objection to this relief is that the plaintiff has not complied with the laws of Washington, Dakota, Montana, and Minnesota, the state and territories through which defendant's road runs, concerning express companies doing business therein, and that, therefore, it has no right to enter these places, and cannot complain if it is not allowed express facilities upon defendant's road therein. To begin with, I have a very strong impression that it does not lie in the mouth of the defendant, a corporation engaged in the business of a common carrier, to say to this plaintiff, "You have not complied with the laws of these territories concerning the transaction of business therein." It does not seem to me that it is a matter which concerns the defendant. It does not seem to be a matter that the defendant can judge of; and I think the case I put to counsel on the argument has not

been answered; that is, supposing the law of Washington Territory provides that no person shall be engaged in peddling jewelry in that territory unless he has taken out a license and paid for it, and a person with pack upon his back, peddling jewelry, offers to go on board of defendant's train, having purchased a ticket for that purpose, can the defendant object and say: "You are a peddler, peddling without a license; you have no right here; we cannot carry you." I do not think the defendant can. The matter is one for the state or territory, and not the defendant. However that may be, I think the burden of proof is upon the defendant to show that the plaintiff is not qualified to act as an express company within these territories. I think that if the plaintiff failed to comply with any particular required by the laws of these territories, that the burden of proof is cast upon the defendant to show it. There is no presumption that the plaintiff has not complied with the law; as all men are presumed to obey the law and comply with it, until the contrary is shown. The plaintiff alleges in its bill that it has complied with the law. The defendant alleges in its answer that the plaintiff has not complied with it, but does not state wherein the plaintiff has not complied with it.

The defendant alleges that the plaintiff has not complied with the law, but does not state wherein. The affidavits in support of plaintiff's bill, made by its manager and officers, who ought to know whereof they speak, are clear, full, and explicit, and are to the effect that they have complied with the law, and on the argument it was substantially admitted by counsel for defendant that the plaintiff attempted to comply with it, but, in his judgment, there was some technical defect which was not very particularly stated. I apprehend it is not a very serious matter. I shall assume, then, that these laws have been complied with, and that, therefore, as far as that objection is concerned, it has no weight. But supposing that none of them had been complied with by the plaintiff, or that plaintiff had not undertaken to comply with them. Plaintiff is engaged in an interstate commerce. There can be no commerce without transportation. Transportation is one of the essential elements of commerce,—the means by which commerce is supported. The plaintiff is engaged in transportation between these points, and is engaged in an interstate commerce, and in my judgment no territory or state can impose upon it any conditions, by way of license or otherwise, to engage in this commerce by passing through its limits. Of course, the right to engage in interstate commerce is not a right to do a local business within the territory, and therefore the plaintiff has no rights to do an express business in Washington, Idaho, Montana, and Dakota, if it has not complied with their laws. But if it has an existence, and is authorized generally to do express business, it may do it, so far as interstate commerce is concerned, without reference to these laws. I think this is very clear both on the authorities and the reason of the case. The

case of *Pacific Coast Steam-ship Co. v. Board of R. Com'rs*, 18 FED. REP. 10, is a case directly in point.

I have not been able to come to any definite conclusion how far the legislation of congress on the transportation of dutiable goods affects this question. It seems that in 1870 congress passed an act to facilitate the transportation of dutiable goods from the ports of entry on the sea-board to important points in the interior. It has amended the act once or twice since,—once in 1880 and once in 1884. By the act of 1880 Portland was made one of the points from which goods from foreign ports might be transported in bond to the interior without paying duty at this point; and by the act of 1884, in addition to the provision that whoever undertook to carry these goods should be treated and considered as a common carrier for that purpose, it was expressly provided that they might be carried by express companies in such boxes or safes as they usually had or furnished for like articles. The act goes upon the assumption that an express company is a safe mode of conveyance, and a recognized mode of transporting such things, without special provision as to what should be the character of the vehicle, the box, or safe. How far that should be considered a regulation of commerce, under which this plaintiff may carry goods from Portland to St. Paul, irrespective of any inimical or restraining legislation of the territories between Portland and St. Paul, I am not prepared to say. It is not necessary to decide it, though the inclination of my mind is that it has some effect upon the matter in favor of the plaintiff.

The next objection is that the defendant is not able to furnish the facilities, admitting that plaintiff has a right to them. Upon this phase of the case counsel for the defendant, with his usual ability and zeal, insists that, if there is a conflict of evidence upon that point, the court is powerless to act, as it is not at liberty to weigh evidence,—to decide either from the number of witnesses on the one hand, and the scarcity on the other, or from the inherent probability of the testimony, or from the circumstances which are commonly known to all men, or altogether, but is powerless to act from the simple circumstance that there is a conflict of testimony in the affidavits concerning this question of its ability to furnish these facilities. I understand counsel to maintain that this proposition extends to any material question, that may arise on the application for an injunction, that is involved in the conflict of evidence,—one against a thousand although it be; that in such case the court has not the power to act, particularly in the case of an application for a mandatory injunction. I must admit that this doctrine is new to me. I do not think it can be found in those words, or anything like it, in the books; but I conceive the true doctrine to be that, where there is a conflict of evidence, the court must decide, and act according to the weight of evidence. But I can see very readily that the court might require more satisfactory and conclusive evidence in one case than another, owing to

the effect or consequence of its action. If its action were merely conservative, and could do no harm, it might be at liberty to act where there was a well-balanced conflict of statement. But if its action might seriously injure or inconvenience the defendant, it might very properly refuse to act where the evidence was at all equal and conflicting.

With this understanding of the rule of evidence in these matters, I now proceed to dispose of this point. There are two affidavits made by the officers of this defendant corporation. They state in so many words that the defendant is not able to furnish these express facilities, and goes on to say wherein they are unable to do so. They say, first, that it would require an additional car beyond Missoula for the plaintiff to do its business in, and they have none; that if an additional car is put on the train for the express company the weight of the train would be increased, and the propelling power is now so evenly balanced that, with an additional car, it would require another locomotive, and that would put the company to very considerable expense. I asked the counsel for the defendant, in the course of his argument, if he expected the court to believe that this defendant corporation, with all its power, wealth, and resources, was really unable to furnish an express car to this plaintiff, and the counsel, of course, had not the hardihood to state that he thought the court would be expected to believe it, but only that the defendant meant that to do it would take some little time. Of course, taking that view, the statement does not amount to much. It may be that defendant corporation has not a car which, at this moment, it can divert to the use of the plaintiff. But if it can supply a car in five or six or ten days, that is practically the same thing. In my judgment it can do so to-morrow if it wants to. The testimony on the part of the plaintiff shows that the car which is used by the plaintiff from Wallula junction to Missoula is carried from there to Helena empty, and there is no reason why it should not be used by the plaintiff to Helena, except the desire of the defendant not to allow the plaintiff to use it. Of course, when it reaches Helena the plaintiff is in the center of business of that country. It is in reach of another railroad, the Northern Utah, by means of which it has access to the Central and Union Pacific roads. The defendant allows the plaintiff to go to Missoula, and there requires it to leave the train, and the car is carried from there empty. In this connection it must be noticed, as a material circumstance, that there is a rival express company upon this road, the Northern Pacific Express Company, and it is manifest that the defendant intends to give the express business over its road to this company if it has a lawful right to do so.

In considering the question whether the defendant has furnished facilities to the plaintiff as it ought to, and whether it is able to do so, or whether this is an excuse for not doing what the law requires it to do, the Northern Pacific Express Company and its relations to

this defendant is a very material circumstance. One of the affidavits, stating that the defendant is unable to furnish an express car, is made by an officer of the defendant and of the Northern Pacific Express Company. The fact that its stock is owned largely by the men and people in the Northern Pacific Railroad Company, and is, in fact, its other self, is a very material circumstance. The defendant may have been advised that, being a railway corporation, it was not competent to do an express business, and therefore it has undertaken to do so as nearly as it can, and has formed a corporation for that purpose that is, in fact, itself. It is also stated in these affidavits that the plaintiff will not be injured if this relief is not granted, because the express business is overdone east of Missoula. There is such competition between the American Express Company and the Northern Pacific Express Company that they are carrying at losing rates. This is a matter which does not concern the defendant upon any theory in this case which can be taken into consideration. Whatever the fact may be in relation to the Northern Pacific Express Company, as to its connection with the Northern Pacific Railway Company, in the eye of the law it has no more relation to it than it has to the plaintiff; it has no more interest in one than the other. It is no matter to the defendant if they are both broken up in the express business, so that they pay for the services which they require. This is not a matter of any moment to the defendant. Nor is it probable that, if the defendant is allowed express facilities upon the defendant's train east of Missoula, there will be any need either of additional power or cars. It does not follow that any more business is going to be done. I will not say—I am not sufficiently well informed to say—that there would be no need of another car. It is not probable that the bulk of the goods transported would be materially increased. And there may be room for both companies in one car, if it would not be disagreeable to the employees. Instead of having separate cars, the one now in use might be partitioned.

The result would be that Wells, Fargo & Co. would have their share of the business, and what they would do the Northern Pacific Express Company would not do. There probably would not be any particular addition to the business. It would be distributed between the two companies. Wells, Fargo & Co., having been on the ground so long a time, and having now access to the business, would do its share of it, and by as much as it did, the Northern Pacific Express Company would do less. Besides, the plaintiff is not entitled to this injunction, except upon giving security to pay whatever is right; and it comes to this: that if the defendant has to put on another locomotive, or has to put on another car, it is one of the circumstances to be considered, and should be charged for. Of course, the main question in this case, as to whether the plaintiff is entitled to these facilities, and whether it is the duty of the defendant to furnish them, has been decided in this court in the case of *Wells, Fargo & Co. v. Oregon Ry. & Nav. Co.*

8 Sawy. 600; S. C. 15 FED. REP. 561. It is not now proposed to consider that question any further. It is a serious question, and an important one, which awaits the final decision of the supreme court. If the ruling of this and other circuit courts is affirmed in the supreme court of the United States, the question is settled in favor of the plaintiff; if otherwise, of course the question is decided in favor of the defendant. But, for the time being, we go upon the assumption that the defendant is under obligation to furnish reasonable express facilities to the plaintiff, or any other express company that wishes to do business on its road.

Another point was made, and that was that this application has been delayed. This objection is made particularly with reference to the mandatory character of the injunction. But the delay in this case has not worked any prejudice whatever to the defendant; it has worked to its advantage, if it be an advantage to keep the plaintiff off its road. It has not changed its condition; it has not built up a wall which it has now to take down; it has not done anything which it would have to undo. In so far as it has had any effect, it has been to its advantage, if it be an advantage, as I apprehend it is, to keep the plaintiff off its road. The delay is more apparent than real. I think the fact is that the defendant has been operating this road about 14 months, and it appears from the affidavits in this case that the plaintiff commenced a suit in Washington Territory prior to that time, and maintained there until a short time since, when the defendant came into this state with its road from Kalama to Portland, whereupon the plaintiff commenced this suit, and shortly after dismissed the other. The delay is more apparent than real; but if there was an actual delay, there is nothing in it which can prejudice the defendant. If anybody has suffered by the delay it is the plaintiff, and not the defendant.

There is only one other question to be considered: that is, whether a mandatory injunction ought to be issued in a case of this kind; that is, so far as this is a mandatory injunction. It is laid down in Pom. Eq. Jur. § 1539, "that where the injury is immediate and pressing, and irreparable, and clearly established by the proofs, and not acquiesced in by the plaintiff, a mandatory injunction ought to issue." An injunction, as an equitable remedy, has grown wonderfully in the last 50 years, and, of course, if we are to be guided by decisions and *dicta* prior to that time, the court would often fail to exercise this power where it is necessary. I think myself, with Prof. Pomeroy, that very much of the objection and argument that has been made against the allowance of a mandatory injunction in times gone by is simply absurd; and that it was absurd is manifest by the practice of the courts of evading the rule,—admitting it by mouth, but overruling it in act; that is to say, admitting that the authorities stated that a mandatory injunction ought not to be allowed, and at the same time enjoining a party to do some affirmative act in a negative form.

When the injury is immediate and pressing, and at the same time irreparable, and the right to relief is made out clearly upon the proof, there is no reason why a mandatory injunction should not issue. In this case, although the injunction is mandatory in form, it is in effect negative; it can do no harm to the defendant, even if it should turn out to be wrong. It is simply an equivalent to the ordinary provisional injunction. The defendant is engaged in operating this road; it is there for the purpose of carrying all express matter which can be gathered up and brought to it, to be carried between its *termini*. Considered as the Northern Pacific Railway, and not as a private partner of the Northern Pacific Express Company,—in which light we have no right to regard it,—considered simply as the Northern Pacific Railway Company, it is a matter of no particular moment to it whether the express matter is furnished by Wells, Fargo & Co. or by the Northern Pacific Express Company. Therefore the defendant cannot be injured, in any legal sense, if it be required to furnish these facilities to Wells, Fargo & Co., provided that Wells, Fargo & Co. give a bond to compensate the defendant in every respect for the reasonable expenses incurred in furnishing the facilities. Much of the law and argument on the subject of mandatory injunctions has very little application to this case, because while it is mandatory in form, it is hardly so in effect. It simply requires the defendant to do that which it ought to do,—to carry express matter if furnished by A. as well as by B., being paid for at the same rate, and making the same amount of money out of it.

These, I believe, are all the points made by counsel for the defendant in his elaborate argument in this case. I do not think he has left anything unsaid, or any stone unturned. The main question—as to the duty of the defendant to furnish plaintiff express facilities—I have passed on before; and the particular and peculiar ones made in this argument have been so thoroughly and well considered by Mr. Justice GREENE, in the case in Washington Territory between these same parties, that I might have contented myself by simply referring to his opinion, from which I have already quoted.

The order of the court will be that the defendant be required to furnish ordinary express facilities to the plaintiff on its road between Oregon and St. Paul, and connecting lines or links, whatever they may be, and to furnish the plaintiff such facilities as the defendant furnishes any other express company; and, in addition, that the plaintiff give a bond, to be approved by the master of this court, in the sum of \$25,000, to pay all costs, charges, and damages which the defendant may incur. I have fixed this sum, but if the counsel for the defendant thinks the sum ought to be greater, I will hear him now, or at any time. Possibly, at some future time, it may be necessary to increase the bond.

v.23f,no.10—31

In re ANDERSON, a Bankrupt.*Ex parte* GIBBONY'S ADM'R.*Ex parte* KENT'S ADM'R.*Ex parte* SMITH and others, and other Petitions.

(District Court, W. D. Virginia. March 18, 1885.)

1. BANKRUPTCY—SCHEDULE—CREDITORS' BILL—WIFE'S PROPERTY.

In his schedule the bankrupt included his life-interest in lands inherited by his wife from her father. There was a question whether this was a life-interest by the curtesy, or a fee acquired by transactions which occurred between the administrator of the decedent and the bankrupt before the bankruptcy, and the co-heirs of the bankrupt's wife. After the commencement of the bankruptcy proceeding, certain creditors of the bankrupt filed a general creditor's bill in a state court, making the bankrupt, his wife, and his assignee in bankruptcy parties defendant; and therein sought to settle the title of the land received by the wife as her share in her father's estate. During the progress of this suit in the state court the wife was, while under moral duress and pressure, induced to sign an agreement jointly with her husband and the attorney of creditors that she would by deed relinquish her interest in three-fourths of her lands, and acknowledged it before the person who was to be her trustee in the other fourth; but this agreement was never recorded as the deeds of married women are required to be by the Code of Virginia; yet it was ratified by decree of the state court. *Held*, that the creditors' suit in the state court was *coram non judice*, and could not affect the bankrupt's estate, or the rights of any one having a "specific claim" upon it or any part of it, who, as this wife did, came into the bankruptcy proceeding asking protection. *Held*, that the bankruptcy court had exclusive jurisdiction to administer the bankrupt's estate, and to adjudicate between the assignee and any person having such "specific claim;" especially if that person came voluntarily into the bankruptcy court and asked for such adjudication. *Held*, that the written agreement signed by the wife to convey away three-fourths of her interest to save the other fourth, was void (1) because not signed by the assignee; (2) because the signing of it by the bankrupt was nugatory, he being *civiliter mortuus* as to the estate; (3) because it was executory and of the nature of a power of attorney, which a married woman is not authorized to execute by the Virginia statutes; (4) because it was acknowledged before an interested notary; (5) because it was not recorded in the manner required by statute. *Held*, that the assignee had no power to give consent to an extrajudicial decree of the state court, the laws of congress nowhere authorizing him to become defendant to a suit commenced *in invidiam* towards and essentially in conflict with the jurisdiction which the bankruptcy legislation of congress gives to the bankruptcy court.

2. SAME—WIFE AS WITNESS.

In proceedings in bankruptcy the wife of the bankrupt is a competent witness to facts affecting the estate in bankruptcy, and so is every party to any "trial or cause" arising under the bankruptcy act, (section 8, act June 22, 1874, amending section 26 of the general bankruptcy act.)

3. SAME—HUSBAND AS TRUSTEE.

Where a husband has by fraud or mistake been invested with the title in fee-simple of real estate inherited by his wife, equity will treat him as trustee of his wife, and a court of bankruptcy will refuse to subject the land to liens of the creditors of the husband who is a bankrupt.

4. SAME—LIMITATIONS.

The limitation of two years to suits brought by or against assignees against or by persons in adverse interest, provided in section 4979, Rev. St., applies to suits at law and in equity brought independently of and separate from the bankruptcy proceeding proper, on the common law or equity side of the courts entertaining them; but does not interfere with or limit the jurisdiction of the bankruptcy court to "ascertain and liquidate liens and specific claims, and to

adjust the various priorities and conflicting interests of all parties" to the bankruptcy proceeding proper. In these latter the bankruptcy court proceeds as directed by section 4972, without reference to the two-years limitation.

5. **SAME—EFFECT OF BANKRUPTCY PROCEEDINGS.**

The proceeding in bankruptcy is equivalent to the general creditors' bill in chancery, and is a plenary proceeding, its practice being prescribed by statute, and to that extent variant from the chancery practice obtaining in creditors' bills. So far as not varied by statute, the practice should be the same. The collateral proceedings incident to and arising in the course of a bankruptcy proceeding, in the form of petitions and motions *nisi*, against persons already parties to the bankruptcy proceeding, are of the same character as like collateral proceedings incident to and arising in a creditors' bill in chancery; and are summary, or not, only where they would be so in a creditors' bill, except where allowed by statute.

6. **SAME—NEW PARTIES.**

A stranger to a bankruptcy proceeding may come into it voluntarily, by petition or other plenary method, and submit to the bankruptcy court his rights touching property in the custody of the court, claimed as assets by the assignee in bankruptcy.

7. **SAME—EFFECT OF PROCEEDING.**

The petition of such a party, filed collaterally in a bankruptcy proceeding, calling for an answer, which answer is filed, and under which depositions are then taken and a hearing had, on a formal making up of issues, is a plenary proceeding and binds all parties to it.

8. **SAME—BANKRUPTCY RULE 32—EQUITY RULE 88.**

Under rule 32 in bankruptcy the practice in bankruptcy proceedings must be conformed, when practicable, to the practice in equity; and therefore, under rule 88 in equity, petitions for review in cases where appeal lies must be brought within the term of the court in which the decree sought to be reviewed was rendered; otherwise, petitions for review will not be heard by the bankruptcy court. Therefore, it is too late for a review of its own decree by a bankruptcy court when the petition for review is not filed within the term of the court at which the decree is rendered, and when an appeal could have been taken.

In Bankruptcy. On petitions for review.

Robert Stiles, for bankrupt's wife.

John J. Wade and *T. E. Sullivan*, for creditors and assignees.

HUGHES, J. The proceeding in bankruptcy of George W. Anderson was commenced on the twenty-ninth December, 1868, and the adjudication was made on the twenty-sixth January, 1869. The petition was filed at Richmond, in the district court for Virginia, when the state constituted but one judicial district. The proceeding went on at Richmond until the sixteenth June, 1881, when, under the act of congress approved on the third of February, 1871, providing for the division of the state into two judicial districts, it was removed into this, the Western, district of Virginia. The proceeding remained at Richmond 10 years after it could have been removed here. While at Richmond most of the proceedings in it were had under my supervision as district judge there. After it was removed, it came again, in consequence of the resignation of Judge RIVES, under my direction during the period of about 18 months, when I was performing the duties of judge here. It is now before the court on petitions for a review of my decrees rendered here and at Richmond, and as such has come to me along with several other cases which were in my hands when my brother, the Hon. JOHN PAUL, became judge in this district.

A very large part of the estate surrendered in this proceeding consists of realty. What the bankrupt's interest was at the time of surrender, in the realty in which he had estate, is a subject of litigation. The realty surrendered consists of two pieces of land, one containing (at first 1,200, now) 1,100 acres, the other 335 acres. The 1,100 acre tract was the home place of Jacob Kent, deceased, who was the father of the bankrupt's wife, Mrs. Sarah J. Anderson. This home tract lies in the county of Montgomery, Virginia, in this judicial district, and on it the bankrupt, George W. Anderson, and Sarah J. Anderson, reside. They have it in actual possession, but, as to the bankrupt himself, it is in the constructive possession of his assignee in bankruptcy, John Gardner; C. B. Gardner, who was joint assignee, being now dead. One of the leading questions in this proceeding has been, whether the bankrupt had a fee-simple right in this 1,100 acres, or only a life-estate by the curtesy. The 335 acres of land surrendered in bankruptcy by George W. Anderson lies contiguous to the larger tract, which has been mentioned. It is conceded that the bankrupt had an estate in fee-simple in this smaller tract, and that this tract is liable to the liens of his lien creditors.

Whatever interest George W. Anderson had in the larger, or eleven hundred acre, tract, is also liable to the liens of his lien creditors. Whether his interest was in fee-simple or for life is a question of law subject to the decision of this court in this proceeding. It could be adjudicated nowhere else in a manner to bind this court or the property itself. Sarah J. Anderson claims that the eleven hundred acre home tract came to her as her interest in her father's estate, and is her own property. She claims this by petition and by amended petition presented to this court in this bankruptcy proceeding. She claims that the liens of the lien creditors of George W. Anderson affect only the life-estate of George W. Anderson in this tract, and that they do not affect her own title in it. This is a question between herself and George W. Anderson's assignee in bankruptcy. She has come voluntarily into this court by next friend, and asks the court so to decree. She claims only a contingent dower interest in the tract of 335 acres, and submits her rights in that tract to the adjudication of this court in this proceeding.

In order to a full comprehension of the questions which have arisen in this case, I will recapitulate, with some fullness of detail, the facts that characterize it. Sarah J. Anderson, wife of the bankrupt, was one of six children left by Jacob Kent, who died intestate in 1858, leaving large real and personal estate. The other co-heirs had received greater or less portions of the estate during their father's lifetime. In the division and distribution of the estate, it was found that the home farm was nearly equivalent to the interest of one of the heirs and distributees. It was desired by the family that some one of the heirs should purchase this home farm. Mrs. Anderson was persuaded and agreed to do so, and accordingly on August 26, 1858, the day on

which the home farm and most of the personal property of the estate were advertised to be sold, it was announced in the presence of the company that the home farm would not be sold, and that Mrs. Anderson had consented to take it as her share of the estate.

Robert Gibbony, administrator of Jacob Kent, was authorized by the heirs to settle among them their shares of the estate, and to make sale of the land for division. His authority was in the form of a power of attorney, dated the nineteenth of July, 1858, signed by the heirs, and the husbands of those who were *femes covert*. But this power of attorney had, of course, no validity in law to bind these *femes covert*. *Shanks v. Lancaster*, 5 Grat. 110. By a paper similarly signed, it was agreed by the several heirs that each might take part of the estate of the intestate, Jacob Kent, at such appraisement as might be made by persons appointed by the county court of Montgomery county, which was the county in which the intestate died and his estate was. On the seventh of February, 1859, there was an arbitration and appraisement (made by three citizens chosen for the purpose) of the home farm, which then consisted of 1,200 acres, (100 acres have since been adjudicated by this court to belong to one Joseph Kent,) and the valuation of it was thereby fixed at \$13,248, which, as was recited in the paper signed by the arbitrators, was "to be paid for by Mrs. Anderson's entire interest in the estate." In short, the purchase of the farm was treated by all concerned as made by Mrs. Anderson; the consideration paid for it being her interest in her father's estate.

At some time during Gibbony's agency in selling the lands of the estate he sold to George W. Anderson, individually, a tract of 335 acres lying contiguous to the home farm, for the price of six dollars an acre. Gibbony went on to sell all the other of the numerous tracts of land belonging to the estate, none of which, except the home farm, was retained by any of the heirs. In the year 1862, (August 20th,) having made contracts for the sale of all the lands, and probably collected much of the purchase money, Gibbony caused deeds to be prepared, executed, and acknowledged, conveying, on the part of all the heirs, the several parcels of land (except the home farm) to the several purchasers of them. Mrs. Anderson, on the faith of having purchased the home farm with her own interest, joined in these deeds, granting fee-simple titles for all the other several parcels of the lands of the estate to the respective purchasers of them. She has not sought in this proceeding to set aside those deeds, but desires them to stand.

Notwithstanding the clear understanding which had been had at the beginning, and had continued for several years, between all persons in interest, and especially between Gibbony and Mrs. Anderson, that she had taken the home farm for her interest in the estate, yet Gibbony, in procuring the execution of the deeds conveying the several portions of the realty belonging to the estate as just mentioned, caused the remaining heirs, in conveying their interests in the home

farm, to make a deed for it to George W. Anderson instead of Mrs. Anderson, and to reserve in this deed, dated August 20, 1862, a vendor's lien (now claimed in favor of Gibbony's widow and representative) for about \$4,000, due from George W. Anderson, the bankrupt, personally, to the estate of Gibbony. On the twenty-first August, 1862, the day after this deed of the remaining heirs purports to have been executed, Gibbony, by a paper signed between himself and George W. Anderson, treated the home tract of 1,200 acres, and the tract of 335 acres purchased individually by Anderson, as both sold to Anderson himself, and took Anderson's bond for an aggregate sum made up of \$13,248, which had been awarded by arbitration as the price of the home farm, and \$2,010 or \$6 per acre for the 335 acre tract. Whether or not Anderson's connection with these proceedings of Gibbony was fraudulent or not in intention, does not appear. Mrs. Anderson does not charge fraud against him or the co-heirs. I think he acted in ignorance of the legal purport of what he was doing. The objects of Gibbony seemed to have been to secure the debt of about \$4,000, which he held against Anderson personally upon the home tract, as well as upon the other tract, and to make commissions as administrator upon the valuation price of the home farm (\$13,248) as well as upon his actual sales.

No considerable amount of money, if any, was ever paid by George W. Anderson on account of this \$13,248, and Gibbony, as to most, if not all of it, from time to time, as he settled his fiduciary accounts before commissioners, merely handed to Anderson receipts purporting that he had received from *Mrs. Anderson* amounts approximately making up the price of the home farm. Afterwards, when the transactions of August 21, 1862, came to be put in the form of G. W. Anderson's bond of that date, Gibbony credited these receipts, nominally from Mrs. Anderson, upon the bond.

Of these proceedings between Gibbony and her husband, Mrs. Anderson was all the while ignorant, and it would seem also that the deed from her co-heirs, conveying the home tract to Anderson instead of his wife, was never delivered to Anderson; that the execution of it to himself individually was unknown even to himself; that the co-heirs were not conscious of the effect of what they were doing, and that it was deposited for registration in the clerk's office of the county by Gibbony without the knowledge either of Anderson or his wife. The existence of the deed to her husband remained unknown to Mrs. Anderson or to her husband until some recent time, which is not shown in the evidence or the proceedings. For all that the proceedings show, she did not know of the transaction until December, 1872. In his schedule, B 1, George W. Anderson gave in his interest in the 1,200 acres of land which have been referred to, as a life-estate, reciting that this tract of land "was inherited by Sarah J. Anderson, wife of petitioner, from her father, Jacob Kent, and petitioner only has a life-estate in the same depending on his own life."

Notwithstanding the pendency of the proceeding in bankruptcy, the representatives of the estate of James R. Kent, who had recovered, in 1867, a judgment for a large amount against George W. Anderson, filed in August, 1869, a general creditors' bill in the circuit court of Montgomery county against G. W. Anderson and his two assignees in bankruptcy, for the purpose of subjecting his lands (treating the farm of Mrs. Anderson as his own in fee-simple) to their own judgment and those of all other lien creditors, including the vendor's lien for about \$4,000 held by Gibbony's representative; all the liens amounting to about \$19,000; the whole real property, including the home farm, being supposed to be worth upwards of \$20,000. As the assignees in bankruptcy of George W. Anderson could not legally become or be made parties to this suit, the suit was *ex parte* as to George W. Anderson's estate; all of which was in the custody and under the jurisdiction of the bankruptcy court. Nevertheless, the state court entertained the bill, and proceeded with the suit until it was ready for hearing. Mrs. Anderson filed a cross-bill setting up her rights, but lost heart, and on the twentieth December, 1872, was made to believe that the deed of August, 1862, made by her co-heirs to her husband, of the home farm, had bereft her of her right to the whole tract; and was persuaded to sign, which she did with great reluctance and distress, an agreement with the attorney of the lien creditors of her husband, John J. Wade, by which it was stipulated that a decree should be entered for a division, by survey, of the home farm into four parts, giving the choice to herself of one of these parts, to be held by a trustee for her in separate right, in fee-simple, and for permitting the sale of the other parts for the benefit of her husband's lien creditors. As to parties, this agreement recited that it was made between George W. Anderson and Sarah Anderson, his wife, of the one part, and 12 creditors of George W. Anderson, to-wit: Floyd Smith; E. D. Slingluff & Son; D. Preston Parr; Hartman & Strauss; Mrs. Ellen Gardner; Isaiah A. Welsh, administrator of James R. Kent, deceased; McDowell, Robinson & Co.; Adams & Co.; T. J. Henderson & Co.; Keen, Baldwin & Williams; John R. Francis, administrator of A. W. Forest, deceased; and Mrs. E. Gibbony, administratrix of Robert Gibbony, deceased, acting through their agent and attorney at law, John J. Wade,—parties of the other part. The paper was signed and sealed by George W. Anderson, Sarah J. Anderson, "and John J. Wade, agent and attorney for the creditors of G. W. Anderson mentioned in this agreement." It was not signed by the assignees in bankruptcy of George W. Anderson.

All of George W. Anderson's interest in or control of the home tract of land having passed to his assignees in bankruptcy, his signing this agreement was nugatory. Mrs. Anderson's execution of the writing was privily acknowledged on the day of its date, namely, the twentieth December, 1872, before one of the counsel of the creditors, Thomas E. Sullivan, who was designated in the body of the writing

as the trustee who was to be intrusted with her title to the portion of her home farm which was to be set off to her. Her acknowledgment was made under circumstances of haste and pressure, and a consent decree, in accordance with the agreement, was hastily entered by A. MAHOOD, judge of the Montgomery court, on the day of its date, directing it to be carried into execution. The assignee of George W. Anderson (or rather the surviving assignee of two, one of whom is dead) did not sign the agreement of twentieth December, 1872, at the time, but he afterwards, to-wit, on the twenty-seventh November, 1875, indorsed on the copy of it his acceptance and adoption of it. He was then incapacitated from signing it by the prior injunctive orders of this court.

After this decree was entered and the survey for a division made, Mrs. Anderson joined her husband in a deed conveying the parts of the home tract, not retained by her, for the benefit of creditors, in pursuance of the agreement and decree just mentioned. This deed was acknowledged by her before the assignee of George W. Anderson, in bankruptcy, a party in interest, but was never duly delivered, was recalled before delivery, and that part of the decree has never been executed by herself and her husband. So far as her own action goes, therefore, there is no further committal of herself to the alienation of her home tract than the agreement she signed with the attorney of the creditors, and the decree of the state court made upon it, both on December 20, 1872. This paper of that date is void as to Mrs. Anderson. A married woman can validly execute no instrument except such as is authorized by section 4 of chapter 117 of the Virginia Code of 1873, page 906, which provides that "when a husband and his wife have signed a writing purporting to convey or transfer any estate, real or personal, she may appear before, etc., * * * and make acknowledgment of the same." No act of a married woman, unless the instrument signed presently conveys or transfers the estate, can be held to divest her of her rights in it. This power given by statute to a married woman does not apply to executory contracts, or to any other acts except deeds or writings making present transfer or conveyance of estate. 2 Minor, Inst. 562; *Shanks v. Lancaster*, 5 Grat. 110.

The writing signed by Mrs. Anderson on the twentieth of December, 1872, was wholly executory. It was a mere agreement that something should be done in the future. It is void on its face as to Mrs. Anderson, because it was executory and of the character of a mere power of attorney. It was void for two other reasons. The agreement stipulated that Thomas E. Sullivan, who was counsel for the lien creditors, should be the trustee to whom should be conveyed for her separate use that portion of the lands stipulated to be divided, which should be allotted to herself. Yet the record shows that her acknowledgment of this executory agreement was made before this very Thomas E. Sullivan, privily and apart from her husband. This

acknowledgment was void because it was made before an interested person. A fundamental maxim of jurisprudence is that no man can be a judge in his own case. Broom, 117. A grantee in a deed, or a beneficiary under it, is not allowed, as an officer, to take an acknowledgment of the deed by the grantor with a view to its registration. *Davis v. Beazley*, 75 Va. 495.

The agreement was also void because never recorded. The acts of married women, unlike those of persons *sui juris*, are void even as to themselves, unless authorized by express statute. It is the statute law alone which gives them validity, even as to themselves. The statute of Virginia requires that conveyances by married women shall not only be acknowledged before a designated officer, but recorded also. See section 7, c. 117, Code Va. 1873, p. 907. It is not pretended that Mrs. Anderson's agreement of December, 1872, and her acknowledgment of it, was ever recorded. Her acknowledgment before an interested officer was nugatory, and the failure to record it completely vitiated the paper. On its face it is absolutely null and void, because executory, because illegally acknowledged, and because never recorded.

Although the agreement was incurably null and void, and although the creditors' suit in the state court was inherently nugatory as to all the estate in the custody and control of the bankruptcy court, counsel for lien creditors contend that by her cross-bill filed in the suit in the state court, Mrs. Anderson submitted her rights to that court, and is bound by its decree directing the execution of the agreement of December, 1872. But that court had no jurisdiction to deal with titles and rights in property not only not within its custody, but in the custody of the bankruptcy court. The agreement, if it had any effect, passed three-fourths of the home farm to the assignees in bankruptcy of George W. Anderson, and subjected those three portions to the exclusive jurisdiction of the bankruptcy court. Mrs. Anderson could not by cross-bill confer jurisdiction upon the state court over that property. Neither express nor implied consent can give jurisdiction. As to the bankrupt's estate surrendered in bankruptcy, neither the assignees nor lien creditors, by consent, nor Mrs. Anderson, by cross-bill or agreement to assign a disputed three-fourths of the home farm to the use of lien creditors, could divest the bankruptcy court of its exclusive jurisdiction of the property surrendered and transfer it to another court. If Mrs. Anderson's agreement could be executed at all, there was no court competent to do so but the bankruptcy court. The creditors' bill in the state court was *coram non judice*; the estate of the bankrupt, including all property in which he claimed any interest, had passed to his assignees, and was in the custody of the bankruptcy court; and the cross-bill of Mrs. Anderson was as empty of jurisdiction for the state court to execute an agreement inherently and incurably void on its face, as so much brown paper.

George W. Anderson was *civiliter mortuus* as to his estate surrendered in bankruptcy, except, perchance, as to a homestead exemption. Claiming this, and in an effort to escape the action of the Montgomery court, he filed a petition in the bankruptcy court at Richmond, on the twenty-ninth July, 1873, praying an injunction against I. A. Welsh, administrator *d. b. n.* of James R. Kent, complainant in the suit in that court, and his other lien creditors, parties thereto, from all further proceedings therein; which was granted by the then judge of the court, Judge UNDERWOOD. The object of this petition was to have a homestead to the value of \$2,000 set apart to the bankrupt out of the real estate he had surrendered in bankruptcy. This claim being inadmissible, that petition was afterwards dismissed, and the order of injunction granted upon it might have been dissolved, but for the fact that in December, 1873, Mrs. Anderson had come into the bankruptcy court at Richmond, by petition setting out the leading facts which have been recited, and praying the court to protect her rights, and either to set aside and annul the deed of her co-heirs to George W. Anderson, of twentieth, August, 1862, and require these co-heirs to convey the home tract to George W. Anderson only for his life, and, after his death, to herself and her heirs, or else to appoint a commissioner of the court to make the proper deed. That petition brought to the knowledge of the bankruptcy court, for the first time, the proceedings that had taken place in the circuit court of Montgomery county; the so-called agreement, which Mrs. Anderson had signed under the coercion of those proceedings, with the attorney of her husband's lien creditors; and the decree of the Montgomery court based upon that agreement.

The bankruptcy court decided, upon the petition, that the proceeding against George W. Anderson, a bankrupt and *civiliter mortuus* as to his estate, was *ex parte*, and as to the estate in bankruptcy and the assignees of the estate was *coram non judice* and null; the estate being in the custody and within the exclusive jurisdiction of the bankruptcy court, and the assignees having no power to make themselves parties to a proceeding in the nature of a creditor's bill against the bankrupt, his estate, and his assignees, commenced after the adjudication in bankruptcy. See *Case of George W. Anderson*, 9 N. B. R. 360, and 3 Hughes, 379-385. Its decree to this effect was made on the sixteenth March, 1874, and was affirmed, on appeal, November 30, 1874. That question is therefore *res judicata* as between all parties to this proceeding. That decree also enjoined all further proceedings in the circuit court of Montgomery by the assignees, and by the parties plaintiff there, and no further steps have been taken in that court.

The case came again to a hearing in the district court at Richmond, as a court of bankruptcy, on the petition of Mrs. Anderson, by her next friend, which has been mentioned, on a plea of the statute of limitations interposed by the assignee to Mrs. Anderson's petition, and

on the petition and answer of Isaiah A. Welsh, administrator *d. b. n.* of James R. Kent, the creditor who filed the general creditors' bill in the circuit court of Montgomery county, which has also been mentioned. This petition of Welsh, administrator, filed December 7, 1875, prayed for a specific execution of the agreement signed by Mrs. Anderson on the twentieth December, 1872. As to the rest, it was an answer to Mrs. Anderson's petition.

At the hearing of these matters the bankruptcy court at Richmond, by decree of April 13, 1876, overruled the assignee's plea of the statute of limitations, on the ground that the exclusive jurisdiction of the bankruptcy court to pass upon all specific claims upon the bankrupt's estate, and to settle all conflicting interests between the various parties to a bankruptcy proceeding, is not affected by the provisions of the bankruptcy act limiting within two years suits brought by or against assignees in bankruptcy against or by persons in adverse interest; and that even if it were, Mrs. Anderson's petition was brought before the expiration of two years after she came to a knowledge of the fraud or mistake of which she complained.

The two-years limitation provided in section 4979 applies to the "suits at law and in equity" authorized by that section. It relates to suits brought independently of and separate from the bankruptcy proceeding, as such, to suits brought in the circuit or district courts, or in state courts on their common-law or equity side. It does not interfere with or limit the jurisdiction of the district courts on their bankruptcy side in bankruptcy proceedings to "ascertain and liquidate liens and specific claims, and to adjust the various priorities and conflicting interests of all parties" to the bankruptcy proceeding proper.

This petition of Mrs. Anderson is not a suit on the equity side of the district court, but is a collateral petition filed in, as part of, the bankruptcy proceeding. As such, it came here by removal from the Eastern district. If it were a distinct and several suit, it would not be here at all, but would still be pending at Richmond; for the order of removal made at Richmond embraced nothing but the bankruptcy proceeding. It was *verbatim* as follows:

"IN THE DISTRICT COURT OF UNITED STATES, EASTERN DISTRICT OF VIRGINIA, IN BANKRUPTCY.

"In the matter of George W. Anderson, bankrupt.

"Upon the motion of Floyd Smith and Elizabeth Gibbon, administratrix of Robert Gibbon, deceased, judgment creditors of said bankrupt, it is ordered by the court that this cause be removed to the district court of the United States for the Western district of Virginia, held at Lynchburg, in said district. And it is further ordered that the clerk of this court transfer the papers herein to the clerk of said district court at Lynchburg.

"Richmond, sixteenth June, 1881."

It was because Mrs. Anderson's petition was part of the bankruptcy suit, and not a suit distinct from it, that it came here under that order.

In its decree of the thirteenth April, 1876, the bankruptcy court ruled that the home farm having been paid for by Mrs. Anderson's property, the deed from the other devisees ought to have been made to her and not to her husband; and that the court, considering that to have been done which ought to have been done, and a resulting trust to have arisen to Mrs. Anderson, would direct a conveyance of the home farm to her by a commissioner, subject to the life-estate of her husband, which latter, together with the 335 acre tract, would be sold for the benefit of her husband's lien creditors. But this court declined at that time to order the sale, and gave leave to Mrs. Anderson, by amended petition, to make all the lien creditors, in behalf of whom the attorney, Mr. Wade, had signed the agreement of December 20, 1872, with Mrs. Anderson, parties defendant by name to her petition. The court in that decree dismissed the petition of J. R. Kent's administrator, in which he had set up the agreement of the twentieth December, 1872, in bar of Mrs. Anderson's claim, and pronounced finally against the administrator and the assignees. Previously to the decree there was a formal joinder of issues made up between counsel, dated December 10, 1875, in which it was stipulated in writing between Robert Stiles, counsel for Mrs. Anderson, on one side, and J. J. Wade, "attorney for assignee and lien creditors," on the other, among other things, that "the petition and answer of Isaiah A. Welsh, administrator of J. R. Kent, deceased; * * * shall be filed *nunc pro tunc* as an answer and cross-petition to Mrs. S. J. Anderson's petition; * * * that the bankrupt and assignee, so far as they are necessary or proper parties, be considered as having waived service of process upon both said cross-petitions, and as consenting to the hearing of both; and finally that the evidence taken under the order of April 21, 1875, and all papers since filed or entered in the cause by consent, are to be considered as taken and filed under the issues as thus joined and made up." The stipulation also submitted the assignee's plea of the statute of limitations.

The order concerning evidence referred to had been entered eight months before the hearing. It was drawn up and applied for by Mr. Wade, "attorney at law for Kent's estate and other creditors of George W. Anderson," and gave Mrs. Anderson two months within which to take depositions in support of her claim, then gave the petitioning creditors one month for depositions in rejoinder, and afterwards Mrs. Anderson a month for her testimony in conclusion; the depositions to be taken on notice of 10 days. The depositions were exceedingly voluminous, making probably 500 pages. Notice of the taking of Mrs. Anderson's testimony was accepted by the assignees in bankruptcy, and in every instance by counsel signing "for the judgment creditors and Robert Gibbony's administratrix." The evidence was taken upon as full notice, and in as orderly and formal a manner, as any that was ever taken in the most plenary suit ever conducted in a court of justice. It was not only taken by parties on both sides

of the issues to be tried, and on full notice, but was taken in accordance with the previous order of court before mentioned, as drawn by the counsel for Kent's administrator, the other creditors of the bankrupt, and the assignees.

There can be no objection to these depositions, on the part of any creditors, for want of notice, or of presence, or opportunity to be present, at their taking. None has been made. No exceptions have been taken to them, save on the ground of the incompetency of Mrs. Anderson to testify for or against her husband, and of any of the witnesses to testify in their own interest as against Robert Gibbon, who is dead. But this suit is between Mrs. Anderson and her husband's assignees, not himself. Her husband has no interest in the property in litigation; all his interest having passed to the assignees. She is competent as to him. As to Robert Gibbon, neither he nor his estate has any direct interest in the property surrendered in bankruptcy. The assignees are the parties defendant, and represent many creditors, most of whom are living, and only a few dead. Mr. and Mrs. Anderson are competent witnesses as to the assignees, and all whom they represent, living or dead, on the general principles of evidence. But, whether so or not, they are competent witnesses by the express provisions of the bankruptcy act. Section 5088 expressly makes the wife of the bankrupt so, and the amending bankruptcy act of June 22, 1874, § 8, provides generally that any party to a "trial or cause" arising under the bankruptcy act shall be a competent witness.

No valid appeal has ever been taken from the decree of April 13, 1876, which was entered upon consideration of these voluminous depositions. As against Kent's administrator, the assignees in bankruptcy, and George W. Anderson, that decree stands as *res judicata*. The time for renewing it by appeal has long since expired, and the question of the right of Mrs. Anderson to the home farm, subject only to the life-estate of her husband, is forever concluded as against James R. Kent's estate and the assignees of George W. Anderson, representing all creditors. It is true that from the decree just mentioned Kent's administrator appealed to the circuit court. The matter was argued before Chief Justice WARRE, who, on the twentieth of May, 1876, entered a decree dismissing the appeal for want of jurisdiction, holding that the matter was one not for "revision," but for regular "appeal." The regular appeal, however, was never taken, and cannot now be taken, and the decree of April 13, 1876, is, as said before, final as against the assignees and Kent's administrator. More than that, it is now too late for a review of its own decree by the district court itself; for wherever appeal can be taken a petition for rehearing must be brought before the end of the term in which the decree has been rendered. Judges in bankruptcy will not hear petitions for review brought in disregard of this rule.

As before stated, the decree of April 13, 1876, after passing upon

the rights of Mrs. Anderson as against the assignees in bankruptcy and the lien creditors of the bankrupt, went on to give her leave to amend her petition by making all the lien creditors of the bankrupt, in whose behalf John J. Wade had signed the agreement of December, 1872, parties defendant to it. This turns out to have been unnecessary. The practice in such collateral proceedings, incident to bankruptcy proceedings, as that of Mrs. Anderson, had not then been settled by express adjudications of the supreme court of the United States; and therefore, notwithstanding the fullness of proofs, and completeness of opportunity which had been enjoyed by the assignees in bankruptcy representing all creditors, and by lien creditors, all represented by counsel of record, I thought it best to allow an amended petition to be filed by Mrs. Anderson, making formal parties defendant, by name, of the lien creditors who were interested in the agreement of the twentieth of December, 1872, which had been signed by Mrs. Anderson. If I had known then of the decision of the supreme court of the United States in *Stickney v. Wilt*, 28 Wall. 150, which had shortly before been rendered, and which appeared in the last and very tardily published volume of Mr. WALLACE, I should have entered a final decree at that time, not only against the assignees in bankruptcy and J. R. Kent's administrator, (against whom I did decree finally,) but against all the lien creditors of the bankrupt; for they were all parties to the proceeding in bankruptcy by force of regular publications, and bound by its adjudications whether expressly named in decrees or not.

It seems to be made necessary by the numerous motions and petitions which have been brought by counsel in this cause at various stages, in behalf of lien creditors, that I should enter to some extent into a dissertation upon the nature of a bankruptcy proceeding, as illustrated by the one at bar. The controversy between Mrs. Anderson and the lien creditors of the bankrupt, her husband, forms a necessary part of the bankruptcy proceeding. By virtue of George W. Anderson's having an estate in the home farm of her father, the fee of which she claims, this court and its predecessor in the Eastern district have had in this proceeding jurisdiction to settle the title to the home farm, as to this "specific claim" upon it. Whatever title the bankrupt had, passed to his assignees in bankruptcy at the time of his adjudication. The question whether the bankrupt had a title in fee or an estate for life only, was a question between Mrs. Anderson and the assignees. The creditors of the bankrupt were and are beneficiaries of whatever title has vested in the assignees, and are all represented in the litigation of the question by the assignees. The litigation as to the home farm is essentially between Mrs. Anderson and the assignees, and this court has jurisdiction of that litigation. It not only has jurisdiction, but that jurisdiction is exclusive. Section 4972 of the Revised Statutes of the United States declares that the jurisdiction of the district court shall extend, among other things,

to the collection of all the assets of the bankrupt; to the *ascertainment* and liquidation of the liens and other *specific claims* thereon; to the adjustment of the various priorities and *conflicting interests* of all parties; and to the marshaling and disposition of the different funds and assets, so as to *secure the rights of all parties*, and due distribution of the assets among all *creditors*. It is difficult to conceive how the jurisdiction of the court could be made more ample than it is made by this section, which gives jurisdiction not only as to all *creditors* of the bankrupt, but as to all *parties* to proceedings collateral to the bankruptcy proceeding. It does not allow persons having specific claims upon the estate of the bankrupt to sign agreements with creditors to be specifically executed under decrees of other courts, but makes the bankruptcy court the arbiter of those claims. It authorizes the bankruptcy court to ascertain and secure the rights of all parties setting up "specific claims" upon the bankrupt's estate, and does not leave these parties, if married women, to wander into other courts for the obtainment of these rights. Its jurisdiction is as beneficent as ample, and it is difficult to see how the court could do complete justice between the numerous, often the multitudinous, parties to bankruptcy proceedings unless its jurisdiction was thus ample.

This jurisdiction is not only as comprehensive as just shown, but, I repeat, it is exclusive. Before June 20, 1874, it was not exclusive. The state courts, before that date, might have concurrent jurisdiction, in sundry instances, over debts and property of the bankrupt. So, also, might the circuit courts of the United States have concurrent jurisdiction under section 4979, cited at bar by counsel for lien creditors. But the act of that date, known as the Revised Statutes of the United States, in section 711, makes the jurisdiction of the district court in bankruptcy, as set out in section 4972, exclusive. It was made exclusive then, for the first time in the history of our federal jurisprudence. In *Claflin v. Houseman*, 93 U. S. 130-133, the supreme court of the United States say that the Revised Statutes, [of 1874,] "whether inadvertently or not," have made the jurisdiction of the United States courts exclusive "in all matters and proceedings in bankruptcy." In that case the court express a doubt whether the clause of section 4979 authorizing suits at law or in equity to be brought by or against assignees in bankruptcy, even in United States circuit courts, is not repealed by the provision of section 711 of the Revised Statutes of 1874, giving exclusive jurisdiction in bankruptcy matters to the district courts. Certainly is the concurrent jurisdiction of state courts taken away absolutely. This exclusiveness of jurisdiction was necessary. The proceeding in bankruptcy is, in character, effect, and object, the same as a general creditors' bill in chancery. It supplies the place and purpose of such a bill. It supersedes and dispenses with it. The two could not go along together, for it is an old principle that two courts cannot entertain several creditors' bills against the same debtor at the same time.

If, pending a bankruptcy proceeding, a creditors' bill for settling the affairs of the same bankrupt is brought in a state court or any other court, that bill is *coram non judice*; and the bill itself and all proceedings under it are null and void. It is unnecessary for the bankruptcy court, which has exclusive jurisdiction of the subject-matter of the bankrupt, his assignee and creditors, to declare them so. They are, inherently, essentially and absolutely so already. There is but one possible qualification to the general doctrine; which is that where, before the bankruptcy, another court has acquired full cognizance of any suit against the debtor *concerning specific property*, or even of a creditors' suit, it may go on and administer *whatever property* may have come into its custody or control, according to its own rules of decision; but its power to do this exists only in cases commenced before the debtor's bankruptcy. *Eyster v. Gaff*, 91 U. S. 521. It has no power to entertain the suit of a creditor after bankruptcy for cause of action arising before. The jurisdiction of the district courts is not only exclusive as to suits brought elsewhere *after* the bankruptcy, but is even so, in some instances, as to such suits brought and ended *before* the bankruptcy.

In *Humes v. Scruggs*, 94 U. S. 22, an assignee brought suit in the United States district court to set aside a deed of settlement, which had been made by a husband in favor of his wife, alleged to have been executed in fraud of his creditors. As a defense in bar to this suit the wife set up a decree which had been rendered in a suit brought by her next friend in a state court, before her husband's bankruptcy, against her husband, in which the deed had in all things been ratified and confirmed by the state court. The United States district court refused to go behind the decree of the state court, but the supreme court of the United States held, on appeal, that the adjudication in the state court did not bind the United States district court having jurisdiction of the bankrupt's estate. The point of the case, so far as it relates to the one at bar, is that the jurisdiction of the district courts of the United States over all the property belonging in law or equity to the bankrupt cannot be defeated by proceedings in other courts, no matter whether brought before or after the adjudication in bankruptcy. Therefore it is that there is nothing in the much-pressed point that Mrs. Anderson had, by her cross-bill in the creditors' suit in the Montgomery court, submitted her claims in the home tract to that court. The cross-bill was but a branch of a suit *coram non judice*, the nullity of which was fatal to the collateral proceeding. It was the more so because the decree against her in that suit was rendered upon an agreement null and void, as to herself, on its face. This court had to look into the record of the Montgomery court. It was invited to do so by the lien creditors. Thus invited, it did look into that record, and saw patently and prominently that the decree there was in execution of a writing incurably void and null. The case was precisely the same as that of *Humes v. Scruggs*, just com-

mented on, except that instead of the married woman there attacking the instrument on which the decree of the state court was founded, it was the assignee who did so. In that case the district court was held bound to pass upon the validity of the instrument and of the decree. So it is bound here. If the jurisdiction of the district court was good there to set aside the instrument and disregard the decree, so it is here.

The creditors' bill, which was brought against George W. Anderson and his assignees in the circuit court of Montgomery county, after the commencement of this bankruptcy proceeding, was *coram non judice*; it was not only so pronounced to be by myself, when the petition of Mrs. Anderson and that of J. R. Kent's administrator were first before me at Richmond, in March, 1874, but, on appeal, was declared by the circuit court to be null and void. In his opinion in affirmance the circuit judge said:

"It is clear that both Mrs. Anderson and her husband were entitled to be heard in the district court, and that the proceedings in the state court, commenced after adjudication in bankruptcy, were null and void, so far as they affected the rights of any person who might come into the bankruptcy court, claiming an interest in the property in litigation in the state court."

And the circuit court remanded the cause to the district court "with directions to proceed to ascertain the rights of the parties claiming the property in litigation in the state court." All this is *res judicata* as to Mrs. Anderson, the bankrupt, his assignees, and the administrator of James R. Kent. I may go further and say that all the creditors of this bankrupt, and especially those represented by Mr. John J. Wade, as counsel, who took the appeal I have mentioned, are estopped by the decree of affirmance from insisting upon the validity of the creditors' suit in the Montgomery court, or any part of it, and are estopped from denying the exclusive jurisdiction of this court, in this bankruptcy proceeding, to proceed to ascertain the rights of the parties claiming the property which was sought to be subjected to division and sale in the state court.

It is objected that the petition and amended petition of Mrs. Anderson in this cause, being plenary, and not summary, should have been treated as a bill in equity, and that proceedings in it should have been according to the course of practice in plenary bills in equity. Objection is also made to the bankruptcy proceeding on the allegation that it is summary and not plenary, and therefore not a proceeding in which the trial of the rights of Mrs. Anderson as against the assignees in bankruptcy of this bankrupt, representing his creditors, should be had. On the contrary, a bankruptcy proceeding is more plenary than almost any other known to English or American jurisprudence. It is more so than the ordinary creditors' suit in chancery. As already said, it is itself a creditors' suit in its nature and objects. The difference is only in the practice; most of that in the bankruptcy proceeding being prescribed by statute. Many of the

matters connected with the proceeding are, indeed, as in creditors' suits in chancery, heard on rules *nisi* and motions to show cause, which are summary; but this is because the parties to those motions are already before the court in the bankruptcy proceeding, and it is useless to get out process to bring them in, and to resort to plenary methods in determining them. But petitions collateral to the bankruptcy proceedings, which in their nature are plenary, do not become summary merely from the fact that they are brought in the bankruptcy court. They are in form and character like collateral petitions brought in creditors' or other suits in chancery. In the case at bar, the bankruptcy proceeding was itself plenary, and the collateral petition filed in it by Mrs. Anderson was plenary. All the parties in adverse interest to Mrs. Anderson—that is to say, the assignees, and the lien creditors represented by them—being already in court as parties to the bankruptcy proceeding, it was unnecessary for petitioner to make them formally, by name, parties defendants, and to pray for process to bring them into court. They were already in court as parties defendant to her petition soon after it was filed, by force of the regular publications in bankruptcy.

It is contended that Mrs. Anderson had no right to file her petition in the bankruptcy proceeding as a collateral part of it, but ought to have brought a separate plenary suit either in the United States district or circuit court. Section 4979, adduced as authorizing such a suit, and the cases of *Smith v. Mason* and *Marshall v. Knox*, are cited as requiring that course to have been adopted. But section 4979 merely gives the option to an assignee to bring such a suit against a stranger to the bankruptcy proceeding, and gives a stranger such a right as against an assignee. It allows an option, but does not impose a duty. It does not require the assignee to go out of the district court or the bankruptcy proceeding to assert a claim, nor does it shut the door of the district court in the bankruptcy against a stranger. Efforts have been made to induce the supreme court of the United States to require, by judicial legislation, a resort to such suits, where persons not necessary parties to the bankruptcy proceeding have adverse rights to the assignee and creditors in the bankrupt's estate, but that court has refused thus to supplement the statute law by making that necessary which the statute leaves optional. There are cases, indeed, in which approved canons of procedure require that rights of property should be determined by methods pursued in suits other than bankruptcy proceedings,—that is to say, in ordinary common-law and chancery proceedings,—and the supreme court has held that in such cases resort should be had to suits at law or in equity.

In the case of *Smith v. Mason*, 14 Wall. 419, it held that where property belonging to the bankrupt's estate has, before the bankruptcy, been transferred to a "third party," who is not a party to the bankruptcy proceeding, and that person is in possession of the property, and the assignee seeks to recover the possession from him, the suit

must be brought at law or in equity, and that the property cannot be recovered from the "third party" by rule to show cause brought in the bankruptcy proceeding. But in summing up the case, at the conclusion of the decision, the supreme court said: "Strangers to the proceedings in bankruptcy, not served with process, and who have not voluntarily appeared and become parties to such a litigation, cannot be compelled to come into court under a petition for a rule to show cause." This language, therefore, limits and qualifies the rather broad terms which had been used by the court on pages 430, 431, implying that such persons as "cannot be compelled to come into court by rule to show cause" may not come in voluntarily, as Mrs. Anderson did.

In *Marshall v. Knox*, 16 Wall. 551, the same court ruled in the same manner. There, a partnership firm were lessees of a plantation in Louisiana. One of the partners went into bankruptcy. The lessor, after this event, distrained for rent upon mules and other property found on the premises belonging to the firm; the sheriff acting as the distraining officer. The assignee of the bankrupt partner thereupon sued out of the bankruptcy court a rule upon the lessor and the sheriff, requiring them to show cause before the bankruptcy court why they should not deliver to the assignee the distrained property. The supreme court of the United States held, on appeal, that the rights of the lessor, a third party in possession, who was a stranger to the bankruptcy proceeding, could not be adjudicated against his consent under summary rule to show cause sued out against him in the bankruptcy proceeding.

The case at bar is essentially different from both of those just mentioned. The property with which we are concerned is in the constructive possession of the assignee, and in the actual possession of the bankrupt, who holds for the assignee. It is thereby in the custody of this court, and is part of the assets in bankruptcy over which section 4972 gives it complete and exclusive jurisdiction. It is not in the possession of a "third party," having color of title, whether as vendee, creditor, or sheriff, and the petition of Mrs. Anderson is not a summary rule against a "third party" to show cause why he should not be dispossessed of the property. Moreover, the supreme court held in both cases last cited that the "third party" in each case could not be brought, by mere rule to show cause, into the bankruptcy proceeding to try rights of property against his will. It did not decide, and has never decided, and I am sure will never decide, that a third party may not come voluntarily into a bankruptcy proceeding, by petition or other plenary method, and submit to the bankruptcy court his rights touching property in the custody of that court, claimed as assets by the assignee in bankruptcy. Mrs. Anderson has come voluntarily into this court in this proceeding and asked the adjudication of her "specific claim" for property in the custody of the court upon which liens are claimed by creditors, who are already

in that court as parties to the bankruptcy proceeding, seeking to subject that property to their liens by decree of the bankruptcy court.

A petition, filed collaterally in a bankruptcy proceeding or other creditors' suit, calling for an answer, which answer is filed, and depositions taken on these pleadings through the course of many months, and then heard on an agreed "making up of issues," is a plenary proceeding, and binds all parties concerned. The petition of Mrs. Anderson, thus proceeded in, bound the assignees and all the creditors of the bankrupt. Even in creditors' bills, every creditor need not be made formally and by name a party to the record. A few creditors may maintain a suit in behalf of themselves and all other creditors standing in like relations to the debtor and his estate. The other creditors may come in and prove their debts, and may be treated as parties to the suit. If any of them decline to do so, they will be excluded from the benefit of the distribution of assets, and will nevertheless be bound by the decrees of the court. Story, Eq. Pl. § 99. Where the creditors are represented in the suit by a trustee or an assignee, the circuit courts of the United States refuse to hear motions or to receive petitions from individual creditors, require the trustee or assignee to represent them in all respects, and hold them bound by all orders and decrees to which the trustee or assignee is a party. As to trustees, this is a settled practice.

So it is in bankruptcy proceedings. The publication in bankruptcy brings all creditors into court. As early in the history of the practice, under the bankrupt act of 1867, as the year 1868, Judge TRENT held, in *Davis v. Anderson*, 6 N. B. R. 145, that "creditors of a bankrupt, having security, whether by judgment, mortgage, or otherwise, must prove their debts against the bankrupt, and foreclose their liens under the authority of the court in bankruptcy, or they may not only be barred of their debts, but may also lose the benefit of their securities. They are parties for the purpose of administering the estate, whether they formally come in or not. If they fail to prove their debts, and receive no dividends in consequence, they are barred." This ruling of a judge of very high authority has been followed ever since, and is only qualified by the exception of those cases in which specific liens are held on specific property, and the amount of the lien exceeds or equals the value of the property which it covers; in which cases nothing passes to the assignee.

Every judgment creditor of George W. Anderson was a party to the bankruptcy proceeding, *volens volens*, whether he came in and proved his debt or not. The judgment creditors were so because their liens were general. The only creditor who was not as of course a party, was the representative of Robert Gibbons's estate, in favor of whom there was a specific lien on specific property. But this lien was for a sum inferior to the value of the property it bound. Such was the condition of that lien as to that property that the representative of that estate could not have enforced it without coming into the bank-

ruptcy court. As to Mrs. Anderson's petition, Mrs. Gibbony came in by counsel, and was represented in the depositions, and in the making up of issues, and in the decree of April 13, 1876. The lien creditors being parties to the bankruptcy proceeding in which Mrs. Anderson filed her petition, it was immaterial whether they were formally named as defendants in the petition or not. It was only necessary for her to state her specific claim and ask the protection of it by the court. By the filing of her petition, those against whose liens she claimed, being all creditors in court, became parties defendant to it. The agreement of December 20, 1872, even if it had been valid, could not put them out of court, if Mrs. Anderson chose to come in. When she came in it was unnecessary for her to make them parties by prayer for process. In *Stickney v. Wilt*, 23 Wall. 150, it was pointedly held by the supreme court that the fact that the petition did not pray for process, did not affect the sufficiency of the petition even against strangers to the proceeding; the court saying: "Beyond all doubt the petition contains every requisite of a good bill in equity, whether the pleading is tested by the statement of the cause of action, or by the charging part of the bill, or by the prayer for relief." Nor is it any objection to the validity of Mrs. Anderson's proceeding that her first pleading is in the form of a petition.

In *Stickney v. Wilt*, instead of bringing a distinct bill in equity in the United States district or circuit court, the assignee filed his petition in the bankruptcy proceeding, assailing the validity of certain mortgage deeds resting upon lands of the bankrupt held by persons who were in no way parties to the bankruptcy proceeding. They were not judgment creditors, but creditors having specific liens upon specific pieces of realty, one of them a vendor's lien and all the rest specific mortgages. They had not proved their claims, but stood out upon their specific securities. The assignee filed a petition assailing their liens and setting out his case, without praying or taking out process against them. They made voluntary appearance and defense; and, on appeal, sought to set aside all that had been done under the petition on the ground that the assignee should have brought a distinct suit in equity against them by formal bill. The supreme court held that the petition was a suit, and that the bankruptcy court had jurisdiction without process against lienholders, when they come in voluntarily. The mortgagees in that case were in the same relations to the petition filed that Gibbony's estate is in here. The only difference is that Mrs. Anderson files the petition instead of the assignee. The case of *Stickney v. Wilt* settles affirmatively the question whether contests respecting the property of the bankrupt between an assignee and persons having specific claims adversely can be litigated in the bankruptcy proceeding in cases where strangers to that proceeding come voluntarily into it, as was done by Mrs. Anderson on one side and Gibbony's representative on the other. The cases of *Smith v. Mason* and *Marshall v. Knox*, *supra*, so far from negativ-

ing the proposition, really affirm it. In both the latter cases the assignee sought to bring strangers to the bankruptcy proceeding into court against their will by the summary process of motions to show cause, and the supreme court held that this could not be done; ruling, in effect, that if an assignee seeks to litigate against strangers any right of property, especially where the property is not in the custody of the court, he must sue them as any other person must sue them, either at law or in equity, in a proper court other than the bankruptcy court sitting in bankruptcy.

I have thus shown that it is not a valid objection to the proceeding of Mrs. Anderson that it was a petition filed in the bankruptcy proceeding as part of it, instead of a distinct suit brought in the district court on its equity side; or that this petition did not make parties defendant by name, and pray for process against the lien creditors of the bankrupt who were already, by the publications in bankruptcy, parties to the proceeding; or that these creditors and the assignee were not summoned each personally to appear and make answer to the petition, filed in a proceeding where they had already been summoned by publication and were constructively present; or that they had not formally appeared and made especial answer to the petition. The assignee was in court and pleaded the statute of limitations. Isaiah Welsh, administrator of J. R. Kent, much the largest creditor, appeared formally, and answered and filed a cross-petition, making all the defense that could be made, either by himself or other creditors, not only by negation of Mrs. Anderson's claim, but by affirmation of those of the lien creditors. All the other lien creditors, though not formally answering the petition of Mrs. Anderson, were in point of fact represented by counsel in the taking of depositions for eight months, and in the argument at the hearing. They were represented by the same counsel who had represented them in the state court, who had signed for them the agreement of December, 1872, and who now represented Welsh and the assignee. They were represented by that counsel in the "making up of issues" antecedent to the hearing preparatory to the decree of April 18, 1876. That hearing was on the eleventh of December, 1875. The argument was elaborate and full, oral and in writing, and made in behalf of all the lien creditors. After the hearing, the court held the case under advisement for four months. Thorough investigation was made of all the voluminous evidence; all proceedings in Montgomery court; and all the proceedings in bankruptcy. During that interval the court freely accepted additional notes and suggestions from counsel on the points involved. While the case was *sub judice*, I received a letter from Mr. Wade, dated on the twenty-seventh of January, which is filed in the cause, in which he said: "I have already said all I wish to say in the case, and, besides my oral argument, I left with Major Stiles a hastily written note of argument on the evening the case was submitted to your honor." This note I had. Seldom was a cause

more thoroughly contested, more fully and earnestly argued, or more deliberately and maturely considered, than the case between Mrs. Anderson and the lien creditors of this bankrupt at the hearing of December, 1875, upon which the decree of April 13, 1876, was rendered.

I do not now think that I was under legal obligation to require an amended petition to be filed by Mrs. Anderson. I am of opinion that all the creditors were bound by the decree of April, 1876. They were bound technically, because they were parties to the bankruptcy proceeding under the publications that had been made in bankruptcy. They were bound justly, because they had been efficiently and zealously represented by counsel during the whole period of more than two years, during which Mrs. Anderson's petition had been pending and progressing to a hearing. In point of fact, Mrs. Anderson's litigation was not with the lien creditors. Their claims were not contested in a single instance to the extent of a single dollar. They were conceded to be due. Her litigation was with the assignee as to what had passed to him by the adjudication in bankruptcy. It is true that the creditors were interested in the question, what estate passed to the assignee; but that officer was competent to contest that point, and they were not necessary parties to its litigation. They would never have been considered by the court as parties but for the agreement of December, 1872; and it was solely with reference to that agreement that they were afforded an opportunity and the privilege of coming into the litigation.

I gave Mrs. Anderson leave to file a petition which should make all lien creditors for whom Mr. Wade had signed the agreement of December, 1872, formal parties by name to her litigation. This leave was confined to those creditors. It was a requirement upon Mrs. Anderson,—a burden imposed, and not a boon conferred. It was for the benefit of the creditors, and really a leave given them to come in and contest the pretensions of Mrs. Anderson. How have they availed themselves of this privilege, which I conceive that the court was under no legal constraint to afford, and which it accorded out of mere grace? This will appear from what transpired after the thirteenth April, 1876. Appeal for supervision was taken from the decree of that date, which, on the twentieth May following, the chief justice dismissed, on the ground that has been stated. Very soon thereafter Mrs. Anderson's counsel, Mr. Stiles, began a correspondence with Mr. Wade for the purpose of making up a correct list of the lien creditors who were to be made by name parties defendant to the amended petition. In reply, Mr. Wade wrote under date of July 24, 1876, from a watering place in Montgomery county, a letter containing the following passage: "In the matters pending in the state court I represented the judgment creditors as they appeared by petition or otherwise down to and including Floyd Smith, (except Hartman & Straus,) being the first twelve in the list forwarded to me." The list com-

menced instead of ending with Floyd Smith. The last of the 12 was Elizabeth Gibbony, executrix of Robert Gibbony, who was doubtless meant. See *ante*, 487, for a list of these creditors, in the order in which they were named in the petition. Alluding to the creditors in the Montgomery suit, he said that those represented by himself "embrace all that could by any possibility have derived anything from the sale of the lands of Anderson if the court had settled that he owned a fee-simple title in the same, the aggregate amount of their judgments being in excess of the value of the lands. I think, upon a careful examination of the list, I can act for all the other creditors except Barrett & Higgins and Miller & Co.;¹ and I will either act for them or get Major Taylor to accept service of process as their counsel. This will relieve you of the necessity of service of process as to any of the creditors. * * * I agree that the testimony now filed in the cause on both sides may be read in evidence upon the issues upon the amended petition, to the same effect as if notice had been given to all the parties, but subject to all just exceptions from any other cause. Prepare your amended petition and send it to me here by the eighth August. I will then indorse acceptance for such creditors as I represent, and get Major Taylor to do the same for the other creditors, he and I representing all the creditors." The amended petition was accordingly sent him by Mr. Stiles on the fifth of August, 1876, having attached to it, as exhibits, lists of the lien creditors of the bankrupt. This petition appears to have been lost or mislaid by Mr. Wade for a long time, and was not returned to Mr. Stiles until February 3, 1880; the exhibits not until several months later.

Meanwhile notice had been given to Mr. Stiles of a motion on the part of some of the creditors to remove the case to the Western district of Virginia, at Lynchburg, which motion was once abandoned, then renewed, and set for hearing October 30, 1880, argued several times on several different grounds, always strenuously resisted by Mrs. Anderson's counsel, but finally granted June 16, 1881, as has been seen. Through the failure of the movers to comply with the provisions of the statute in respect to removals, the papers were not actually brought to Lynchburg until the thirtieth of August, 1881. On the seventh of January following, notice was given by creditors of a motion to dismiss the original petition of Mrs. Anderson, and to set aside and annul the original restraining order granted upon it.

The notice was signed by John J. Wade and T. E. Sullivan, attorneys for James R. Kent's administrator, and Robert Gibbony's executrix, and others. These were the same counsel that had represented the assignee and all the creditors in the elaborate and protracted proceedings in the case, while pending at Richmond. The notice fixed the hearing for the sixth of February, 1882, in chambers, at Charlottesville, before Judge Rives, then judge of the Western

¹ These had no part in the agreement of December, 1872, and had no right to be made parties to the amended petition.—HUGHES, J.

district. This being but a month before the spring term of the court at Lynchburg, the hearing was adjourned to the latter place in term. The matter was afterwards several times delayed or continued, at the instance of counsel for creditors, but finally, at the fall term held at Lynchburg in September, 1882, where, in consequence of the resignation of Judge Rives, I sat by designation, the motions to dismiss and set aside were overruled, and the amended petition of Mrs. Anderson was filed, against the opposition of counsel for the creditors of the bankrupt, who strove again for delay.

The petition was filed, and all creditors for whom Mr. Wade had signed the agreement of December, 1872, were served with process to answer it, either by actual service or by acceptance of service by counsel, except D. Preston Parr and Samuel Straus, surviving partner of Hartman & Straus. These latter were non-residents residing in Baltimore, Maryland, who had small claims of about \$175 each. Mr. Wade had signed for them the agreement of December, 1872, and had represented Parr subsequently in the court; certainly as late as his letter of the twenty-fourth July, 1876, which was after the decree of April, 1876. They were both cognizant of the proceeding of Mrs. Anderson, and of its full purport. This fact is shown by their affidavits to petitions and answers now filed in the record, which were prepared by Mr. Wade for them in Baltimore, and to which they swore on the twenty-fourth of March, 1883, during the term of this court at Lynchburg, which had commenced on the 20th, and to which process that had been served on resident defendants to the amended petition of Mrs. Anderson was made returnable.

At the beginning of the term of court just mentioned, Mr. Sullivan, one of the counsel for lien creditors, was present, and asked the court to defer action on the petition until Mr. Wade, his associate, who was expected in a day or two from Baltimore, would be present. No answer was presented or defense made by any of the 12 defendants to the petitions, and Mr. Sullivan soon disappeared. The court deferred action in the matter for a week, and, none of the defendants having made objection, the final decree of March 26, 1883, was entered. This decree was, in substance, but a repetition of the decree of April 13, 1876. The 12 lien creditors who, through Mr. Wade, were parties to the agreement of December, 1872, had been allowed the privilege of coming personally into court and contesting the claim of Mrs. Anderson. Process had been served on, or service of it accepted for, them by 10 of the 12. The other two, who were creditors for inconsiderable amounts, were aware of the petition, but had not come into court. Instead of coming promptly in while there was yet opportunity, these two had remained away and contented themselves with preparing dilatory papers four days before the end of the term at Lynchburg, and sending them to counsel here too late for them to be filed during the term. Their counsel, Mr. Wade, who had represented most of the other creditors, and had accepted service of process for

these others two months before, and who lived in Baltimore, where D. P. Parr and Samuel Straus resided, and who prepared their papers for them, and was in correspondence with counsel here in their behalf, instead of appearing at Lynchburg and making defense for the other creditors, as Mr. Sullivan, his associate, informed the court that he would do, remained in Baltimore, where he prepared the dilatory papers which reached counsel in Lynchburg eight days after the term of court had commenced, and a day after the decree of the twenty-sixth March was entered.

By requiring Mrs. Anderson to file an amended petition, making the 12 creditors parties defendant to it by name, the court had accorded these defendants a privilege. Notwithstanding this concession to them, these creditors by counsel resisted the filing of the amended petition, and when it was filed, and they were summoned into court, failed to appear. The court did more than it was called upon *stricti juris* to do, when it required that they should be made parties. When, on being summoned, or apprised that the privilege was accorded them, they failed to avail themselves of the opportunity of making personal defense, the court could do nothing but grant the decree in favor of Mrs. Anderson, which it entered at Lynchburg near the close of the March term of 1883. The defendants Parr and Straus were in fact bound by the decree of April, 1876, being, as creditors, parties in court under the publications in bankruptcy. They were, besides, during the March term of 1883, personally cognizant of the petition of Mrs. Anderson, to which they signed an answer, and of the privilege which the court had accorded them of making defense to it. They failed to make that defense in time; and the court is not at liberty, with any respect for the rights of Mrs. Anderson, who has been a patient and diligent suitor at its bar for 12 years, to reopen decrees to which no substantial objection has been shown, and which were most maturely considered and deliberately passed, first in April, 1876, and next in March, 1883, and to which no effective appeal has been taken.

The petitions now before the court of several or all of the 12 creditors that have been mentioned, contain nothing substantially new. The objections which they raise to the decree of March, 1883, are all either strictly technical, or set out grounds that have been repeatedly overruled by the court in this proceeding; especially at the hearing at Richmond in December, 1875. The assignee and creditors were concluded by the decree of April 13, 1876, except from appeal. That they lost by invoking the supervisory instead of the appellate jurisdiction of the circuit court in May, 1876. Allowed by the decree thus unsuccessfully appealed from to come in and make defense to the amended petition, the 12 creditors failed to avail of this privilege, and permitted the decree of March, 1883, to be entered against them. Appeal from that decree was open to them. They could have invoked the appellate jurisdiction of the circuit court, but they neglected to do so. Several of the 12 creditors could have carried

the case beyond the circuit court to the supreme court of the United States. They all neglected the recourse which was thus open to them, and the door of appeal is therefore closed to the decree of March, 1883. They now ask a review here. After neglecting to ask the circuit court to review the district court, and then to ask the supreme court to review the decree of the circuit court, if adverse, they now adopt the expedient of asking the district court to review two deliberate decisions made by itself, one of them nine years ago. The right to ask a review of the decree of March, 1883, expired as to all cases pending at Lynchburg at the end of the term which commenced on the twentieth of March, 1883, which terminated not later than the night of the eighteenth of September, 1883. These petitions for review were none of them filed until the first day of the fall term of 1883, at Lynchburg.

Proceedings in bankruptcy, in matters plenary in character and assimilated to equity suits, (which counsel for creditors insist that Mrs. Anderson's petition is,) are required by rule 32 in bankruptcy to be conformed as nearly as practicable to suits in equity; and the eighty-eighth rule in equity forbids petitions for review, where appeal would lie, from being brought after the expiration of the term during which the decree complained of is rendered. All these petitions for review, therefore, having been brought after the expiration of the term which commenced on the twentieth of March, 1883, at Lynchburg, are brought too late, and cannot be entertained. I will enter a decree dismissing them all, as well on the merits as on the ground that they are brought too late.

PEARCE v. JOHNSON.

(Circuit Court, S. D. New York. April 3, 1885.)

1. PATENTS FOR INVENTIONS—SCHOOL DESKS—PATENT No. 86,440, CLAIM 2.
The second claim of patent No. 86,440, granted to John Pearce, February 2, 1869, for an improvement in school desks, construed, and held not infringed.
2. SAME—COMBINATION OF OLD ELEMENTS—VALIDITY.
In a patentable combination of old elements, all the constituents must so enter into it as that each qualifies every other. It must form either a new machine of a distinct character and function, or produce a result due to the joint and co-operating action of all the elements, and which is not the mere adding together of separate contributions. Otherwise, it is only a mechanical juxtaposition, and not a vital union.
3. SAME—PATENT No. 115,232.
Letters patent No. 115,232, granted to John Pearce, May 23, 1871, for an improved school desk, held void.

In Equity.

Frederic H. Betts, for complainant.

Francis Forbes, for defendant.

COXE, J. This action is founded upon two patents, No. 86,440 and No. 115,232, granted to the complainant for improvements in school desks, February 2, 1869, and May 23, 1871, respectively. One of the objects of the inventor in the first of those patents, No. 86,440, was to furnish a school desk so constructed that the desk-board can be folded up out of the way, or turned up to serve as an easel. When used for the latter purpose, it is held in position by adjustable supports, having hooks formed upon their upper and lower ends, to hook over the edge of the desk-board, and the stationary part of the desk-top, respectively. The second claim of this patent is alone in controversy, and is as follows:

"(2) Supporting the desk-board E in an elevated position by means of the supports H, or equivalent supports, substantially as herein shown and described, and for the purposes set forth."

The defenses interposed are:

First, that the claim is functional and void; *second*, that mechanical skill alone is involved, and not invention; *third*, that as to one of the alleged infringing desks the claim, now 14 years old, is stale; *fourth*, non-infringement.

Assuming that the claim is not functional, and for that reason void, it must, in view of the state of the art, be limited to the apparatus described or its equivalent; it cannot be held to cover broadly every device for holding up a desk-top. So construed, the conclusion is reached that the defendant does not infringe.

The desk-board in this patent is attached to arms pivoted to the upper part of the standards, and so constructed that it may be used in three positions: horizontally, as a desk; perpendicularly, or nearly so, as an easel; and it may be turned over to form the back for a seat. It swings in all about 270 degrees. When used as an easel, it is entirely above the standards, and overhangs the seat in front, making it necessary for that seat to be vacated. The easel is too far distant from the scholar sitting in the seat behind to be used as a reading or book board, and can be used by him for drawing purposes only when standing. The supports, H, are movable, and can be taken off at pleasure. They may be made of two parts sliding upon each other, so that their length may be increased or diminished to hold the desk-board at any desired angle. When in use the desk-board is held rigidly in position. To move it, the hooks must be taken off. To change its angle as an easel, they must be adjusted by hand.

The defendant in the two exhibits said to infringe, has a desk-board pivoted at a point nearly midway between its front and rear edges; the rear edge turns upward, presenting the lower side to the scholar in the seat behind. The board swings between the standards and is brought so near that it can be used as a reading-board by a scholar while in a sitting position. A stop-hinge is used, having lugs on the hinge, which are turned against corresponding shoulders in the frame

by pressing the rear edge of the desk-board upward and forward, so that when the board assumes the proper position it is held there and prevented from going further in that direction. The hinge permits the board to assume two stationary positions only: a horizontal one as a desk; an upright one as a reading-board. From one of these positions to the other, a distance of about 145 degrees, the board can be turned at pleasure. It is thought that the stop-hinge is not an equivalent for the hooked rod in complainant's patent. To be an equivalent it must perform the same function in substantially the same manner. The two are different in construction, operation, and principle. *Rowell v. Lindsay*, 5 Sup. Ct. Rep. 507; *Eames v. Godfrey*, 1 Wall. 78; *Werner v. King*, 96 U. S. 218, 230; Walk. Pat. §§ 353, 361.

In the second patent, No. 115,232, the object of the patentee was to improve the construction of school desks and seats, making them more simple, convenient and comfortable. The desk and seat boards, supplied with a hinge having a concealed stop, fold up, filling the space between the supports. Ample unobstructed room is allowed for the scholars to pass between the desks, and the concealed stop renders it entirely safe for them to manipulate the desk-board. When the desk-board is turned up the under side alone is visible to the scholar. A reading-board, flanged and shouldered for the purpose of holding books, is attached to the under side of the desk-board and is held in position at the proper angle by means of wedge-shaped blocks. The scholar is thus enabled to read while sitting erect in his seat. The claims are as follows:

"(1) The flanged reading or book board F G attached to the under part of the pivoted desk-board B, substantially as herein shown and described, and for the purposes set forth. (2) A desk, B, pivoted brackets C C, having checks c^2 , and the circular end a^1 , of the frame, having recess with shoulders a^2 a^3 thereon, all combined with reading-board F G, and constructed and arranged as and for the purpose specified."

The defenses are lack of novelty and invention, and non-infringement. The conclusion that these claims are for an aggregation merely, cannot be avoided. Both are for combinations. The second claim contains an additional element, and is for a larger combination than the first.

The supreme court, in *Pickering v. McCullough*, 104 U. S. 310, describe, at page 318, with remarkable perspicuity, the essential requisites to a valid combination. The court say:

"In a patentable combination of old elements, all the constituents must so enter into it as that each qualifies every other; to draw an illustration from another branch of the law, they must be joint tenants of the domain of the invention, seized each of every part, *per my et per tout*, and not mere tenants in common, with separate interests and estates. It must form either a new machine of a distinct character and function, or produce a result due to the joint and co-operating action of all the elements, and which is not the mere adding together of separate contributions. Otherwise it is only a mechanical juxtaposition and not a vital union."

Tested by this rule I am unable to understand how these claims can be upheld.

If to the under side of the desk-board, shown in defendant's patent No. 109,518, the well known church book-rest is attached, the product will be the precise invention described in the first claim. What is the one practical result produced by the action of all the elementary parts? In what manner do the desk-board and the reading-board co-operate to produce a common result? This question was fairly and frankly answered by the complainant's expert. He says: "They do co-operate in so far as they form a desk-board in one position and a reading-board in another position." A writing-desk is turned up for reading, and a reading-desk is turned down for writing. Is not this the precise fault found to be so fatal in *Reckendorfer v. Faber*, 92 U. S. 347? The desk-board performs its functions independently of the reading-board. So do the hinges. There is no joint action. Take away the reading-board, and the desk-board operates in precisely the same way. Each does when placed in juxtaposition precisely what it did alone. The reading-board does not influence or modify the action of the desk-board or of the hinges. Its action combined with them is in no respect different from its action when disconnected from them. It was a reading-board before; it is a reading-board still. No new feature is added to it by placing it in the position indicated. It is thought that the patent is invalid within the doctrines of the cases cited. See, also, *Hailes v. Van Wormer*, 20 Wall. 353; *Packing Co. Cases*, 105 U. S. 566; Walk. Pat. § 32; Sim. Pat. 47.

The bill is dismissed.

TRAVERS v. PALMER.

(Circuit Court, S. D. New York. April 3, 1885.)

PATENTS FOR INVENTIONS—HAMMOCKS—INFRINGEMENT.

Letters patent No. 217,964, issued to James P. Travers, July 29, 1879, for an improvement in hammocks, *held* not infringed by the hammock manufactured under patents issued to Isaac E. Palmer, in January and February, 1883.

In Equity.

Frost & Coe, for complainant.

Edwin H. Brown, for defendant.

COXE, J. This is an action to enjoin the alleged infringement of letters patent, No. 217,964, issued to the complainant July 29, 1879, for an improvement in hammocks. In the specification attached to the patent the inventor declares that the object of his invention is to form a new and improved hammock which shall be stronger, neater, and better adapted for its purpose than the hammocks now in use. He says:

"My hammock A is made or woven into an elastic open-worked fabric of cotton or other fiber, and is made of any length and width. It may be made plain or in colors. At the ends of the hammock A are secured eyelet-rings *a*, of metal or other suitable material. Through these rings *a* the suspensory continuous cord C passes and forms a grommet, D, for the purpose of securing the cord C to the rings B, of metal or other proper material. * * * The hammock A is bound with any suitable material, thus giving said hammock a neat and tasteful appearance."

The claim is as follows:

"The hammock herein described, consisting of the rectangular flexible open-worked fabric A, having a continuous outer flexible binding, provided with strengthening end cords F, and a series of eyelets, *a*, in its ends, continuous cord C D, and rings B, as and for the purpose set forth."

The claim covers the following elements:

First, the rectangular, flexible, open-worked fabric; *second*, the continuous flexible binding; *third*, the strengthening end cords; *fourth*, the eyelets; *fifth*, the continuous clew-line; *sixth*, the suspending rings.

The defense is non-infringement. An examination of the defendant's hammock, which is manufactured under patents issued to him in January and February, 1883, discloses the fact that he uses but two of these elements, viz., the material and the rings. He does not use the binding, the strengthening cords, the eyelets, or the continuous clew-line. It is contended, however, that for these, equivalents are adopted. That there is no outer flexible binding on defendant's hammock is conceded. But it is said that the selvage, formed by weaving the edges of the fabric closer than the general body, is an equivalent for the binding. This argument would be plausible were it not for the fact that the hammock offered in evidence, as made in accordance with the complainant's patent, also shows a selvage edge, not so wide, but similar in every other respect. There is, then, no substitute what-

ever for the binding, which, it is quite evident, is used for ornament only. The strengthening end cord, which, in the drawing, appears to extend entirely around the sides and ends of the hammock-body, is not found in the defendant's hammock. The lines of double sewing can hardly be regarded as an equivalent, and especially so in view of the fact that the same sewing appears on the complainant's hammock. The cord is intended to add additional strength to the sewing. Although the defendant uses no eyelets, it may be doubtful whether his loops formed of many strings running out from the ends of the hammock-body are not fair equivalents. It is, however, unnecessary to decide this question. The defendant does not use the continuous cord extending back and forth from the hammock-body to the ring. His cords are separate from and independent of each other. Of the six elements of the complainant's hammock the defendant uses but two, and possibly an equivalent for a third. As three of them are wholly absent from his hammock it must be held that there is no infringement. *Williams v. Stolzenbach*, 30 O. G. 891; S. C. 23 FED. REP. 39; *Watermeter Co. v. Desper*, 101 U. S. 332; *Blake v. City and County of San Francisco*, 5 Sup. Ct. Rep. 692; *Voss v. Fisher*, 5 Sup. Ct. Rep. 511; *Rowell v. Lindsay*, 5 Sup. Ct. Rep. 507; *Prouty v. Ruggles*, 16 Pet. 336; *Gould v. Rees*, 15 Wall. 187; *Seymour v. Osborne*, 11 Wall. 516, 555; *Gill v. Wells*, 22 Wall. 1, 14.

The bill is dismissed.

WABASH, ST. L. & PAC. RY. CO. v. CENTRAL TRUST CO. OF NEW YORK
and others. (Two Cases.¹)

CENTRAL TRUST CO. OF NEW YORK and another v. WABASH, ST. L. &
PAC. RY. Co. and others.¹

(Circuit Court, E. D. Missouri. March 20, 1885.)

1. REMOVAL OF SUITS INVOLVING BOTH CONTROVERSIES BETWEEN CITIZENS OF THE
SAME STATE AND CONTROVERSIES BETWEEN CITIZENS OF DIFFERENT STATES.

Where a suit instituted in a state court involves both a controversy between citizens of the same state and a distinct, independent, and separable controversy between citizens of different states, either party to the latter controversy may remove the entire suit to this court.

2. CONSOLIDATION OF SUITS.

A mortgagor came into this court before default, alleged that it was going to default, and asked for and obtained the appointment of a receiver. The mortgagee filed a cross-bill to foreclose the mortgage, and also filed a bill in the state court to accomplish the same object. The complainant in the original bill, filed here, removed the suit in the state court to this court, and moved to consolidate said suits. Motion sustained.

3. RECEIVERS—APPOINTMENT AT INSTANCE OF MORTGAGOR—FORECLOSURE—JURISDICTION.

Semble, that this court has power to appoint a receiver, at the instance of a mortgagor, where default is about to take place, and, upon the mortgagees filing a cross-bill after default to foreclose, it has jurisdiction to proceed to a decree of foreclosure.

Motion to Consolidate.

For a history of the original and cross bill filed here, see 22 FED. REP. 272. The bill was filed in the state court, because of doubts as to the jurisdiction of this court in the suit before it. The suit in the state court was removed, and the motion to consolidate made by the Wabash, St. Louis & Pacific Railway Company.

John F. Dillon, Henry T. Kent, Wager Swayne and Greene, Burnett & Humphrey, for the Wabash, St. L. & Pac. Ry. Co.

Phillips & Stewart, for the Central Trust Co.

John I. Brown and Thos. J. Portis, for the St. Louis, I. M. & S. Ry. Co.

BREWSTER, J., (orally.) In these cases, which were argued yesterday, and in which there is a motion made to consolidate, I think I can express my views better by commencing at the rear end of this litigation. The last suit was commenced by the filing of an original bill in the state court, in behalf of the Central Trust Company of New York, a bill of foreclosure, making the Wabash road, and the various mortgagees thereof, parties defendant. That the state court had jurisdiction of that suit is to my mind indisputable, and that it was a case which was removable to this court is equally clear, although some of the parties defendant, one at least, is a citizen of the same

¹Reported by Benj. F. Rex, Esq., of the St. Louis bar.

state with the complainant, the Central Trust Company; for there is a primary, separable, independent controversy between the Central Trust Company, a citizen of New York, and the Wabash Railroad, a citizen of the state of Missouri, a controversy in respect to the mortgage given by the one to the other. Where there is such a separable, independent controversy between citizens of two states pending in a suit in the state court, either one of the parties to that controversy may file his petition and bond to remove the entire suit to this court, although thereby they bring into this court, if you please, another controversy between citizens of the same state. That is the clear language and scope of the decision in *Barney against Latham*, 103 U. S. 205; and followed by other causes. In other words, the supreme court there affirmed, as was well said yesterday, the doctrine that where there is in a suit a distinct, separable, independent controversy between citizens of two states, it is a case which may be removed into the federal courts, and the federal courts can take jurisdiction of it, and of the whole of it. In that respect, as said in a late opinion of the supreme court, the jurisdiction of the circuit court is larger than that which can be obtained by an action brought originally here. Hence that case—the last suit—is properly in this court; and that this court has jurisdiction of it, with all that is involved, we have no question.

In the foreclosure of a mortgage there is a certain sense in which you may say that the only indispensable parties are the mortgagor and the mortgagee. You can foreclose that mortgage and divest the mortgagor of all his interest, and transfer it by sale into the mortgagee, or any other purchaser, and that without the presence of other incumbrances as parties. And yet we all know that there are certainly proper parties, or may be proper parties, other than the mortgagor and the mortgagee. Subsequent mortgagees, of course, are proper parties in order to cut off any equity of redemption; and while it is laid down in the supreme court of the United States that an independent controversy between the mortgagor and a third party, one involving the question of paramount title, is not to be litigated in a foreclosure suit, yet all those things which simply involve matters of lien on the property, whether prior or subsequent, may, as a general rule, properly be considered in such a suit. Well, that case being one that is properly in this court, a motion is made to consolidate it with a prior case, a case brought originally by the Wabash road. It has been said that that original action was an anomaly. A mortgagor, before default, comes into a court of equity and says he is going to default, and wants the court to take possession of its property, the mortgagee saving nothing. It may be it is not a common action, and yet I believe it is not solitary nor the first. That application presented this state of facts to the court: that here was a vast property, running through several states, burdened with a variety of local incumbrances and obligations, whose value consisted largely in its being preserved in its entirety and with all its connections. Split up

into a hundred fragments, the aggregate value of the varied fragments, it was contended, would be as nothing compared with the value of the single, intact property; and the question was put before the court whether, two days before a default, when various rights of attack would arise in different parts of this territory, the court might anticipate and take possession of the property, and preserve it intact, in order to permit the general mortgagee, when default actually occurred, to file its bill for foreclosure, and have the property, as an entirety, sold? While, of course, there were matters, in respect to this, of doubt that required consideration,—and we did consider it carefully,—yet both of us then thought, and both agree now, that it was wise that it was so done, and that the court properly appointed the receivers.

Immediately after the filing of the bill, when the default came, the trustee in the general mortgage filed a cross-bill to foreclose such mortgage, and that cross-bill is pending with others. The object of the cross-bill, and the object of this original bill filed in the state court, is the same. Of course the query naturally arises, what is the necessity for this last? If there was jurisdiction in the court in the first suit, what is the necessity of the second? Speaking for myself, I think the court had jurisdiction over the first bill; that the cross-bill was properly filed; and that the court would have jurisdiction to proceed to a decree in that. And yet I cannot say that it was unwise to initiate the second suit, because here is an original bill filed in the state court, a court of unquestionable jurisdiction, long after the default had occurred. It is not always sufficient, to be sure, that the court has jurisdiction to render a decree; it is also often well to have the proceedings such that all parties interested are satisfied that it has jurisdiction, that there shall be no doubt existing; because a doubt tends to check bids at a sale, and prevent the property offered for sale from realizing its full value. Hence I see that there was a propriety, while I do not think there was a necessity, for this second suit commenced in the state court; and yet, that having been commenced, and having been transferred to this court, and the object of the suit in the state court and the cross-bill in the federal court being the same, I see no impropriety in consolidating the two and proceeding with them as one consolidated case. The parties are the same. There is, as stated, perhaps a technical change in the name of a single party or two, defendants in the state court, yet they are merely substituted trustees in some of the mortgages; so that the interests, the questions, the controversies, the real parties are identical in the two cases. The order will therefore be made for a consolidation.

Of course this cuts off no questions, as to any particular party made defendant, as to whether he is properly in court. He can still raise any question of that kind. He can deny that the controversy or the matter which is charged against him is one which is determinable in this case. Each individual defendant has his right to come into court and challenge the propriety of the proceeding as against him.

All we hold now is that the cases are properly before us, and that, with the unity of interest and the unity of questions and the identity of parties, the motion to consolidate is proper, and should be sustained; and it is so ordered.

TREAT, J., concurs.

LAUDERDALE CO. v. FOSTER.

(Circuit Court, W. D. Tennessee. April 9, 1885.)

JURISDICTION—EQUITY—SET-OFF—STATE AND FEDERAL JUDGMENTS.

The relation between the state and federal courts imposes a restriction upon the equity powers of either in setting off a judgment of the one against a judgment of the other. Where, therefore, a federal court of equity is asked to set aside the satisfaction of a state judgment at law or to determine equitable defenses to that judgment, as a preliminary to a decree of set-off against a judgment of the federal court itself, the parties will be sent to a state court of competent jurisdiction to settle their controversy, and in the mean time the federal judgment will be stayed.

In Equity.

Metcalf & Walker and Thomas Steele, for plaintiff.

Myers & Sneed, for defendant.

HAMMOND, J. The defendant holds the balance of a judgment at law in this court against the plaintiff, which, after adjusting the matter of credits claimed in the manner indicated by the court, on consideration of the master's report, amounts to \$2,052.83. This judgment he is seeking to enforce by *mandamus*. The plaintiff claims a judgment against the defendant in the circuit court of Lauderdale county for \$1,870.51. This bill is filed to set off one judgment against the other, and to adjust certain disputes as to credits claimed by the plaintiff and denied, which latter feature has been determined on exceptions to the master's report, and need not be further noticed. It alleges that the defendant is insolvent, and that the plaintiff has no opportunity to enforce its judgment by execution. There would be no doubt about the plaintiff's right to this relief, and no difficulty in granting it, but for the fact that on the records of the state court the judgment appears to have been "satisfied" by a levy upon and sale of defendant's land under an execution which issued on the judgment. 3 Meigs' Dig. (2d Ed.) § 2490. The bill states this, and seeks to avoid its effect by invoking the equitable powers of this court to set aside the entry of satisfaction, because, as is alleged, the sale was void, and the plaintiff took no title to the land, by reason of certain irregularities and defects which the bill points out. 1 Meigs' Dig. (2d Ed.) § 516; 2 Meigs' Dig. § 1753. It further alleges that the plaintiff disclaims all title under the execution sale; that, because the pro-

ceeding was void, it has never taken any steps to recover possession; that the defendant remains in possession, and has mortgaged the land for its full value; and that the mortgage would now absorb the property, on which the judgment is not now a lien, the statutory time, for the lien having long since expired.

The answer of defendant neither admits nor denies the invalidity of the sale, but insists that the plaintiff must stand by its title to the land; that the proof shows there is no judgment, it having been satisfied of record; and that the plaintiff, having appropriate remedies to recover possession, cannot now claim further satisfaction through a set-off. It also sets up certain equitable defenses against the judgment, arising out of the fact that, under our state revenue system, it was procured against defendant as a surety on the county tax collector's bond, in a summary way, without any notice to him, and only on notice to the defaulting collector, and that, under those statutes, as such surety, he was entitled to certain advantages and privileges which have been denied to him by the plaintiff, whereby the judgment itself is void; and a court of equity will not enforce it.

The court concedes very fully the principle that equity, in exercising its powers to set off one judgment against another, requires that the plaintiff's judgment must be a subsisting claim capable of enforcement, and that if there be any obstruction to it the court will not interfere, but leave the parties to their mutual legal rights. *Wat. Set-off*, p. 380, §§ 349-355. But this must be understood as subject to the power of a court of equity to inquire into and remove the obstruction in a proper case for equitable jurisdiction in that behalf. *Id.* If this case were in the equity court of the state, and both judgments were those of the state court of law, or if both judgments were those of a federal court, neither court of equity could have any difficulty in deciding the question here raised. If a proper case has been made for the plaintiff, the satisfaction would be set aside, the judgment reinstated, and the set-off declared; or, on the other hand, if there be any validity in the equitable defenses set up by defendant, the court would give effect to them by refusing the set-off and restraining by injunction any further vexation on account of a void judgment. Thus complete equity would be meted out to these parties.

As it is, however, this federal court of equity has no jurisdiction to scrutinize the records of a state court, correct them by setting aside an entry of satisfaction appearing thereon, and adjudicating upon the validity of the proceedings, to bind these parties in a matter like this. Of course it could, whenever the matter came up in litigation, determine whether any title to the land had passed or any controversy over or involving the title; but that is not what we are asked to do; we are asked to vacate a satisfaction of record, re-establish a judgment of a state court, and satisfy it by a set-off; which, I think, we cannot assume to do. On the other hand, neither can we inquire into and

adjudicate upon the equitable defenses set up in behalf of defendant to the judgment, for the same reason precisely, and because we are forbidden by statute to enjoin a state judgment or execution. Rev. St. § 720. This statute is the declaration of a principle which, necessarily, must prevail to preserve harmony in our system of government, and substantially controls this court to refuse its relief both to the plaintiff and defendant in this matter of dealing with the state judgment. So, too, the state court of equity cannot enjoin the federal judgment we have here, or otherwise interfere with it.

At first it seemed to me that the logical but unfortunate result of this situation would be to dismiss this bill; but on reflection I am satisfied that would be wrong. It would defeat the plaintiff in the collection of its debt, for which it already has a judgment, and *prima facie* a valid one, if it has not been satisfied. It would allow an insolvent debtor, while still in possession of the land sold under execution, to keep the land and deny the debt, and by a mortgage to displace the judgment, levy, and sale. The defendant would collect his money from the plaintiff and render its claim against him fruitless, no matter how just, for this is all with which he has to pay. However, the accidents of this particular case should not control our judgment here. The true principle is that our duplex system of government has imposed upon our state and federal courts of equity, in their relation to each other in this matter of dealing with judgments at law, restrictions upon their respective equitable powers which otherwise would not exist. To do complete equity between the parties here, for example, requires essentially the concurrent and co-operative action of both a state and federal court, while, under ordinary circumstances, either court could give full relief. By sending these parties to the state courts, to take within a reasonable time such action as they may be advised to settle their controversy over the state judgment, we do no violence to the comity between the courts, and usurp no intolerable jurisdiction; while, in the mean time, we can stay our own judgment and await a settlement of that controversy in a court of competent jurisdiction. But since the defendant's judgment against the plaintiff must be collected by taxation, which, under our process, is a very slow proceeding, I do not think it proper to delay the levy and collection of the money, but direct that it shall be paid into the registry of the court, to be invested and held for the party to whom we may ultimately decree it. The only objection is that this may be imposing a tax on the county which it possibly need not levy, but that is largely its own fault in not sooner taking the necessary steps to vacate the satisfaction of its judgment. Besides, the sum is not large, and if the money goes back into its treasury, it will be in exoneration of future taxes, and no great harm is done. The surplus must, of course, be paid to defendant. Either party may have leave to apply for further directions. Decree accordingly.

ST. LOUIS, K. C. & C. R. Co. v. DEWEES and others.¹*(Circuit Court, E. D. Missouri. March 28, 1885.)***1. APPOINTMENT OF RECEIVER OF UNOCCUPIED RAILWAY PROPERTY WHERE POSSESSION AND TITLE ARE IN DISPUTE.**

Where the title to an unused railroad track is in dispute, and both parties to the controversy claim possession, and neither is in actual physical possession, a court of equity will not interfere in a suit to quiet title by appointing a receiver, even where the defendant has attempted to take forcible possession, until the right to possession is established at law.

2. SAME.

Semble, that the proper way in such cases is to establish both title and possession at law.

Bill to Quiet Title. Motion to appoint a receiver.

The bill states, among other things, that the defendant has attempted to take forcible possession, and prays for an injunction, and the appointment of a receiver to take charge of the property in dispute, pending the proceedings herein, or until the further order of the court.

Noble & Orrick, for complainant.

Farrish & Jones, for defendants.

BREWER, J., (*orally*.) In this matter, Brother Noble, which you and Mr. Orrick presented yesterday, we have read your briefs and listened to your arguments with a great deal of interest and pleasure, as we always do, but it seems to us they beg the important question, a question yet unsettled, and that is the question of possession. A party in conceded, open, notorious, actual possession is entitled to have that possession protected in a court of equity as well as in a court of law; but upon the affidavits,—I do not want to say that your's do not make a case in your behalf, yet they are contradicted by the affidavits of the defendants,—it impresses myself and my Brother TREAT that this question of possession is as yet unsettled. It is a disputed fact. It is a thing which you cannot proceed upon as a basis from which to build. If it was settled,—if we thought that the possession was established, and that here A., B., and C. were, in the manner you indicate, undertaking to crowd you out of possession, why, it would impress us very differently from what it does now. I can understand how, for instance, in a building—your own home—you are in it; your family is there; possession is actual; it is open, it is notorious; and anybody who attempts to interfere therewith meets the matter of possession as an established fact. If it is a piece of land upon which there is no improvement,—an open quarter section of land, or, as in this case, a track over which no trains have been run for the last year or two; a sort of dead, empty, open property that is not tangibly, physically occupied,—it impresses me, and impresses my Brother TREAT, (and in that we agree very positively,) that the right

¹ Reported by Benj. F. Rex, Esq., of the St. Louis bar.

to possession should, by some legal proceeding, be established before any further action is taken.

Of course, in an ordinary action at law, the right to possession can be settled. I do not mean to say you have not possession, and that these gentlemen on the other side are not trespassing upon that, but it does impress us that, upon the affidavits, there is that doubt hanging over the question—that uncertainty as to your possession—which forbids the court interfering in the summary way. Of course we would like to do everything in our power to prevent any physical violence,—any lawless acts; and if this case stood alone by itself, with never a chance of another to follow it, we might, on the suggestions and arguments you have made, feel we were doing society good by taking possession. Yet the action we take upon this matter will lie before us as a precedent in the future, and to that extent, at least, limits our discretion. So far as the possession, in the first instance, of the Forest Park Railroad Company is concerned, it is unquestioned. It built the road; it was in possession; did the work; procured and laid the iron. Now, whether its possession has been ever, in fact, transferred to you, is one of those questions which we think, on affidavits, is not clear. The corporation, as a corporation acting through its directors, never transferred possession. No officer of the court ever transferred possession. You do say that Mr. Shultz, vice-president and acting manager, did transfer possession,—we can only speak from what is developed in the affidavits here, and from that it would seem to us as though he had forgotten the obligations of consistency, and had trifled with one or other of the parties in interest,—yet it does not seem to us that you have established that actual, indisputable, acquiesced possession which puts you in a position where you can invoke the power of this court for its protection. We think that the true way for you is to first establish your legal title to that possession. If the charge had been made here the other day that these defendants were likely to take up the iron and carry that away, and thus destroy the property, why that would have put the question in a different shape before us. But that was not suggested. It does come before us in the light that possession to-day is of value; not that either party is going to take up the track and destroy the property as a property, but that there are other matters not fully developed in the testimony,—some supposed advantage in present possession in reference to other outside connections.

While we should like to do all possible to preserve the public peace under the circumstances, yet we do not feel that the case is so clearly presented to us, in respect to your actual possession, that we ought to initiate the plan of appointing a receiver,—dispossessing both parties; for, if we put the property in the possession of a receiver, it looks to us very much as though we would have a receiver taking charge of a piece of dead property like an open quarter section of land, and just put in his possession for the sake of keeping the par-

ties who claim it out of possession,—a receiver who could not do anything with it, who could not build the road, who could not operate it because there is no rolling stock, and no connection with any other road, and no opportunity of doing anything, but simply put in possession to keep your client, and Mr. Davis' client outside, and hold it while you proceeded to litigate the title and right to possession.

We think the true way is that the question of title and possession should be settled by an action at law, and that will end all controversy. We have looked at it for the last two or three days, on these different facts, in all the lights and shades suggested, and we feel constrained to deny the application for a receiver. Mr. Brother TREAT suggests, if we should carry this to the extent to which you claim, we should be having this court pushing the doctrine of receivership to the extent of making us justices of the peace, and issuing peace warrants.

BLAIR, Trustee, v. ST. LOUIS, H. & K. R. Co. and others. (NORTON, Intervenor.¹)

(Circuit Court, E. D. Missouri. March 19, 1885.)

1. RECEIVERS—ANTE-RECEIVERSHIP DEBTS—ATTORNEYS' FEES.

A claim of an attorney against a railroad, for fees earned a year and a half before the appointment of a receiver, is not entitled to any preference.

2. SAME—ATTORNEYS' SALARY.

Where the annual salary of the attorney of a railroad falls due only a short time before the road is placed in the hands of a receiver, his claim against the company is entitled to priority over that of mortgage bondholders.

3. SAME—PAYMENT OF JUDGMENT AGAINST ROAD.

One who pays a judgment against a railroad company a few weeks before the appointment of a receiver, under an agreement that the amount so advanced shall be repaid by the company, is not entitled to priority over bondholders.

In Equity. Exceptions to master's report.

Theo. G. Case, for complainant.

John O'Grady, for receiver.

James Carr, for intervenor.

BREWER, J., (orally.) In the exceptions which have been argued to the reports of the master in the case of *Blair* against *St. Louis, Hannibal & Keokuk Railroad*, the first that I shall notice is that in the case of *Norton* against *Railroad Company*, where three sets of claims were presented.

The first was for services as special attorney in two or three cases, a year and some months prior to the appointment of the receiver, amounting to \$135. The master disallowed that; that is, he recog-

¹ Reported by Benj. F. Rex, Esq., of the St. Louis bar.

nized it as a claim against the company, but refused to give it priority over the mortgages. In that, I think that he was right. While, of course, as we in the profession all agree, lawyers are benefactors to the race, and entitled to special consideration at the hands of any intelligent tribunal, yet I think that the lawyer who waits a year and a half before collecting his fees is guilty of great negligence. He certainly presents no equitable claims for preference.

The second claim is for salary for the year prior to the appointment of the receiver. The master finds, and that fact is not challenged, that he was to be paid a salary of a thousand dollars, payable at the end of the year, which amount became due just before the appointment of the receiver; and it is insisted on the part of the bondholders that that is not a claim of a character to be recognized and awarded priority; in other words, that the services of an attorney are not necessary to the operation of a railroad. The counsel seemed to liken this to the rulings under that statute, in force in some states, making a railroad company responsible to one employe for the negligence of a co-employe. Such statute has been held to refer only to that negligence which occurs in the management of the trains, the actual operation of the road, something which is attended with peculiar risk, and so justifying an exception to the general rule of masters' liability. It does not seem to me that in that idea is to be found the true test. I think that whatever is necessary in the ordinary administration of the affairs of the corporation, comes within the spirit of the decisions of the supreme court; and that an attorney's services are thus necessary is very clear. That exception made by the bondholders will be overruled, and the allowance sustained.

The third arises upon these facts. It appears that this gentleman, the attorney of the road, paid off sundry judgments, rendered before justices of the peace, against it, paid certain claims for wages, and for stock killed, etc., and paid them under an arrangement, between himself and the president of the company, that the money thus advanced by him should be repaid by the company on the first of January, 1884. This was only a few weeks before the appointment of the receiver, and his claim is that, having paid these liabilities of the company, at its instance, under a contract by which repayment to him was to be made at a time within less than six months before the appointment of the receiver, such debt should be preferred to the mortgage. We do not think so. It amounts simply to this: He loaned the company so much money, but the bondholders had loaned theirs long before, and loaned it secured by a lien. If he had taken a mortgage at the time of making this loan, and thus obtained a lien, no one would contend that he thereby obtained priority over the earlier loan. That is all this transaction amounts to. He loaned so much money to the company, but did not take a lien. Now he asks that, not having taken a lien, and having loaned the money a few weeks before the appointment of the receiver, that he should obtain priority

over those who loaned money three or four years or more ago and then took a mortgage. All the exceptions in this case of Norton's will be overruled.

BLAIR, Trustee, v. ST. LOUIS, H. & K. R. Co. and others. (NORTON, Intervenor.¹)

(Circuit Court, E. D. Missouri. March 18, 1885.)

RECEIVERS—ANTE-RECEIVERSHIP DEBTS—SURETY ON APPEAL-BOND.

Where a judgment is recovered against a railroad company in an inferior court upon a claim not entitled to priority, and an appeal is taken, and the company's attorney goes on the appeal bond, and a receiver of the road is thereafter appointed, and after his appointment a judgment is recovered in the appellate court against the company and the attorney, and the latter pays it, his claim is entitled to no priority over that of mortgage bondholders.

In Equity. Exceptions to master's report.

It appears that the intervenor paid the judgment referred to in the opinion of the court.

Theo. G. Case, for complainant.

John O'Grady, for receiver.

James Carr, for intervenor.

BREWER, J., (orally.) The other case of *Norton* against *The Same Road* presents a different state of facts.² There, the same gentleman, who was attorney for the road, at the instance of the president, went surety on appeal-bonds. Cases were pending before a justice of the peace in the latter part of 1873, a few months before the appointment of the receiver, and after judgment there the company appealed, and he signed the appeal-bonds. The cases went to the circuit court of the state, and on trial there, after the receiver's appointment, judgments were rendered against the company, and against him.

Well, not one of the claims sued on before the justice would be entitled to priority. They date back two or three years before the appointment of the receiver, and it would be strange if, when the claims in the first instance were not of a character entitled to priority over a secured and registered indebtedness, that an attorney of the road could, by simply giving his services as surety on appeal-bonds, indirectly secure the payment of those claims in priority to the mortgage debts. We think the ruling of the master in that was correct, and the exception will be overruled.

¹Reported by Benj. F. Rex, Esq., of the St. Louis bar.

²See other case of same title, which was decided immediately before this one.

BLAIR, Trustee, v. ST. LOUIS, H. & K. R. Co. and others. (GREENE, Intervenor.¹)

(Circuit Court, E. D. Missouri. March 19, 1885.)

MORTGAGES—SURRENDER OF BONDS UNDER SCALING ARRANGEMENT—LIEN FOR PORTION OF REDUCED INDEBTEDNESS, FOR WHICH NEW BONDS WERE NOT ISSUED.

The indebtedness of a railroad was scaled down,—old mortgage bonds were surrendered, and new issued. A creditor surrendered his bonds, and received new ones for all, except a small portion, of the reduced indebtedness to him. No bond was issued for it, because no bond was issued for so small a sum. *Held*, that said creditor is entitled to a lien, equal to that of other mortgage creditors, for the whole amount due him.

Exceptions to Master's Report.

Theo. G. Case, for complainant.

John O'Grady, for receiver.

Fogg & Hatch and James Carr, for intervenor.

BREWER, J., (*orally*.) In the case of *Greene* against *The Railroad* this state of facts is presented: It appears that this gentleman held at one time, I think, \$20,000 of bonds. (I may not have the figures correctly.) The indebtedness was scaled down, and new bonds were issued. He surrendered his old bonds, and received new bonds for a portion of that amount; but there was a fraction over, \$500 or \$600, and no bonds apparently issuing for that limited sum, he holds that claim unadjusted, or rather unsecured by a bond. The master has allowed this as a claim against the company, but holds that it is inferior to the mortgage,—this new mortgage that was created at the time the debt was scaled down. In that, we think he is mistaken; that as Mr. Greene held the amount of the original indebtedness—\$20,000—as a prior and secured debt, and surrendered it for the mere purpose of having the indebtedness scaled down, he is entitled for all of the reduced obligation to come in with the present bondholders on the same standing; that although he has an amount here of \$500,—not enough to make a full bond,—yet his debt in equity stands on the same footing as that of those who have received bonds. So in that respect the exception will be sustained, and the debt will be held to be of equal lien with the mortgage debt, and paid out of the proceeds of the sale, the same as the other mortgage obligations.

¹ Reported by Benj. F. Rex, Esq., of the St. Louis bar.

KELLOGG and others v. Root and others.

(Circuit Court, W. D. Michigan, S. D. March 30, 1885.)

1. ASSIGNMENT FOR BENEFIT OF CREDITORS—HOW. ST. MICH. §§ 8739, 8744—FRAUDULENT PREFERENCES.

A creditor in Michigan may take security by mortgage, or otherwise, from an insolvent debtor, with knowledge of his financial weakness, so long as the creditor has no notice or knowledge that the debtor contemplates making an assignment, but the security must be given at the instance of the creditor, be duly delivered, and he must have no notice or knowledge of any fraudulent purpose, within the meaning of the statute.

2. SAME—CHATTEL MORTGAGES HELD VOID.

When an insolvent, at his own instance and convenience, voluntarily gives some of his creditors security, it is at once a suspicious circumstance, and if followed within a short time by an assignment, the conclusion will be justified, in the absence of other controlling circumstances, that both were contemplated, and should be deemed in law one transaction; and such securities will be held void. Chattel mortgages *held* void.

In Equity.

Smith, Nims, Hoyt & Erwin, for complainants.

Norris & Uhl, for defendants, Root & Co.

Mitchell, Bell & McGarry, for defendants, Stone & Porter.

WITHEY, J. Kellogg & Co., the complainants, are creditors of Ellen H. Stone, who, on the tenth of March, 1884, signed two chattel mortgages covering her entire stock of goods, in Portland, Ionia county: one to her father-in-law, Darius Stone, of that place, for \$6,176.90; the other to the defendants, Root & Co., of Detroit, for \$4,778.83, aggregating about \$11,000. Her husband, Allen Stone, was her man of business, who, as her agent, managed the store and conducted her affairs. He had the mortgages prepared, took them to Mrs. Stone to be executed, and when she had signed them, they were handed back to him, one to be filed in the town clerk's office, the other to be handed to Darius Stone. Neither of the mortgagees were present, or knew that the mortgages had been prepared or signed until a subsequent day. Allen Stone had them in his possession until March 17th, at about 5 o'clock p. m., when he lodged them in the proper office to be filed. In the mean time he had caused to be prepared a common-law assignment for the benefit of Mrs. Stone's creditors; had conferred with the defendant Porter, and procured his assent to act as the assignee. From the clerk's office, after filing the mortgages, Allen Stone proceeded directly to the store, and within two hours the assignment was executed and delivered to Porter, together with the assigned property.

The bill of complaint sets up the facts in the case, and prays that the mortgages be declared void; that the assignee be enjoined from paying them; that a receiver be appointed to take charge of the assigned property, and enforce the trust. There is also a prayer for general relief. On the motion for an injunction and for the appoint-

ment of a receiver, both were refused, but the cause was retained for hearing upon the merits.

The statute of this state declares that all common-law assignments which give a preference to one creditor over other creditors shall be "void." How. St. § 8739. The deed of assignment, on its face, is not open to the objection that it gives a preference; but it is claimed that the transaction of Mrs. Stone, touching the mortgages and the assignment, manifest an attempt to evade the statute, and should be considered as one transaction. The supreme court of Michigan has given construction to the statute in question as regards some of its bearings on this case: The provision already alluded to, "that all assignments, commonly called common-law assignments, for the benefit of creditors, shall be void unless the same shall be without preferences as between such creditors." And the sixth section of the act, (How. § 8744,) which reads:

"In case there shall be any fraud in the matter of said assignment, or in the execution of said trust, or if the assignee shall fail to comply with any of the provisions of this act, or fail or neglect to promptly and faithfully execute said trust, any person interested therein may file his bill in the circuit court in chancery of the proper county for the enforcement of said trust, and the court, in its discretion, may appoint a receiver therein," etc.

The construction is that the general intent of the statute is to secure equal distribution of the property of insolvents among all their creditors, and if preferences are fraudulently attempted, the intervention of a court of equity to prevent it is authorized. Commenting on the first section, the court says:

"The statute declares the assignment 'void' if the bond is not filed; but this word is frequently used in the sense of voidable, and it must have that construction here if it shall be necessary to give other provisions of the statute effect." *Fuller v. Hasbrouck*, 46 Mich. 78; S. C. 8 N. W. Rep. 697.

The bill in the case at bar is filed on the theory that, although preferences were given, the assignment creates a trust, and is to be enforced, the preferences alone being void; and such view is upheld by the case referred to, and will be followed by this court as manifestly the correct construction of the statute, and which we must accept.

About two months prior to the time the assignment was made, Allen Stone, the husband of Mrs. Stone, applied to her creditors for an extension of their claims, among them to Root & Co., who were then informed concerning her financial condition: that she could not then pay all her creditors promptly, but if they would grant her an extension, he thought she would be able to pay them. Root & Co. refused, except on the terms that they should be secured, and Stone promised to give them security, in case his wife consented. Root & Co. then prepared and sent by mail to Mrs. Stone four notes, each for \$887.55, payable in two, three, four, and five months, which she signed and returned, but gave no security at that time. On the tenth

of March following, as already stated, she signed the chattel mortgage on her stock of merchandise, and wrote to Root & Co. the same day, "I have this day made a chattel mortgage in your favor, on my stock of goods, for \$4,778.83, which I will place on file for you." The letter was received on the twelfth of the same month, to which no reply was made. The mortgage, it is seen, was for an amount in excess of the indebtedness in January of \$1,228.63, but it seems this excess was for goods sold since January, and not paid for.

Previous to applying to creditors for an extension, Mrs. Stone, through her husband, had made unsuccessful efforts to borrow three or four thousand dollars with which to meet pressing debts, and failing to find any one willing to lend on the security that she could give, the extension was applied for, which was not entirely successful, as has been seen. She owed \$17,791; her assets were appraised by the assignee at \$14,243; and they have produced a total of \$10,742, something less than the sum of the mortgages. It is safe to say that any person of ordinary business knowledge and experience, under such circumstances as we have alluded to, would not fail to understand that Mrs. Stone was insolvent, and our conclusion is that both Mrs. Stone and her husband knew, or were bound to know, that such was the fact. I presume they may not have known the extent of the utter hopelessness of her affairs as disclosed by the inventory and appraisal, but they knew enough for them to understand, at the time she executed the mortgages, on the tenth of March, that she could not continue in business.

It will be noticed, the mortgages were made and signed in the absence of the mortgagees, and, though some time previous they had requested security, the giving of the two mortgages in question were, when given, the voluntary acts of the mortgagor. At that time, Mrs. Stone and her husband contemplated, in my opinion and understanding of the facts, making the assignment which she did make seven days subsequent. If I am correct in my conclusion, then it is manifest that, within the meaning of the statute forbidding preferences in an assignment, the making of the mortgages and the deed of assignment will be deemed in law to constitute one transaction. This being so, the preferences are to be regarded as void; and the deed of assignment is to be upheld and enforced in accordance with the case of *Fuller v. Hasbrouck, supra*.

It does not change the views expressed, that the mortgagees had no notice or knowledge of the contemplated assignment at the time the mortgages were signed or placed on file, for the reason that they were not actors or participants in the giving of the instruments of security. They were intended as preferences by the only party who had to do with their creation, or who had any intention concerning them; and this party's purpose then and there was to give preferences by means of the mortgages, and follow them by a general assignment in the near future. They were, therefore, fraudulent and void at their in-

ception as against other creditors, and could not be thereafter delivered as valid instruments. True, about two months prior to the assignment, Root & Co. requested and were promised security, and it is also true that Darius Stone had requested and been promised security for indebtedness of Mrs. Stone to him of something over \$3,000; but the mortgages were not made to either of them under any contract, nor in compliance with the terms of such requests and promises. The mortgage to Root & Co. was for more than \$1,200 in excess of the debt owing to them when such promise was made, and the mortgage to Darius Stone covered indemnity for \$2,500 of paper indorsed by him for Mrs. Stone, which had not been paid when the promise was made to him, and was not included in it. The question is not whether, as between Mrs. Stone and the mortgagees, in the absence of rights of *bona fide* creditors, the mortgages would be valid, but whether, in view of the facts of this case, they are valid.

When Allen Stone, who managed the entire business, was asked, as a witness, why so much delay took place, after one of the parties had requested and been promised security, before the mortgage was executed, he answered as follows:

"I knew the minute that mortgage was put on file, that minute the credit of the concern was ruined. I knew that, and that was the reason I staved it off as long as I could."

This was true as to both mortgages; and reveals the true state of his mind, and explains why he held the mortgages for seven days without filing in the clerk's office, and why, in the intervening time, he perfected arrangements for having the assignment made within two hours after the mortgages were placed on file by him. No one, it would seem, can escape the conviction that Stone and his wife contemplated making the assignment at the time the mortgages were signed. The making of a mortgage and an assignment under like circumstances, have been held to be one transaction, because one in contemplation, and correctly so. *Perry v. Holden*, 22 Pick. 269; *Berry v. Cutts*, 42 Me. 445; *Doggett, Bassett & Hills Co. v. Herman*, 5 McCrary, 269-272; S. C. 16 FED. REP. 812. See the recent case decided by the supreme court of Michigan, Judge CHAMPLIN's opinion, concurred in by Judge COOLEY, *Heineman v. Hart*, reported in 20 N. W. Rep. 792, October 25, 1884.

The case at bar was not one where a diligent creditor was present, and pressing for security from his insolvent debtor. I do not question, in view of the decisions by the supreme court of Michigan, the right of a creditor to take security by mortgage or otherwise from his insolvent debtor, with knowledge of his financial weakness, so long as the creditor has no notice or knowledge that the debtor contemplates making an assignment; but the security must be given at the instance of the creditor, be duly delivered, and he must have no notice or knowledge of any fraudulent purpose, within the meaning of the statute. When an insolvent, at his own instance and convenience,

voluntarily gives his creditor security, it is at once a suspicious circumstance, and if followed within a short time by an assignment, the conclusion will be justified, in the absence of other controlling circumstances, that both were contemplated, and should be deemed in law one transaction. Such is the case at bar, under the evidence, as I view it. Both mortgages were the voluntary acts of Mrs. Stone and her husband, not given to reward diligent creditors, but made voluntarily, with the intention of evading the statute forbidding preferences in a deed of assignment, without the presence or participation of the preferred creditors.

A decree will be entered in accordance with this opinion, decreeing the two chattel mortgages void as to the creditors of Mrs. Stone; that the assignee be enjoined from paying anything from the proceeds of the assigned assets on the said mortgages, or either of them; and that, after paying the costs and expenses of executing his trust, he pay the proceeds *pro rata* upon the debts proved against Mrs. Stone, according to their respective rights, under the statute in such case provided, including the debts of Root & Co. and Darius Stone with the debts of other creditors.

There were several questions raised as to the jurisdiction of the court; but they are all overruled. Mrs. Stone is not a necessary party; the assignee can contest every question that she could. The debt or claim of the complainants has been sufficiently established in this suit, in which there has been ample opportunity to contest it, and it was the duty of the assignee, if there was any defense, to make it. The bill of complaint is not a creditor's bill, but a bill to enforce the trust created by the deed of assignment, among other things, and to have preferences declared void; and this is clearly the right of complainants, within the paragraph 8744 of Howell's Statutes before alluded to. They may bring their suit in this or in the state court, being non-residents.

Ex parte KOEHLER, Receiver, etc.

(Circuit Court, D. Oregon. May 4, 1885.)

1. CORPORATION ACT—VESTED RIGHT THEREUNDER CANNOT BE IMPAIRED OR DESTROYED BY THE LEGISLATURE.

The power of the legislature to alter or repeal the general incorporation act of Oregon is qualified so that it cannot thereby "impair or destroy any vested corporate right."

2. RIGHT TO A REASONABLE COMPENSATION.

A railway corporation formed under the general incorporation act of Oregon has a vested right to collect and receive a reasonable compensation for the transportation of persons and property over its road, which the legislature cannot impair or destroy.

v.23f,no.11—34

3. LEGISLATURE MAY PRESCRIBE RATES OF TRANSPORTATION.

The legislature may prescribe rates of transportation, and the same will be presumed to be reasonable until the contrary is shown, but the judiciary are the final judges of what is reasonable, or what "impairs" the vested right of the corporation to a reasonable compensation for its services.

4. DISCRIMINATION BY RAILWAY CORPORATIONS.

The legislature may prohibit any discrimination by a railway corporation between persons or places, unless the same is done to enable it to retain or secure business at a point or place where there are competing lines of transportation, and in such case it may charge less for a long haul than a short one in the same direction, so long as the charge for the latter is reasonable.

Petition for Instructions.

John W. Whalley, for petitioner.

DEADY, J. On January 19, 1885, Mr. Richard Koehler was appointed receiver by this court, in the suit of *Harrison et al. v. The Oregon & California Railway Company et al.*, of the road of said company, comprising upwards of 400 miles of track, leading from Portland, via the east side of the Wallamet river, to Ashland, near the southern boundary of this state, with a branch from Albany to Lebanon, and from Portland, via the west side of said river, to Corvallis. On February 20, 1885, the legislative assembly of the state of Oregon passed an act entitled "An act to regulate the transportation of passengers and freight by railroad corporations," which will take effect, by operation of the constitution, on May 21st. On April 23d the receiver presented a petition to this court, asking for instructions concerning his duty in the management of said property in certain particulars covered or affected by said act, which he says he is advised by his counsel is unconstitutional and void. The act is very verbose, and unskillfully drawn, but, so far as it relates to the matters about which the receiver seeks direction, it may be briefly stated as follows:

(1) The fare for the transportation of passengers shall in no case exceed four cents a mile. (2) All charges for transporting property shall be reasonable; but the rate charged on January 1, 1885, by any corporation shall be its maximum rate. (3) No "greater or less" compensation shall be charged one person than another "for like and contemporaneous service" in transporting property. (4) No rebate or drawback shall be allowed in any case, except when property is shipped for points beyond the limits of the state. (5) Pooling freight or dividing the earnings of "different and competing" railways is prohibited. (6) No greater rate shall be charged for carrying similar property a short haul than a long one, in the same direction. Any person who violates any provision of the act is made liable to the person injured in treble damages, and a fine of \$1,000.

So far as the act undertakes to fix the charges for carrying passengers and freight it is claimed to be void, on the ground that it impairs the obligation of the contract of the state with the corporation, to the effect that the latter might prescribe and fix its own tolls and charges, contrary to section 10 of article 1 of the national constitution. By section 2 of article 9 of the constitution of Oregon it is provided that

"corporations may be formed under general laws. * * * All laws passed pursuant to this section may be altered, amended, or repealed, but not so as to impair or destroy any vested corporate right." The Oregon & California Railway Company was formed under the general corporation act passed pursuant to this constitutional provision on October 14, 1862, which act contains the following section:

"Sec. 36. Every corporation formed under this act for the construction of a railway, as to such road, shall be deemed a common carrier, and shall have power to collect and receive such tolls or freights for transportation of persons or property thereon as it may prescribe." Laws Or. 532.

In *Wells, Fargo & Co. v. Oregon Ry. & Nav. Co.* 8 Sawy. 614, S. C. 15 FED. REP. 561, this court held that this section only authorized the corporation to charge a reasonable compensation for the transportation of persons and property; but that so far it constituted a contract between the state and the corporation, the obligation of which it could not impair by any subsequent legislation. This conclusion, of course, implies that the right or franchise of the corporation to demand and have a reasonable compensation for the carriage of persons and property is a "vested" one, within the meaning of the constitution of the state, and therefore cannot be impaired or destroyed by the legislature under the power to alter, amend, or repeal the general corporation act.

But it is admitted that the right of the corporation to fix its rates and fares is not absolute, and that, if necessary, the legislature may limit the same to what is reasonable. Nor, in my judgment, is the power of the legislature over the subject absolute. It cannot require the corporation to accept less than a reasonable compensation for its services. And while the presumption may be, and doubtless is, that any rate which the legislature may prescribe is a reasonable one, such presumption is not conclusive, and may be overcome by evidence to the contrary in any case when the question arises before the courts.

I am aware that in what are called the "*Granger Cases*," 94 U. S. 155-187, it was practically held that the action of the legislature in fixing the maximum rate of compensation for certain railways was conclusive of the question, and could only be reviewed or reversed at the polls. But in none of these cases, as I read them, was the power of alteration or repeal reserved to the state, qualified as in Oregon, so that it could not be used "to impair or destroy any vested corporate right." And the contention of the corporations in those cases was that, although the state had reserved to itself the right of repeal without qualification, still the court ought in justice and right to so limit its operation as not to allow it to interfere with vested rights, as was suggested by Mr. Chief Justice SHAW, in *Com. v. Essex Co.* 13 Gray, 239. But the court refused to do so, and held in effect that, under the unqualified power of appeal reserved to the state, the legislature might deal with the subject as it pleased, even if it deprived the corporation of all right to compensation for services in the future, and

there was no appeal from its action except to the polls; and that, if the business and property of the shareholders was thereby destroyed or rendered valueless, they must blame themselves for engaging in a corporate enterprise under such precarious conditions.

Admitting, then, that the legislative assembly has the power to prescribe a maximum rate for the carriage of persons and property, and that such rate is presumed to be reasonable until the contrary is shown, I proceed briefly to consider the matters concerning which the receiver desires instruction.

And first as to the provision fixing the rates for carrying passengers: There is no sufficient showing that the rate prescribed is not reasonable. The only distinct allegation in the petition to the contrary is that "the actual cost" of carrying "passengers on many portions of the road is in excess of the maximum rates allowed" therefor; but what the effect is upon the receipts for passenger traffic on the road, as a whole, does not appear, and probably cannot be definitely ascertained except by experience. It is commonly understood that now, and prior to the passage of the act, the fare between Portland and Albany, Lebanon and Corvallis, was four and one-half cents a mile; between Albany and Roseburg, six cents; and between Roseburg and Ashland, seven cents; and on mileage tickets between Portland and Oregon City, two cents a mile; between Portland and Albany and Lebanon, three cents; and all other points, four cents a mile.

Owing to the increased cost of operation and the limited population and travel, it is probably true that a rate which would be reasonable in the Wallamet valley would not pay expenses to the south of it. But if the legislature, in fixing the rate, think proper to make it uniform over the whole line, so as to make the more wealthy and populous portion of the state contribute to the locomotion of the inhabitants of the southern portion thereof, I am not prepared to say it has not the power to do so, or that the corporation can be heard to object thereto, so long, at least, as the compensation received by it for the carriage of passengers over its road, as a whole, is reasonable. While the road remains in the hands of a receiver of this court, it is not desirable that there should be any conflict between its management and the policy of the state, except when the latter is clearly contrary to the legal right and substantial interest of the road. For the present the receiver will be instructed to operate the road in this respect in subordination to the act, and if experience shall prove that the rate is insufficient to yield the road, as a whole, a reasonable compensation, the matter may be further considered.

As to the matter of long and short hauls, the question, although *prima facie* one of discrimination, directly involves the right to a reasonable compensation. I assume that the state has the power to prevent a railway company from discriminating between persons and places for the sake of putting one up or another down, or any other reason than the real exigencies of its business. Such discrimination,

it seems to me, is a wanton injustice, and may therefore be prohibited. It violates the fundamental maxim, which in effect forbids anyone to so use his property as to injure another, *sic utere tuo ut alienum non ledas*. The provisions of the act that I have condensed in paragraphs 3, 4, and 6 aforesaid are intended to prevent this practice. But where the discrimination is between places only, and is the result of competition with other lines or means of transportation, the case, I think, is different. For instance, the act prescribes a reasonable rate for carrying freight between Corvallis and Portland, or from either to points intermediate thereto. But Corvallis is on the river, and has the advantage of water transportation for some months in the year. The carriage of goods by water usually costs less than by land, and as water-craft are allowed to carry at a rate less than the maximum fixed for the railway, they will get all the freight from this point unless the latter is allowed to compete for it. But if, to do this, it must adopt the water rate for all the points intermediate between Portland and Corvallis, where there is no such competition, it is, in effect, required to carry freight to and from such points at a less rate than that which the legislature has declared to be reasonable, or else give up the business at Corvallis altogether. And the same result would follow as to Salem and other points on the east and west side lines, where there is convenient access to water transportation.

If the legislature cannot require a railway corporation, formed under the laws of the state, to carry freight for nothing, or at any less rate than a reasonable one, then it necessarily follows that this provision of the act cannot be enforced so far as to prevent the railway from competing with the water-craft at Corvallis and other similarly situated points, even if in so doing they are compelled to charge less for a long haul than a short one in the same direction. It is not the fault or contrivance of the railway that compels this discrimination, but it is the necessary result of circumstances altogether beyond its control. It is not done wantonly for the purpose of putting the one place up or the other down, but only to maintain its business against rival and competing lines of transportation. In other words, the matter, so far as the railway is concerned, resolves itself into a choice of evils. It must either compete with the boats during the season of water transportation, and carry freight below what the legislature has declared to be a reasonable rate, or abandon the field, and let its road go to rust. Nor can the shipper at the non-competing point, or over the short haul complain, so long as his goods are carried at a reasonable rate. It is not the fault of the railway that the shipper who does business at a competing point has the advantage of him. It is a natural advantage which he must submit to, unless the legislature will undertake to equalize the matter by prohibiting the carriage of goods by water for a less rate than by rail; and when this is done, the inequalities of distance as well as place may also be overcome by requiring goods to pay the same rate over a short haul as a long one,

and then the shipper at Ashland will be as near the market as any one.

As to the interchange of freights with the Oregonian Railway Company, the case stated in the petition does not seem to be one of pooling freights or dividing earnings, but rather a case of a long haul at a less rate than a short one in the same direction, to meet the contingency of river competition at Ray's or Fulquartz's landing. Pooling freights or dividing earnings is resorted to by rival and competing lines of railway as a means of avoiding the cutting of rates, which, if persisted in, must result in corporate suicide. It is not apparent how a division of the earnings of two such roads can concern or affect the public, so long as the rate of transportation on them is reasonable. But assuming, what is not admitted, that the legislature has the power to prohibit the practice, the Oregon & California and the Oregonian railways do not appear to be competing ones, but rather supporting ones,—the latter serving as a feeder, branch, or continuation of the former. Nor is the arrangement between them a pooling one, but simply one by which each carries for the other at a fixed price, per ton per mile. There is nothing in the arrangement which prevents the receiver from doing a "like service" for any one else on the same terms, and I have no doubt he would be glad to. The receiver is instructed:

(1) To carry passengers at a rate not exceeding four cents a mile on any portion of the road, and for as much less on the whole or any part thereof as he may think advisable; (2) to charge no more for the carriage of goods than the maximum allowed by the act, nor no more for a short haul than a long one in the same direction, except to and from points where the rate obtainable is affected by water transportation, in which case he may carry at as low a rate as the water-craft do, without reference to the length of the haul; (3) to continue the interchange of freight with the Oregonian railway on the footing of the present arrangement as long as he may think advisable; and (4) in the discharge of his duties, to otherwise obey and conform to the provisions of the act.

The foregoing contains my present impression of the rights and duties of the receiver in the premises. But being *ex parte*, of course, it is given subject to further consideration and correction. The receiver is instructed to obey the act for the time being, except in the case of a long haul to or from a point affected by water transportation. If any one considers himself aggrieved by the action of the receiver in this particular, on application to this court leave will be given to bring an action herein against him for damages, so that the matter may be regularly and formally heard and determined.

As the question involved—"has the corporation a contract with the state for the right to demand and have a reasonable compensation for the carriage of goods?"—is a federal one, it is proper that the action should be brought in this court.

SINTON v. CARTER Co.¹*(Circuit Court, D. Kentucky. January 24, 1885.)***1. CONSTITUTIONAL LAW—LEGISLATIVE POWERS—MUNICIPAL CORPORATIONS.**

In the absence of any constitutional prohibition the corporate existence and powers of municipalities are subject to the legislative control of the states creating them.

2. SAME—BY WHAT AGENCY MUNICIPALITY MAY ACT.

Where there is no constitutional inhibition, the legislature of a state may properly authorize a county to create a debt for a governmental purpose without a submission to a vote of the people, and may, in its discretion, select the agency by which the county is to act.

3. SAME—CASE STATED.

Where Carter county had lawfully issued its bonds in aid of a railroad, and portions of its territory had been taken to form other counties, by acts which provided that the citizens and property within the old limits should remain liable to taxation for the payment of those bonds, "as though this act had never been passed;" *held*, that an act which authorized the Carter county court to compromise those bonds, to issue new obligations in settlement, and to levy and collect taxes upon all the territory originally bound, was constitutional.

4. OBLIGATIONS.

The word "obligations," used without limitation, includes coupon bonds payable to bearer.

At Law. On demurrer.

John W. Stevenson, Wm. Gobel, and E. B. Wilhoit, for plaintiff.

A. Duvall, for defendant.

BARR, J. The defendant demurs to the petition because, as is argued, (1) the act under which the bonds sued on were issued is unconstitutional and void; (2) the act, if constitutional, does not authorize the issuing of these bonds; (3) there is a defect of parties defendant. It is insisted that the title of the act under which these bonds were issued does not express its subject, but is misleading and delusive. The title of the act of 1878 (1 Sess. Acts 1878, p. 77) is: "An act authorizing the county of Carter, and those parts of Boyd and Elliott taken from Carter county, to compromise and settle with the holders of the bonds and coupons of interest executed by Carter county in its subscription to the capital stock of the Lexington & Big Sandy Railroad Company, and to levy and collect a tax for that purpose." An examination of the act will show that the subject-matter is distinctly expressed by this title. But it is claimed that the legislature had no constitutional authority to authorize the county court of Carter to compromise an old debt and issue bonds for parts of Boyd and Elliott counties, and to levy and collect taxes upon parts of those counties to pay their proportion of those bonds thus issued. If this be true, as contended, the act would not be unconstitutional by reason of its title. The constitutional provision is that "no law enacted by the general assembly shall relate to more than one subject, and that shall be expressed in the title." Here there is only one subject, and that is clearly expressed in the title. We have seen no case

¹Affirmed. See 7 Sup. Ct. Rep. 650.

which sustains the contention of the learned counsel, and we think none can be found. Cooley, Const. Lim. 144-148, and authorities referred to in notes.

The next inquiry is whether the legislature had the constitutional right to empower the county court of Carter to act and bind those parts of Boyd and Elliott counties which had been a part of Carter county. Carter county, under the authority of the legislature, and prior to the formation of Boyd and Elliott counties, subscribed \$75,000 to the stock of the Lexington & Big Sandy Railroad Company, and paid for it by the issuance of its coupon bonds payable to bearer. In 1859, and with these bonds outstanding, the county of Boyd was created. Sess. Acts 1859-60, p. 34. In this act the legislature provided "that nothing in this act shall be construed to release the citizens and property, now subject or which may hereafter become subject to taxation, within the boundary of Carter county, included in the first section of this act, from being held and made liable for the bonds and interest issued to the Lexington & Big Sandy Company, as though this act had never been passed." The county of Elliott was created by an act of the legislature passed in 1869, and exactly the same language is used in regard to this subject as that used in the act of 1859 creating Boyd county. Sess. Acts 1869-70, p. 72, § 7. In addition to this, express authority was given the officers of Carter county to continue to levy and collect taxes in that part of Elliott which was taken off of Carter county. This part of the act was, however, subsequently repealed. The effect of these provisions in the acts creating the counties of Boyd and Elliott was, I think, to retain those parts of Carter county within that municipality, as far as the then outstanding bonds were concerned. No other construction of these provisions would give full effect to the words, "as though this act had never been passed."

If the acts creating Boyd and Elliott counties had never been passed, there could not have been a doubt of the right of the legislature to authorize the county court of Carter to compromise and adjust the outstanding debt, and issue new bonds binding the county for the amounts agreed upon in the compromise. This would not have been because the people of the county had elected the county court as their final agent, but because the legislative department of the state authorized a subsisting municipality to compromise and adjust its outstanding bonds, and authorized the county court, as the agent of this municipality, to act for the corporation. It might, in the legislative discretion, have indicated any other agent. If I am correct in the conclusion that for the purpose of this outstanding debt of Carter county the territorial limits were the same as before the establishment of Boyd and Elliott counties, then the agency which should act for the county was within legislative discretion.

The question is not whether the legislature has the constitutional authority to empower a county court of one county to subscribe stock

in a railroad company, and issue bonds in payment thereof, for another county, without the consent of the people of that county, but whether, when the debt has already been created by the county itself under the authority of law, the legislature may not, in its discretion, indicate the agency to represent the debtor municipality in compromising and adjusting the debt, and issuing new bonds in settlement, without the consent of the people of that municipality. It is true that the act of 1878 authorized the novation of the old debt, and the creation of a new one for the amount of the compromise, and that the petition alleges the bonds sued on were delivered and accepted as the result of that compromise; but this fact did not make the act unconstitutional, for the reason indicated.

Allison v. Louisville, H. C. & W. Ry. Co. 10 Bush, 1, rather sustains than conflicts with the conclusion indicated. In that case the court sustained a subscription to the railroad company, and the issuing of bonds of one precinct of a county by the county court of the county. This precinct was only a small portion of the county, and the county court was in no proper sense the representative of the precinct. It was, in reality, an agency indicated by the legislature, and not selected by the people of the precinct. The court therefore, in that case, sustained the constitutional authority of the legislature to authorize this county court to act as the agent of the precinct, and for it to issue and deliver their bonds without asking the consent of the people of the precinct. See, also, *County Judge Shelby Co. v. Shelby R. Co.* 5 Bush, 225; *Bracken Co. Ct. v. Robertson Co. Ct.* 6 Bush, 70.

In the absence of a constitutional inhibition, the legislature of a state may, in its discretion, indicate the mode and the agency by which a debt is created by a city, town, county, or precinct in a county. The debt must be created for a governmental purpose, but if for such a purpose, there can be no necessity for a submission to a vote of the people of the city, town, or county, or other municipality. *Railroad Co. v. Otoe*, 16 Wall. 667; *Town of Queensbury v. Culver*, 19 Wall. 83; *County of Callaway v. Foster*, 93 U. S. 567; *Mount Pleasant v. Beckwith*, 100 U. S. 514.

In the case at bar the original debt had been created for a recognized public and governmental purpose, and the mode and an agency for an adjustment and settlement was indicated by the legislature, and this agency, representing the municipality, has compromised and settled the debt by giving new obligations for much less than the amount of the outstanding debt. The fact that the new obligations were for much less than the original debt makes no difference in the constitutional question, however.

It is insisted that if the act of 1878 be constitutional, still, it does not authorize the issuance of the bonds sued on, which are coupon bonds; payable in Cincinnati, Ohio, to the holders of the original bonds or bearer; and they are *ultra vires*. The act authorized the county court of Carter county to compromise and settle with the holders of the out-

standing coupon bonds. These bonds were payable out of the state and to bearer, and the county court was empowered to execute to the holders of said bonds and coupons, severally, the obligations of said county of Carter, and those parts of the counties of Boyd and Elliott as had been a part of Carter. The act provided that "said obligations shall contain such stipulations as to interest as may be agreed upon by the court and holders of said bonds, but not at a greater rate than six per centum per annum, payable semi-annually. Said obligations shall be due and payable at such times and be for such amounts as may be agreed upon by the court and the holder or holders of said bonds and coupons." The authority is to execute to the holders of the outstanding bonds and coupons new obligations, due and payable at such times and for such amounts as might be agreed upon by the court and the holders of the outstanding bonds, bearing a semi-annual interest at a rate to be agreed upon, not exceeding 6 per centum per annum.

It is insisted that "obligations," as used in this act, excludes the authority to issue a coupon bond payable to the holder of the old bonds and *bearer*, and only authorizes the county court to issue an ordinary promissory note, non-negotiable, and payable to the holder of the old bonds only. Obligations is a generic word, and includes all kinds of contracts by which contracting parties bind themselves, and, in the absence of limiting words, or the connection in which it is used, will be construed in its generic sense.

I perceive nothing in the provisions of this act or the surrounding circumstances which indicates that the legislature intended to limit the obligations to be executed to the county's non-negotiable note. The act does not indicate the place of payment, or limit it to this state. It, in express terms, gives the county court authority to execute the obligations, payable at such *times* and for such amounts as might be agreed upon, and provide that the obligations should bear semi-annual interest. The various provisions of the act itself show that it was not expected or intended the county court would compromise and settle a large debt, and pay the whole of it immediately, or within a short time by taxation. The evident purpose of the act was to compromise and refund this debt, or a very large part of it. The word "obligations" was probably used because of its broad meaning, and it included coupon bonds as well as promissory notes, or a mere acknowledgment of indebtedness. In adjusting this outstanding debt, it might be useful to have the right to execute various kinds of obligations, but, however that may have been, I think there is nothing to limit the meaning of "obligations" to mere acknowledgment of indebtedness or non-negotiable notes.

The suggestion of the learned counsel, that the authority given in this act to execute the obligations to the holders of the outstanding bonds *severally* limits the meaning of obligations, is not sustainable. If the word was used for any especial purpose, it was more likely to

indicate the legislative authority for the county court to compromise with any of the holders of the outstanding debts, and that the authority to compromise and issue new bonds was not conditioned upon all holders accepting the compromise. The authority to execute coupon bonds is express, and there is no occasion to imply any authority which was exercised by the Carter county court, unless it be for making them payable to *bearer*. The express authority is "to execute to the holder," and under this authority the bonds were executed to the holders of the outstanding bonds; *and bearer*. If these bonds had been executed payable to the order of the holders of the outstanding bonds compromised, they would have been within the express authority given. Why is not "payable to the holder and *bearer*" equally within the authority given? But, waiving this view, I think that as the county court of Carter had authority to execute and deliver "obligations," which included coupon bonds, that, in the absence of any limitation as to the character of these obligations, that court had a right to make them payable in the usual way, and that is to *bearer* as well as to the holder of the outstanding bonds.

The case of *Supervisors v. Galbraith*, decided by the supreme court, (99 U. S. 216,) is a much stronger case than the one at bar, and settles this question in favor of the plaintiff. There, the Mississippi legislature authorized the supervisors of Calhoun county to issue bonds in aid of a railroad company, and directed that the bonds be payable to the "president and directors of the Granada, Houston & Easton Railroad Company, and *their successors and assigns*." "The bonds were made payable to the Granada, Houston & Easton Railroad Company, or *bearer*." This was claimed to be a fatal defect, but the supreme court held the bonds valid.

There is no defect of parties, for the reason indicated, and for the further reason that if the county courts of Boyd and Elliott might be sued, there is nothing which compels the plaintiff to sue them.

The demurrer to the petition should be overruled; and it is so ordered.

STATE OF MISSOURI *ex rel.* BALTIMORE & O. TELEGRAPH CO. v. BELL TELEPHONE CO.¹

(Circuit Court, E. D. Missouri. March 31, 1885.)

RIGHT OF TELEGRAPH COMPANY TO CONNECTION WITH TELEPHONE COMPANY—PATENTS—LICENSER AND LICENSEE—MANDAMUS—PARTIES.

A., a Massachusetts corporation, and the owner of a patent on a telephone, licensed B., a Missouri corporation, to do the telephone business of St. Louis, upon condition that B. should not establish telephonic connection with any telegraph company unless especially authorized by A. A. permitted B. to establish telephonic connection with the Western Union Telegraph Company. Thereafter the Baltimore & Ohio Telegraph Company applied for a *mandamus* to compel B. to permit telephonic communication between it and the petitioner.

¹ Reported by Benj. F. Rex, Esq., of the St. Louis bar.

A. was not made a party. *Held*, (1) that A. was not a necessary party; (2) that all other telegraph companies were entitled to the same privilege granted the W. U. Co. upon paying the same price; and that the petitioner was entitled to the relief asked. *TREAT, J.*, dissenting.

Application for a Mandamus.

Garland Pollard, for petitioner.

E. T. Allen, for defendant.

BREWER, J., (*orally*.) In this case, I regret to say that my brother *TREAT* and myself do not agree fully as to the rights of the parties. It is an application on the part of the Baltimore & Ohio Telegraph Company to compel the Bell Telephone Company of Missouri—the company having the telephone business of this city—to permit telephonic communication between it and the petitioner, the Baltimore & Ohio Telegraph Company. The defendant answers that it is engaged in the telephonic business here by virtue of a license obtained from the American Bell Telephone Company, a Massachusetts corporation; that by the terms of the license under which it does business, it may not establish telephonic connection with any telegraph company, other than that permitted by the licenser,—the holder of the patent,—the Massachusetts company; and it further appears that such licenser has permitted telephonic communication with the Western Union Telegraph Company.

Now, the question is whether the court can compel this defendant, doing the telephonic business of this city, to establish communication with any other individual, or company, than that permitted by its license from the patentee. I believe fully in the sacredness of property; but I think all property stands upon an equal basis, whether that property consists of gold dollars in your pocket, real estate, or the ownership of a patent. There is no peculiar sanctity hovering over or attaching to the ownership of a patent. It is simply a property right, to be protected as such. Starting from that as a basis, while every property owner may determine for himself to what he will devote his property, yet the moment he puts that property into what I perhaps may, for lack of a better expression, define as the channels of commerce, that moment he subjects that property to the laws which control commercial transactions; just as in the warehouse cases, (*Munn v. State of Illinois*, decided by the supreme court of the United States, and reported in 94 U. S. 113,) in which that court held that when an individual built a warehouse, and put his property into that kind of business, he subjected the property thus placed to the laws which controlled the transactions of commerce, involved in which was the power of the public, through the legislature, to regulate rates. No man holding property was bound to build a warehouse, or bound to put his property into that particular channel, but the moment he did so, he put it where the legislature could say, "You may charge so much, and no more, for the transaction of this business." He put his property into the channels of commerce,—as mul-

titudes are doing,—into the railroad business, into the express business, and into other channels of commerce. Whenever the property is put into those channels, it is put within the power of the public, speaking through its legislature, or the power of the court enunciating general rules operative upon such transactions, to modify leases, modify licenses, control duties. So, notwithstanding this licenser has given to the licensee the right to establish a telephonic system in the city of St. Louis, with telephonic communication with only certain prescribed telegraph systems, the moment it permitted the establishment of a telephonic system here, that moment it put such telephonic system within the control of the state of Missouri, and the control of the courts, enforcing the obligations of a common carrier.

A telephonic system is simply a system for the transmission of intelligence and news. It is, perhaps, in a limited sense, and yet in a strict sense, a common carrier. It must be equal in its dealings with all. It may not say to the lawyers of St. Louis, "my license is to establish a telephonic system open to the doctors and the merchants, but shutting out you gentlemen of the bar." The moment it establishes a telephonic system here, it is bound to deal equally with all citizens in every department of business; and the moment it opened its telephonic system to one telegraph company, that moment it put itself in a position where it was bound to open its system to any other telegraph company tendering equal pay for equal service.

So, my conclusion is that, notwithstanding the terms of this license, which seem to inhibit it from dealing or giving its telephonic privileges to any other telegraph company than the Western Union, the moment it established its telephonic system here, that moment it compelled itself to respond to the demands of any telegraph company or any individual in the city tendering to it equal pay for equal privileges.

The application for *mandamus* will be sustained.

Mr. Brother TREAT differs, however, from me, and may desire to express his difference of views.

TREAT, J., (*orally*.) This is an application, it must be borne in mind, against the licensee, who has a license only in accordance with the terms thereof, and we are asked to *mandamus* that licensee to do what he has no authority to do under the terms of his license. I know of no power in a court which can change a contract between the licenser and the licensee, and give him a contract other than what he has made, either by enlargement or diminution. If this application had been made against the American Bell Telephone Company, which holds the patent,—the patentee,—it would have been a very different question, and the views suggested by my brother judge would then come up for consideration. But how is it that this licensee, who has only a restricted privilege, can by a *mandamus* of this court be ordered to do what under his contracts he cannot do? Can we make

a new contract? Now, so far as the American Bell Telephone Company is concerned, which holds the patent, it reserved for itself the right with respect to telegraphic connections; and it is alleged in this petition that it has granted that to one company. Now, if the American Bell Telephone Company was here, as between it and this party petitioner, the question presented by my brother judge would have arisen, and in that, possibly, we might not have differed at all.

This matter is not a new one in the courts. In the noted case in Ohio the court proceeded not as in this case, because there were two parties defendant or respondents, to-wit: the American Bell Telephone Company, that had all these rights, with which it had not parted; also the local company, and the charter of the state in connection therewith. There is no such case here. A like case to this was reviewed very elaborately by the Connecticut supreme court, (I think in 49 Conn.,) where precisely the views I am expressing were entertained, and they seemed to me a demonstration, and express much more clearly and forcibly than I can do in this summary manner, the true doctrine arising out of the sanctity of contracts. If this party wishes the American Bell Telephone Company to grant equal privileges to it with another telegraph company, let it pursue it,—make it do what it is asked,—but I cannot see, by any true theory of the law, why this local party is to have its rights enlarged, and its duties correspondingly enlarged, in violation of the contract under which it rests.

There may be many reasons, of course, no judicial notice of them being taken, why this restriction was made, to-wit: Here is a telephonic system in St. Louis. Each one of you present here may wish, under the terms stated, to have such telephonic connection. It is stated in the license, which is a contract, that no one of you shall use that for the purposes of taking tolls thereon. In other words, if I have a telephonic connection in my house, and I pay whatever the figure is for it, I am not to open a general telephonic system there, and let the whole neighborhood come in and use my telephone, and pay me therefor, and thus destroy the telephone company's income. It is a personal right, restricted to the use of the individual and his immediate needs. When you bring a telegraph company into operation in connection with it, what would happen? At the telegraph stations here probably there are thousands of messages coming in every day. It is receiving for these telegrams a given amount of money, and taking its tolls thereon. Further than that, instead of doing as heretofore, employing its messengers to do this work, we are asked to compel this telephone company to do that messenger work for it, as an individual would do in permitting his telephone to be used 400 to 500 times a day,—it may be for general purposes,—and the whole telegraphic business of the country poured on this telephonic system and done at a low figure. That, I suppose, was one of the reasons why this restriction was put there.

But suffice it to say, in my judgment there is no authority, for courts to compel a man to do what he has no right to do, and force him to violate his contract. He stands on his contract as he has made it, and there ends his duties, obligations, and rights, and courts cannot cause him to violate it. That is my view of the case. Parties must pursue the American Bell Telephone Company if they wish this question to be presented. It cannot arise in this way.

BREWER, J., (*orally*.) I may be pardoned for suggesting, and I do it with great deference, because as you all know, gentlemen, I share with all the members of the bar in this district in a profound admiration for my brother TREAT, but there are two things which seem to me to make against his argument very strongly. I agree with him that if this telephonic system had refused a telephonic connection with any telegraph company, that the Baltimore & Ohio Telegraph Company could not insist upon such connection, but when it has established a telephonic connection with one telegraph company, I think every other telegraph company has equal right; on the same principle that if it established a telephonic connection with one lawyer, it could not refuse telephonic connection with another lawyer; and the further practical question, that while there may be a contract between the licensor and the licensee, the licensor is not a citizen—an inhabitant—of or found within this district. Suppose this petitioner went to Massachusetts, and obtained a decree there binding the licensor; that would not bind the licensee; that would not disturb the contract, so far as the licensee is concerned. Would the court in Massachusetts have entertained a suit seeking to establish a naked legal right, and without practical benefit to any one? The licensee does not live in Massachusetts. The licensor does not live in St. Louis. Practically, of what avail would a decree be against a licensor in Massachusetts? Would it bind the licensee here? Haven't you got, in a last resort,—a last analysis for practical results,—to come right to the licensor, the holder, the proprietor of the telephonic system here?

TREAT, J., (*orally*.) You omit one consideration, (and I may say we are not going into a discussion of the question on the bench,) but it so happens that the licensor, by the very terms of his license, is the only party to make connection. He has done it, and the licensee has nothing to do with it. If you compel the licensor, in whom alone is reserved this privilege, to equalize the matter, he does it; it is immaterial whether the licensee agrees with whatever the licensor says shall be done. Hence the licensee wouldn't be a necessary party anywhere.

BREWER, J., (*orally*.) This question will be settled finally by the supreme court.

Mr. E. T. Allen. I will ask, in view of what has been expressed by the court, whether it wouldn't be proper that your honors should make up a certificate of a difference of opinion, in order that there may be no difficulty in regard to the amount that is involved?

TREAT, J. An affidavit will settle that.

BREWER, J. I do not think it would avail particularly, unless, as I gathered from what Justice MILLER said to me last fall, that the supreme court looks a little more kindly on a case where there is a certificate of division in respect to a motion for advancement. As far as the mere question of amount is concerned, I think that can be settled without difficulty.

TREAT, J. That has been settled, Mr. Allen, repeatedly. In looking for something else, I found repeated decisions on the point, but there is no dispute as to the practice. An affidavit as to values will be sufficient.

Mr. Allen. This is a very important question, and it has been, as your honors have observed, passed upon quite differently in two courts of last resort in the states of Connecticut and Ohio, and it is very desirable that it should be speedily passed upon in the supreme court.

TREAT, J. All you can do is to make an affidavit, and let it go with the papers, stating that the amount involved is over \$5,000. It involved your system, and I suppose you can state that conscientiously. You can take it to the supreme court at once, and we will note there is a division of opinion, so that it can be advanced.

BREWER, J. Anything that the court can do to further the advance of the case there, it will gladly do.

*In re DOOLITTLE and another, Strikers.*¹

(Circuit Court, E. D. Missouri. March 18, 1885.)

1. RECEIVERS—INTERFERENCE WITH PROPERTY BY STRIKERS—CONTEMPT.

Where the employes of a railroad company, whose property is not in the custody of this court, by concert of action quit work and take possession of and obstruct the movement of engines and cars on the tracks of said company, and while so doing also take possession of or obstruct the operation of engines or cars in the custody of receivers of this court, it is the right and duty of the court to punish such latter acts as contempts of its authority.

2. SAME—DISTINCTION BETWEEN LAWFUL AND UNLAWFUL PURPOSE OF PARTIES INTERFERING.

If a party engaged in a lawful undertaking unintentionally interferes with or obstructs the officers of this court in the discharge of their duties, the court is not tenacious of its prerogative; but it is otherwise where parties, while engaged in an unlawful act, obstruct the officers of this court, although intending no contempt.

¹Reported by Edwin G. Merriam, Esq., of the St. Louis bar.

3. SAME—DUTY OF STRIKERS TO APPLY TO COURT.

This court is open to hear any just ground of complaint against its receivers. Employees of the receivers may present their grievances, and the court will instruct its officers in the premises. For this reason the court will be prompt to punish men who interfere with its receivers in the custody and control of property committed to them by law.

4. SAME—INTIMIDATION OF EMPLOYEES BY STRIKERS—"REQUESTS" EQUIVALENT TO THREATS.

A simple "request" to do or not to do a thing, made by one or more of a body of strikers under circumstances calculated to convey a threatening intimidation, with a design to hinder or obstruct employees in the performance of their duties, is not less obnoxious than the use of physical force for the same purpose. A "request" under such circumstances is a direct threat and an intimidation, and will be punished as such.

In the Matter of the Order on Edward Doolittle and William Schanbacher to show cause why they should not be punished for contempt in interfering with property in the hands of the receivers of this court.

The marshal reported to the court that at Hannibal, Missouri, he found the possession and use of property in the custody of the receivers of the Wabash, St. Louis & Pacific Railway, heretofore appointed by this court, interfered with by bodies of men, who prevented the agents and employes of said receivers from operating portions of said property by spiking and blocking the tracks, drawing water from engines, inciting the agents and employes of the receivers to quit work, and threatening them with violence if they continued in the service of the receivers; that he gave warning that all persons interfering with property in the custody of this court would be arrested and punished. He further reported that, in particular, one Edward Doolittle had, on the tenth day of March, 1885, prevented James W. Ritchie, a train-master of the said Wabash Railway, from taking out of a round-house a number of engines in the custody of the receivers, although notified that these engines belonged to the Wabash Railway. Doolittle was reported to be a recognized leader of persons engaged in the unlawful acts as above stated. The marshal accordingly caused him to be arrested. And, further, that on the twelfth day of March he arrested one John Schanbacher for holding an engine upon and for the purpose of blocking the main track over which Wabash trains are run into the city of Hannibal. Schanbacher was previously warned that he was interfering with property in the custody of this court, but he disregarded the warning, and interposed his person between the marshal and the engine, saying he would not let the engine go down the road; whereupon the arrest was made. Schanbacher was also alleged to be an active leader of the "strike" then in progress.

The report of the marshal as to the acts of Doolittle was supported by the affidavit of James W. Ritchie, a train-master of the Wabash Railway, as before stated, which affidavit showed that the engines and freight cars of the Wabash Railway, the movement of which Doolittle obstructed, were at the time in the yards of the Missouri Pacific Railway Company, certain of whose employes it seems were then engaged in a "strike." The affiant stated:

"I said to him, [Doolittle,] 'I understand that you object to my moving these engines and this freight. How is this, when your friends and associates have consented?' He replied: 'We have a point to make on this.' I told him to make his point where it belonged, and not on us. I told him this was Wabash freight, and the Wabash had nothing to do with this strike in any shape or form. He replied they were good ornaments. I asked him to get into a car and talk this matter over with me, and he said it was too rich for his blood; and I then asked him to walk down the track with me, and he said he had not time."

The result was that the movement of the 9 Wabash engines and about 100 cars of freight was delayed some hours. The prisoners, Doolittle and Schanbacher, were accordingly ordered to show cause why they should not be attached and punished for contempt of court, for their interference with property in the possession of the receivers. They filed a reply in writing, alleging that they had not at any time been knowingly or willfully in contempt of this court or its officers, or intentionally obstructive of the decrees, orders, or process of the court; but, on the contrary, had intended to regard and obey the orders of the court so far as they knew or understood them. As to the detention of the nine engines in the Hannibal yards, they alleged that the train-master of the Wabash Railway "cordially" agreed to a delay of several hours, until Doolittle could obtain advice by telegraph from "our headquarters" at Sedalia. Also, that there being a difference of opinion as to which railroad the freight belonged to, it was "harmoniously settled" between the train-master and the strikers that it should be left where it was; that no violence, intimidation, or threats were used towards the engineers, or any one else, but that the engineers were unwilling to go out without the full consent of the strikers; and thus the engineers were detained by the strikers, of whom Doolittle admitted that he was one, and also that he acted as their "spokesman." Doolittle denied that he had participated in spiking the track, drawing water from engines, or that he had any previous knowledge that such acts were contemplated. Schanbacher admitted that he "objected" to the marshal taking the engine to a side track, but alleged that he did so hastily, and without appreciating the marshal's authority, and a moment later called to the engineer to go onto the side track, when some one in the crowd cried out not to do it. In conclusion, both Doolittle and Schanbacher reiterated that they did not at any time use threats or violence against any person, whether marshal or other person. They admitted that their "zeal in the cause" might have led them to commit acts capable of being construed as in contempt of this court, but averred that such contempts were without willfulness, malice, or intent on their part.

Charles C. Allen, for respondents, Doolittle and Schanbacher.

BREWER, J., (*orally*).¹ The facts in reference to this case are very

¹The opinions of Judges BREWER and TREAT as here published were reported by Mr. L. L. Walbridge, stenographer of the court, and copy of same was submitted to the judges for revision previously to this publication.

obvious. It does not appear that these defendants in the first instance started out to obstruct the receivers in their management of the road. In some way they had ascertained that the road was in possession of the receivers appointed by this court, and that it was not prudent to interfere with them. But it is clear that, while engaged in a strike against the Missouri Pacific Railroad, they did interfere with the management of the engine and freight cars under the control of such receivers, and did obstruct such receivers in carrying on the business of the road placed in their charge by this court. Now, while in one sense they cannot be charged with contempt in that they intended to obstruct this court and its officers in the discharge of its and their duty, yet they placed themselves in this attitude: They engaged in an unlawful enterprise, and while so engaged they did interfere with the officers of this court in the management of the road which was in their hands as receivers. Now, if a party engaged in a lawful undertaking unintentionally interferes with some of the officers of this court, and obstructs them in the discharge of their duties, this court is not tenacious of any mere prerogative, and would let such action pass almost without notice; but where parties are engaged in that which is of itself unlawful, in doing that which they have no right to do, and in so doing obstruct the officers of this court, although intending no contempt, that is a very different thing.

Suppose a party of men—and I state this merely as an illustration—combine to commit an assault and battery upon one person, and, without intending so to injure, do, through mistake, actually seize and beat a third person. Although such beating was unintentional, perhaps accidental, yet, as they were engaged in an unlawful enterprise, it is just the same as though they intended that unlawful attack upon the person actually receiving the injury. And so, here, though these defendants did not set out to obstruct the officers of this court, and the receivers of the Wabash Company, in their administration of that property, yet they did set out to obstruct some persons in the exercise of their legal rights; they did set out to do that which they had no right to do; and this court is justified, indeed, it is its duty, inasmuch as they did obstruct the officers of this court, to regard it just the same, or nearly the same, as though they started out to obstruct the officers of this court, the receivers of the Wabash Railway Company.

Mr. Charles C. Allen. Do I understand your honor to say that the act of striking—merely carrying out of the strike—was unlawful?

The Court, (Judge BREWER.) It is not the mere stopping of work themselves, but it is preventing the owners of the road from managing their own engines and running their own cars. That is where the wrong comes in. Anybody has a right to quit work, but in interfering with other persons' working, and preventing the owners of railroad trains from managing those trains as they see fit—there is where the wrong comes in.

I believe Judge DRUMMOND, in a series of cases that came before him, across the river in Illinois, where there was a direct resistance by parties engaged in such a strike, to the receivers appointed by him, sentenced the ringleaders to six months in the county jail. In this case I do not feel as though it would be right to treat them exactly as though they occupied that same position, and yet, as I said before, I do not think it is a matter that can be overlooked. Things of this kind are not to be encouraged or tolerated, and the sentence will be that they shall be confined in the county jail for 60 days, and pay the costs of this attachment.

TREAT, J., (*orally.*) As far as I am concerned, I should have given a severer punishment if the matter had been left solely to me, and I should emphasize the statement very strongly that while no one would admit more readily than the judges of this court the right of every man to determine whether he will engage in this or another employment, and would protect him in that right through any proper judicial proceeding, he must not resort to lawless measures to injure the property or the person of any other party. More particularly is that true with regard to the receivers of courts. If there was any just ground of complaint, so far as the so-called strikers were concerned, this tribunal was open to have them present their matters here, and the court would have instructed the receivers with regard to it; and one of the prominent reasons why courts are so prompt to punish men who interfere with receivers in the custody and control of the property committed to them by law, is the fact that any one engaged in employment under them can have ample redress by applying to the court with respect thereto.

Now, instead of coming to this court to make application, as some other parties have done,—other employes,—they chose to engage in a lawless enterprise whereby were involved, not only the stoppage of commerce, but perhaps a loss of millions of dollars, and merchants and private individuals and all classes were injured by this lawless proceeding. And now the party comes and says, what? Evasively, "I did not know that I was interfering with the officers of this court;" but he did know that he was interfering with property that he had no right to interfere with, and "perchance he overstepped the limit, and involved himself within the jurisdiction of this court." Further, "We did not directly by physical force do sundry and divers things; we merely requested other persons to do it." A specious pretense! The court must be supposed to know, as everybody else does, what the object was; it was the threatening intimidation which lay behind the whole matter, and hence they are within the rule. "A request," under such circumstances, was a threat. The court cannot be blinded by such mere specious language. The fact is there—the positive fact that here was a direct threat and an intimidation. The form of language amounts to nothing. Courts do not stick in the letter; they

look at the fact,—the act itself,—and that was the case here. Parties determined lawlessly to stop the commerce of the country, so far as these roads were concerned, and to do it by force, by threats, and by intimidation; and in doing it they interfered with the property of this company under the charge of the court, and, instead of coming to this court, if they had any wrong to be redressed, and asking the court to adjust their cause, they took the law in their own hands, and they must suffer the consequences of doing it.

Of course I assent, as I must do, to the lenient punishment prescribed by the circuit judge; but if it had been left to me alone, it would have been much severer.

The first point that is to be discussed in connection with the foregoing opinion is that which is embodied in the following statement: "Suppose a party of men—and I state this merely as an illustration—combine to commit an assault and battery upon one person, and, without intending so to injure, do, through mistake, actually seize and beat a third person. Although such beating was unintentional, perhaps accidental, yet, as they were engaged in an unlawful enterprise, it is just the same as though they intended that unlawful attack upon the person actually receiving the injury."

The question which is here put, viewing it in its general relations, is one by which the courts have been frequently embarrassed. It is as old as the earliest opinions of Roman jurists. It comes to us as fresh in the cases of to-day as if it never had before been discussed. Is a man responsible for acts which are incidental to other acts designed by him, but which were, nevertheless, not intended by him? The general rule, I apprehend, may be thus properly stated: When the act in question results as a natural and probable consequence of an intended wrongful act, then the unintended wrong derives its character from the wrong that was intended. So far as concerns questions of general malice this position cannot be disputed. A man, for instance, from general malice, tears a rail off of a railway, or drops from a roof a very heavy substance on the pavement where a crowd is passing; and in such cases, if death ensues, he is responsible for murder, though he did not intend to take any one life in particular. This is also the rule in cases of special malice, when the object effected is incidental to the object intended. The same distinction has been accepted with regard to arson, where it is held that where the house of A. is burned instead of that of B., as the felon intended, this is arson as much as if the intent had been to burn the house of A.¹ In burglary, also, it is held to be no offense that the goods stolen were not those which the burglar intended to steal.² Nor is it a defense to an indictment for stealing that the defendant's intent was not to steal from any particular owner, or that it was to steal from a person who turned out not to be the real owner.³

These conclusions may be sustained on principle. Whatever I ought to regard as incidental to an intended act, I must be regarded as having intended. It is no defense, if I shoot at A. on the road and hit B., who happens to be behind A., that I did not actually see B. in the spot where he was shot. It was my duty to have seen him, and I am responsible for the consequences. It is true, as I have endeavored elsewhere to show,⁴ that the proper way of apportioning the responsibility in such cases is by indicting the offender for shoot-

¹ R. v. Pedley, 2 East, P. C. 1026.

² R. v. Regan, 4 Cox, C. C. 335.

³ R. v. Moore, Leigh & C. 1; 8 Cox, C. C. 416.

⁴ Whart. Crim. Law, § 120.

ing at A. with intent to kill, and also for the negligent homicide of B. But, however this may be, that the offender in such a case is indictable for the injury that he ought to have seen, cannot be questioned.¹

The observations that have just been made are peculiarly applicable to cases of riots arising from the illegal assertion of supposed rights, or redress of supposed grievances. Parties engaging in such a riot are indictable for the natural and probable consequences of the riotous confederacy. If the plan involve a crime, then the offenders are responsible for such crime when committed in execution of the plan.²

The only qualification is that such an act must result from the confederacy. If it does not, the confederates not engaged in it cannot be indicted for its commission.³

The rule is thus well stated by Judge CAMPBELL in *People v. Knapp*:⁴ "There can be no criminal responsibility for anything not fairly within the common enterprise, and which might be expected to happen if occasion should arise for any one to do it. In other words, the principle is quite analogous to that of agency, where the liability is measured by the express or implied authority. And the authorities are quite clear, and reasonable, which deny any liability for acts done in escaping, which are not within any joint purpose or combination."⁵ Hence it has been held that when several persons are engaged in committing a felony, and, on being detected, run different ways, upon which one of them, in order to get rid of a pursuer, assaults him, the others are not to be considered as indictable for the offense.⁶

The general rule is that the confederate is not responsible for the crime which is not a probable and natural consequence of the confederacy, unless such crime was committed with his assent. The question whether a party assaulting an officer in ignorance of the latter's official character is indictable for the aggravated offense, is one of greater difficulty. Undoubtedly we have statements made in such cases that if a man intends a wrongful assault, he is indictable for the distinctive offense of assaulting an officer, even though the assault was made in ignorance of the assaulted person's official rank.⁷ But there is something very unreasonable in this. A public officer, whether he be a sheriff, or a constable, or a receiver, appointed by a court having jurisdiction, ought to give notice of his position, if he desire to clothe himself with the immunities of that position, at least so far as concerns a prosecution for an assault on himself personally. It is the official person of the assaulted party that creates the offense in such a case. It is true that if a statute should prescribe "whoever assaults an officer, even without knowing the person assaulted to be an officer, shall be guilty of the aggravated offense," etc., it

¹See, on this subject, *R. v. Smith*, Dears. C. C. 559; 33 Eng. Law & Eq. 567; *R. v. Jarvis*, 2 Mood. & R. 40; *R. v. Regan*, 4 Cox. C. C. 335; *Callahan v. State*, 21 Ohio St. 306; *Walker v. State*, 8 Ind. 290; *People v. Torres*, 38 Cal. 141. In *Com. v. McLaughlin*, 12 Cush. 615, it was held that when A. shot at B. and C., intending to kill whichever he hit, he might be indicted for an assault with intent to murder both B. and C.

²Steph. Crim. Law, 27; *Sissinghurst's Case*, 1 Hale, P. C. 462; *R. v. Manners*, 7 Car. & P. 801; *Com. v. Knapp*, 9 Pick. 496; *Norton v. People*, 8 Cow. 137; *McCarney v. People*, 83 N. Y. 408; *Breese v. State*, 12 Ohio St. 146; *Green v. State*, 13 Mo. 382; *Selvidge v. State*, 30 Tex. 60; *Miller v. State*, 15 Tex. App. 125; *People v. Brown*, 59 Cal. 345. See *State v. Buchanan*, 35 La. Ann. 89.

³See *R. v. Collison*, 4 Car. & P. 565; *R. v. Howell*, 9 Car. & P. 437.

⁴26 Mich. 112.

⁵See, to the same effect, *R. v. Murphy*, 6 Car. & P. 103; *R. v. Franz*, 2 Post. & F. 580; *R. v. Horsey*, 3 Post. & F. 287; *R. v. Skeet*, 4 Post. & F. 931; *R. v. Hawkins*, 3 Car. & P. 392; *R. v. Tyler*, 8 Car. & P. 616; *R. v. Price*, 8 Cox. C. C. 96; *U. S. v. Jones*, 3 Wash. C. C. 209; *Com. v. Campbell*, 7 Allen, 541; *Watts v. State*, 5 W. Va. 532; *Manier v. State*, 6 Baxt. 595; *Lamb v. People*, 96 Ill. 73; *People v. Knapp*, 26 Mich. 112; *State v. Stalcup*, 1 Ired. Law, 30; *Miller v. State*, 15 Tex. App. 125.

⁶*R. v. White, Russ. & R. C. C. 99*; *R. v. Skeet*, 4 Post. & F. 931; *State v. Absence*, 4 Port. 397.

⁷*U. S. v. Liddle*, 2 Wash. C. C. 205; *U. S. v. Ortega*, 4 Wash. C. C. 531; *U. S. v. Benner*, Bald. 234.

would be no defense that the defendant was ignorant of the officer's official position. But at common law the *scienter* is necessary to constitute the offense, subject to the qualification that a party is supposed to know what he ought to have known. On the other hand, it is no defense to an indictment for obstructing an officer in his duties (*the defendant knowing the officer's official position*) that the object of the defendant was to personally chastise the officer, and not to obstruct him in the discharge of his duties. The obstruction was incidental to the intended assault, and therefore the defendant was indictable for the obstruction.¹

When we come, however, to discuss the question of an attachment for a contempt, a new state of facts is presented. A court of equity is obliged to enforce its decrees; and if those decrees are disobeyed, the only process to compel obedience is by attachment. This is eminently the case with disobedience to an order of specific conveyance,² with disobedience to orders of courts for payment,³ and with disobedience to an injunction.⁴ In such cases it makes no matter what was the intention of the party resisting the order of the court. Whether this resistance were intentional, or whether it were in knowledge of the existence of the decree resisted, or in ignorance thereof, makes no matter. An obstacle stands in the way of the execution of the court's decree, and that obstacle must be removed. Nor is it any defense in such case that the resistance is to a receiver whom the court appoints. The receiver is as much an officer of the court as is an officer appointed by the court to summon witnesses or to execute final process. Resistance in the first case is as much an obstruction of the process as is resistance in the last two cases. It may be objected that this bears with unnecessary harshness on persons ignorantly impeding the action of the receivers in a case such as the present. The same objection, however, applies to all other cases of resistance of process; and if the objection were held good, no process whatever could be enforced against parties who are so stupid or so angry as not to understand what is the nature of the authority which they resist. The relief in all such cases is an appeal to the clemency of the court, which will permit no penalty greater than the merits of the case demand. But, whatever be the penalty, the process of the court must be obeyed.

FRANCIS WHARTON.

Washington, May 6, 1885.

¹ U. S. v. Keen, 5 Mason, 453.

² Daniell, Ch. Pr. 1533; 2 Walt, Pr. 108-112.

³ Id.

⁴ Woodcock v. Rogers, 3 Wood. & M. 135; Rogers v. Rogers, 38 Conn. 121.

THE PENNLAND.¹

(District Court, S. D. New York. March 19, 1885.)

1. COLLISION—STEAMER AND SAILING VESSEL—CROSSING COURSES—RULE 20.

Where a collision occurs between a steamer and a sailing vessel, the former being obliged under rule 20 to keep out of the way, the steamer will be held liable, unless she excuses herself by proof of some misconduct on the part of the sailing vessel, or by proof of such a condition of fog, and of such a compliance on her part with all the rules of navigation, as to absolve her from fault, and reduce the case to one of inevitable accident.

¹ Reported by R. D. & Edward Benedict, Esqs., of the New York bar.

2. SAME—SPEED IN FOG—CASE STATED.

The brig S. C., sailing by night, close-hauled, on a S. S. W. course, saw off her port beam both colored lights of the steamer P., estimated a half mile or more distant, and kept on without altering her course. There was a thickness of the atmosphere down near the water, such as to cause a serious obstruction to the visibility of lights. The P., running nearly 12 knots an hour on a course W. by N. $\frac{1}{4}$ N., saw the brig's red light about 600 yards off, nearly ahead, and then, without decreasing her speed, starboarded and changed her course five points during about a minute and a half following, when, in the act of slowing, she was struck by the brig about 80 feet forward of her stern. The above facts being found upon very conflicting evidence, *held*, (1) that in such a condition of weather the steamer should have gone at a reduced speed; (2) that, as the red light of the brig was seen nearly ahead, and the wind being westerly, the steamer must have known that the brig was going to the southward of the steamer's course, and consequently should not have altered her course so as to attempt to cross the bows of the brig, but should have ported and gone astern; and that the steamer was solely liable for the collision.

3. SAME—FLASH-LIGHT—BURDEN OF PROOF—PROXIMATE CAUSE.

Where it clearly appears that a lighted torch, exhibited by a sailing vessel to an approaching steamer, could not have conveyed any additional information of any use to such steamer, the omission of it is not a proximate cause of the collision, and is immaterial. The burden of proof to establish that it would not have given additional information is upon the sailing vessel. *Held*, that in this case she had done so.

In Admiralty.

At about 2 A. M. on the fifth of July, 1883, the steam-ship Pennland, of the Red Star line, bound from Antwerp to New York, when near Nantucket, in crossing the bows of the brig Stacy Clark, bound from the Kennebec river to Savannah, carried away the latter's jib-boom, bowsprit, and head-gear, to recover damages for which this libel was filed. The brig was 136 feet long, 373 tons register, loaded with ice, sailing close-hauled upon her starboard tack, in a moderate wind from the westward, in a rough sea, a hazy or foggy night, and heading S. S. W. She kept her course until the collision. The Pennland was an iron steamer 350 feet long, and, until a short time before the collision, was making, according to her own testimony, a compass course of W. by N. $\frac{1}{4}$ N. After 12 o'clock, though it was fine and clear overhead, it became hazy below, which about 2 o'clock, very shortly before the collision, increased to a thick fog. Her fog-whistle had been started, and three blasts given, about a minute apart or a little less, before the collision. Her previous speed was from $11\frac{1}{2}$ to 12 knots. Shortly after the first blast of the steam-whistle, the second officer, who was in charge of the navigation, signaled to the engineer in charge, first, to stand by; and afterwards, to go half speed. The signals were obeyed. The engineer testified that he was in the act of obeying the half-speed signal when the shock of the collision came. The brig's red light was first seen a little on the starboard bow, at an interval before the collision variously estimated by the steamer's witnesses of half a minute to a minute and a half. When the red light was seen, the steamer's helm was put hard a-starboard to go ahead of the brig, because, as the first officer states, the brig was judged to be too near to attempt to go astern of her by port-

ing. The fourth officer, who was in the wheel-house, estimates that the steamer ran about a minute and a half under her starboard wheel, and that she changed her course five points up to the time of the collision. No fog-horn was heard from the brig. Two of her witnesses, however, testify that they heard the steamer's fog-whistles, and answered each with a fog-horn; that the weather was hazy, but not foggy; that they saw the steamer's green light about abeam on the port side, estimated at a mile distant. No flash-light was exhibited.

Benedict, Taft & Benedict, for libellant.

Man & Parsons, for claimant.

BROWN, J. The steamer in this case was bound under rule 20 to keep out of the way of the brig. She must be held answerable for not having done so, unless she excuses herself by proof of some misconduct on the part of the brig, or by proof of such a condition of fog, and of such a compliance on her part with all the rules of navigation, as absolve her from fault and reduce the case to one of inevitable accident. *The Carroll*, 8 Wall. 302-304. The principal controversy has been in reference to the existence and character of the alleged fog. The difference between the witnesses is to some extent verbal, rather than substantial. Both sides speak of the weather as in a condition of increasing haziness, rather than of fog proper. Some of the claimant's witnesses speak of it as very thick at the time of the collision; while the captain of the brig insists that there was no fog proper until an hour after the collision, and that lights at the time of the collision could be seen a mile. It is evident, however, that there was such thickness in the atmosphere down near the water, though clear overhead, as to cause a serious obstruction in the visibility of lights, as contemplated by the rules of navigation, though I have no doubt that the greater thickness of the fog subsequent to the collision has been referred by the claimant's witnesses to the time of the collision itself. The thickness of the fog is material only as respects the distance at which the brig's red light could be seen on board the steamer. There are sufficient circumstances in the case to show conclusively that her red light not only could be seen, but was seen, at such a distance as to charge the steamer with fault. Mere estimates of time and distance, not confirmed by acts done at the time, are entitled to little weight. But such acts are proved in this case to have been done after the brig's red light was seen, as show that the interval was not far from a minute and a half, and the distance traversed by the steamer not far from 600 yards. The fourth officer estimates the interval at a minute and a half from the time when the steamer's helm was starboarded, in consequence of seeing the red light, until the collision. He was in the pilot-house at the time, and testifies that the steamer went off five points under her starboard wheel. The proofs before me in other cases as to the rate of the change of steamers of this class show that this change would be made in about 600 yards. See *The Lepanto*, 21 FED. REP. 651, 664. The *Pennland*, being somewhat

larger than the Lepanto, would make a larger circle, other conditions being in proportion. As the steamer's speed was about 12 knots, and was not checked up to the time of the collision, this would give precisely a minute and a half as the interval during which a change of five points would be made, assuming the mean average rate of one point's change in 360 feet. It is possible that the fourth officer's estimate of time was based in part upon his knowledge of the rate at which the Pennland changed her course.

Again, there were three whistles about a minute apart given as a fog signal prior to the collision. Several of the witnesses state that the red light was seen between the first and second whistles. The captain, also, had time to dress himself hurriedly in the same interval. It is urged for the claimants that the time was much shorter than this, because it appears that the engineer was in the act of obeying the order to slow down at the moment of collision; while this order, it is said, was given immediately after the first whistle, and immediately obeyed. But entire reliance cannot be placed on the several items which make up these premises. There were two orders to the engineer: one to stand by, followed by an order to slow down. It would be very easy for the officer in charge to mistake the precise order of sequence in which these various directions and the whistles were given, and the interval which separated them. *The Arklow*, L. R. 9 App. Cas. 136, 141. This kind of testimony is evidently insufficient to rebut the circumstances I have above referred to. The inevitable inference is, either that the order to slow down was not given until after the third whistle, or else that the engineer was tardy in obeying it. While a considerable time is necessary for some vessels to reverse the engine and get it working astern, but a few seconds is needed to execute the order to slow upon a steamer making, like this, 55 revolutions per minute.

The testimony of the witnesses for the brig is certainly not without some weight as to their estimates of time and distance, although much less trustworthy as respects the distance at which their own light would be seen from the steamer. They estimate that the steamer's green light was seen a mile distant; but her light may have been seen, and probably was seen, at a greater distance than the brig's, as the steamer's light was probably a stronger light and higher above the water. There is no reason to distrust the testimony of the captain, that on hearing the report of the steamer's lights he came up from the cabin; saw both colored lights of the steamer about abeam; took a hasty look at his own red light to make sure it was burning brightly; returned to the companion-way; observed the red light of the steamer then shut in; knew from that circumstance that the steamer had starboarded, so as to cross his bows, because in no other way could the red light under the circumstances have been shut in; and that he immediately took the wheel, because he recognized the consequent danger of collision; and his estimate is that it was from one to two

minutes after that change that the collision occurred. These circumstances all together furnish more satisfactory proof than the court is often obliged to act upon in collision cases, and show that the time between the collision and the first notice of the brig's light by the steamer was not far from a minute and a half, and that the distance traversed by the steamer was not far from 600 yards. If an arc be projected of that length, covering five points of a circle, (given by a radius of about 1,825 feet,) it will be seen that between starboarding and the collision the steamer must have made an offing to the southward from her previous course (counting from her main rigging) of about 625 feet. As the brig was but 136 feet long, or, including her bowsprit and jib-boom, possibly 170 feet, it is clear that had the steamer kept her course she would have passed far astern of the brig; and it is equally clear that no admissible margin of variation from the estimate of the rate of change in her course above made would make any material difference in this result.

From the above considerations two faults of the steamer become clear: (1) Assuming that there was a sufficiently dense haze or fog, as her witnesses assert, to require the sounding of the fog-whistle at the time when the first whistle was given,—namely, the third blast before the collision,—it was her duty to go at moderate speed under rule 21; that is, reduced speed. *The Colorado*, 91 U. S. 692; *Clare v. Providence & S. S. Co.* 20 FED. REP. 536; *The Beta*, L. R. 9 Prob. Div. 134. (2) From the direction of the wind it was manifest to the steamer, inasmuch as the brig's red light was seen, that the brig must be going to the southward; that she could not be moving at a greater angle than at right angles with the steamer's course, and might be approaching her at a much less angle. There was, therefore, manifest risk of collision, unless the steamer could avoid it by porting; and that she did not do, but starboarded. The risk of collision was, therefore, imminent until she had crossed the brig's bows upon the course adopted. The rule in such cases positively requires a steamer to slacken her speed, and, if necessary, to stop and back. She did neither, during the interval of about a minute and a half; and she was only in the act of slowing when the collision took place. It is true that a steamer is not bound to slacken speed when it is clear that continuing at full speed offers the only chance of escape. But in departing from the rule the steamer takes upon herself the burden of showing that such a departure was necessary. *The Alaska*, 22 FED. REP. 548, 553; *The Elizabeth Jones*, 112 U. S. 514, 523; S. C. 5 Sup. Ct. Rep. 468, 473; *The Elizabeth Jenkins*, L. R. 1 P. C. App. 501. The event in this case shows that no such departure was necessary, and that there could not have been any such circumstances existing at the time as even apparently justified it.

The brig was at the least 500 yards distant from the steamer when her red light was seen. Several of the steamer's witnesses, indeed, say that the brig's red light was first seen two and a half points on their

starboard bow. This is a manifest error. If that had been her position, the steamer's two colored lights could not at any time have been seen upon the brig; whereas all her witnesses testify that they were both seen together when the steamer first came in view. The brig, moreover, in order to reach the place of collision from a situation two and a half points on the steamer's starboard bow at a distance of 500 yards, would have been obliged to traverse at least 400 yards; a speed, during a minute and a half, equal to nine knots, or nearly twice her actual speed. After the steamer changed her course to port, the brig bore upon her starboard bow, and so remained until the collision. The speed of the brig is stated to have been from four to five knots; and as the wind, according to all the witnesses, was only moderate, there is no reason to believe it greater. In reaching the place of collision by a change of five points, the steamer diverged, as I have said, somewhere about 650 feet from her former course; the precise amount is immaterial. The brig, during the interval of a minute and a half, passed over somewhere from 600 to 750 feet, and tracing her backward a minute and a half, we should find her in a position to see both colored lights of the steamer abeam. This corresponds so entirely with the statements of the brig's witnesses, that they did see both colored lights of the steamer abeam, that their truth cannot be doubted. It follows, consequently, that when the steamer starboarded, so as to shut out her red light from the brig, the brig could not have been to any considerable degree on the steamer's starboard bow; but must have been nearly ahead. Under such circumstances, to starboard, in the endeavor to pass ahead of the brig's known course, instead of going astern, cannot be excused as a mere error of judgment. The steamer had only to continue her course and no danger would have arisen. Her starboarding was, therefore, a third fault; and upon these grounds the steamer must be held.

2. Two faults are alleged against the brig: *First*, that she did not blow her fog-horn; *second*, that she did not exhibit any flash-light as required by section 4234. I cannot disregard the testimony of the men on the brig, that a fog-horn was blown as soon as as they heard the whistles from the steamer, although the horns apparently were not heard. It is admitted that no lighted torch was exhibited. But though the statute requires a torch-light to be exhibited, it does not declare that the sailing vessel shall be answerable for a subsequent collision if she fail to exhibit it, without regard to the question whether her failure to exhibit it had anything to do with the collision or not. When it clearly appears, therefore, that the exhibition of such a torch could have done no good,—that is, could not have conveyed any additional information of any use to the steamer, and could have made no difference in the result,—the omission of it is immaterial. *The Leopard*, 2 Low. 238; *The John H. Starin*, 2 Fed. Rep. 100; *The Margaret*, 3 Fed. Rep. 870; *The Oder*, 8 Fed. Rep. 172. See *The Dexter*, 23 Wall. 76; *The Algiers*, 21 Fed. Rep. 345. The burden

of proof to establish this is upon the sailing vessel. This burden she has sustained in this case, because it appears that her red light was seen on the steamer in ample time to avoid her. A flash-light could have revealed nothing to the steamer in regard to the brig's position or course which she did not fully and seasonably know. It might have done harm by obscuring the brig's red light; and that would have caused evident embarrassment, while the failure to show a torch-light did not create any embarrassment to the steamer or withhold any useful information. There is no ground to suppose that the exhibition of a torch-light would have been followed by any different maneuver by the steamer, or that it would have made the slightest difference in the result. The failure to show it was, consequently, immaterial within the cases above cited, and was in no sense one of the proximate causes of the collision. *Spaight v. Tedcastle*, L. R. 6 App. Cas. 217, 219; *Cayzer v. Carbon Co.* L. R. 9 App. Cas. 873, 882, 886.

The libellant is therefore entitled to a decree with costs; and a reference may be taken to compute the damages.

THE WILLIAM F. McRAE.

(*District Court, E. D. Michigan.* January 26, 1885.)

ADMIRALTY PRACTICE—LIBEL FOR COLLISION—DISMISSAL—SUBSEQUENT LIBEL BY WIFE CLAIMING AS OWNER OF VESSEL.

A. B., averring himself to be the owner of a vessel injured by collision, filed a libel against the offending vessel. This libel was subsequently dismissed by reason of his failure to give security for costs. While his suit was still pending, his wife, appearing by the same proctors, and averring herself to be the owner of the injured vessel, filed another independent libel for the same collision, and caused the offending vessel to be arrested a second time. *Held*, that the wife should have made herself a party to her husband's suit, and that her libel should be dismissed.

In Admiralty.

This was a libel for a collision, promoted by Elizabeth McClure, who was averred to be the owner of the scow Frank Morris, the injured vessel. The case was submitted to the court informally upon the sufficiency of the following averment in the answer:

"(5) Respondent, further answering, says that on the sixth day of October, A. D. 1883, a libel was filed in this court by one George McClure, who is reputed to be the husband of the libellant herein, against the said tug William F. McRae, etc., for the same cause of action, as will more fully appear by an inspection of said libel; that said tug William F. McRae was arrested in said suit, and subsequently was duly released on a good and sufficient bond given, in due form, for the sum of \$4,940, and that thereby the said tug was forever discharged from said cause of action, so that this suit cannot now be maintained against her."

James J. Atkinson, for libellant.

J. W. Finney, for claimant.

BROWN, J. That a vessel discharged from arrest upon admiralty process by the giving of a bond or stipulation for her value, or for the payment of the amount claimed in the libel, returns to her owner freed forever from the lien upon which she was arrested, and can never be seized again for the same cause of action, even by the consent of parties, is a proposition too firmly established to be open to question. *The Kalamazoo*, 9 Eng. Law & Eq. 557; *The Wild Ranger*, Brown. & Lush. 84; *The Union*, 4 Blatchf. 90; *The White Squall*, 4 Blatchf. 103; *The Old Concord*, 1 Brown, Adm. 270; *The Josephine*, 4 Cent. Law J. 262.

The general principle is further illustrated in the case of *The Thales*, 3 Ben. 327. In this case, a libel was filed against the bark *Thales* to recover a balance remaining due for certain repairs, etc. Subsequently, this suit was discontinued and the costs paid. Still later, another libel was filed by the same libellants for the same cause of action, and the vessel arrested and bonded a second time. It was insisted that the discontinuance of the former suit, with the consent of the claimants therein, and the payment of the costs, which had been accepted by them, operated to make the arrest of the vessel in the second suit an original arrest, and not a second arrest. It was held, however, that the case fell within the principle of *The Union* and *The White Squall*, and that the court had no power, in the absence of fraud or mistake, to order her arrested a second time, and that the fact that the first suit was discontinued with the consent of the claimants indicated no intention, actual or in law, to subject the vessel to a second arrest, or to waive the rights in that respect which then belonged to them. This case was affirmed by Judge WOODRUFF upon appeal to the circuit court. 10 Blatchf. 203.

There is occasionally, however, difficulty in determining whether the second arrest is for the same cause of action as the first. Thus a libel by the owner of a ship for damages by collision would obviously be no bar to a second action by the owner of the cargo for damages suffered by him in the same collision, although it has been held, doubtless correctly, that if the ship-owner sues for damages both to the ship and cargo, as he may do under the practice of the admiralty courts, the owner of the cargo cannot afterwards file a libel in his own name, but must petition to be made a co-libellant in the first suit. *The Nahor* 9 FED. REP. 213. In delivering the opinion in this case, Judge CHASE remarked that "the vessel, having given bail for the value of the cargo in the first action, and the action being properly brought by the master and owners, as carriers, for the loss of the cargo, she was not liable to be again arrested for the same cause of action."

The rule, then, manifestly applies only to those cases wherein the libellant might have asserted his rights in the first action; and the real

question in this case is whether the libelant was not bound to appear in the suit begun by her husband, and ask to be made a co-libelant, or be substituted for him as sole libelant. Although it is not expressly averred in the answer in this case, it appears by the record of the former case that George McClure, the husband of the libelant, filed his libel for this collision October 6, 1883, averring himself to be the owner of the *Frank Morris*; and that his libel was dismissed April 7, 1884, for failure to file security for costs. Pending her husband's suit, and on the tenth of December, 1883, Elizabeth McClure, the present libelant, appearing by the same proctors, and claiming herself to be the owner of the injured vessel, filed her libel in the exact language of the first libel, except in respect to the allegation of ownership, and procured a second arrest of the vessel for the same collision. Under these circumstances, there can be no question that she had legal notice of the pendency of her husband's suit. Could she have been substituted in place of her husband as sole libelant in that suit? I should have had little hesitation in saying that she could, were it not for the opinion of Mr. Justice SWAYNE in the case of *The Detroit*, 1 Brown, Adm. 141.

This was a suit for towage services, begun in the name of *John K. Harrow*, who was supposed to be the owner of the tug. After answer filed, and the testimony of one witness had been taken, it was discovered that *James P. Harrow* was the owner of the tug at the time the services were performed. Upon an affidavit that the proctor had been misinformed at the time the suit was commenced, an amendment was permitted, substituting James P. for John K. Harrow as libelant. A motion to vacate the order permitting the amendment was afterwards made, and denied by the district court. On appeal to the circuit court it was held by the learned justice that there was no authority to make this order, and that the substitution of one sole libelant for another is substantially the institution of a new suit. This point was not decided in view of the contingency which has arisen here; and the general rule that a vessel once arrested and bonded is to be regarded as forever freed of that lien, appears to me to be so wholesome a one that I am unwilling to admit exceptions to it, unless in a very clear case. With the utmost respect for the learned justice who decided the case of *The Detroit*, I am constrained to say that I think the technical rule that one libelant can be substituted for another ought to give way to the general rule above stated, and to the still more equitable principle that where an action is substantially between two vessels, a mistake of the pleader as to the ownership or legal title of the injured vessel (a mistake which in actual practice is very likely to occur) ought to be corrected by an amendment. It was decided by the supreme court in *The Commander in Chief*, 1 Wall. 43, that new parties may be added, and parties improperly joined may, on motion, be stricken out. And in *Jennings v. Springs*, Bailey, Eq. 181, it was held to be within the discretion of

the court to permit a bill to be amended by substituting the name of a new for an original complainant, even after answer filed. Here the bill had been filed by an agent of the real complainant.

But whether libelant could have been substituted for her husband or not, I see no objection to her being joined as co-libelant, and to the court making such decree upon the final hearing as to the distribution of proceeds as the justice of the case might require. In the case of *The Tillie*, 13 Blatchf. 514, a canal-boat wholly owned by a married woman was injured in a collision with a steam-tug. Her husband filed a libel *in rem* in his own name, as owner, against the tug, to recover damages sustained. On the trial, the wife testified as a witness for her husband, and gave material evidence to sustain his claim for damages. It was shown that in fact the action was brought by and with the assent of the wife, and it was held that the wife would be equitably estopped from bringing another suit, and that the libel of the husband could be maintained. If, from the circumstances of this case, an equitable estoppel could be said to arise, *a fortiori*, would the wife be estopped if she appeared in her husband's suit and asked to be made a co-libelant with him.

While the operation of this rule may work a hardship to the libelant in this case, I do not see how, upon principle or authority, her suit can be sustained.

WILKINSON and others v. DELAWARE, L. & W. RY. Co.

(Circuit Court, D. New Jersey. March 13, 1885.)

REMOVAL OF CAUSE—DEMURRER—TIME OF APPLICATION—STIPULATION TO FILE NEW PLEADINGS.

Where a demurrer has been filed in a cause pending in the state court raising an issue that would be triable at the regular term of the state court, but a stipulation has been filed by which it is agreed to withdraw the pleadings and file a new declaration and plea making an issue of fact, the case cannot, after the term at which the demurrer would have been heard, be removed to the United States court.

Motion to Remand.

NIXON, J. A second application is now made to remand this cause to the state court. On the first, I refused to remand, for reasons stated in the opinion filed. 22 FED. REP. 353. I think the decision was correct, in the light of the facts as they were then presented to the court; but on this renewal of the motion the facts appear quite materially changed. In the moving papers there is (1) the affidavit of Arthur H. Ely, of counsel with the plaintiffs, showing that on the tenth December, 1883, a declaration was filed in the action in the supreme court of New Jersey, where the suit was originally commenced; on the twenty-second of the same month, demurrer; and on the eighth of January, 1884, a joinder in demurrer; and (2) copies of the said declaration, demurrer, and joinder in demurrer, with a stipulation of the parties, dated June 4, and filed June 6, 1884, signed by the respective attorneys, in which it was agreed as follows:

"It is hereby stipulated and agreed by and between the attorneys of the plaintiff and defendant in the above case: (1) That the plaintiff shall, within twenty days from that date hereof, file an amended declaration; (2) that from the time of the filing of said declaration the demurrer heretofore filed by the defendant shall be withdrawn and of no effect; (3) that the defendant will plead to said amended declaration within thirty days from the date of service of the same upon his attorneys; (4) that the above shall be without prejudice or costs against either party, but each shall pay their own costs.

"Dated June 4, 1884."

—and (3) the certificate of the clerk under the seal of the court verifying the said papers as true copies of the declaration, (original,) demurrer, and joinder thereto, and the stipulation in said cause, as the same remained on file in his office. Acting under the provisions of this stipulation, the amended declaration was filed June 12, 1884; a plea of the general issue July 5, 1884; and the *similiter* July 12, 1884.

It appears from the Revised Statutes of New Jersey (tit. "Courts") that the then stated terms of the supreme court, where issues of law were triable, are held on the fourth Tuesday of February, and the first Tuesdays of June and November, of each year; and the stated terms of the Hudson county circuit court, where the issues in fact were triable, are on the first Tuesdays of April, September, and De-

v.23F,no.12—36

cember. The petition for removal was filed October 18, 1884. The demurrer put in by the defendant to the first declaration was general, alleging that the matters therein contained were not sufficient in law to maintain the action. If a plea had been filed an issue of fact would have been formed, which would have been tried at the May term of the Hudson county circuit, but the demurrer raised an issue of law which could have been argued in the regular course of practice at the June term of the supreme court. Instead of this the parties agreed, in their stipulation, to withdraw the pleadings and file a new declaration and plea making an issue of fact. The question is, did the defendant, by such action, lose its right under the third section of the act of March 3, 1875, to remove the cause into the federal court? The construction of the section by the supreme court in *Babbitt v. Clark*, 103 U. S. 606; *Alley v. Nott*, 111 U. S. 472; S. C. 4 Sup. Ct. Rep. 495; *Scharff v. Levy*, 5 Sup. Ct. Rep. 360; and *Pullman Palace Car Co. v. Speck*, 113 U. S. 84; S. C. 5 Sup. Ct. Rep. 374, renders it manifest that the right of removal has been lost by the delays of the parties in pleading; and the cause is accordingly remanded.

WILKINSON and another v. DELAWARE, L. & W. RY. CO.

(Circuit Court, D. New Jersey. March 2, 1885.)

1. REMOVAL OF CAUSE—RECORD—STIPULATION—CERTIORARI.

Where by stipulation of the parties certain pleadings in the state court have been taken out of the case, the circuit court will not grant a *certiorari* to order the clerk of the state court to add such pleadings to the record.

2. SAME—EVIDENCE.

Although such pleadings have been taken out of the record by stipulation, they may be used in the United States court, when properly verified, to show what has been done in the state court, with a view to showing that the application for removal was made too late.

In *Assumpsit*.

NIXON, J. The above suit was brought here by the defendant on a petition for removal from the supreme court of New Jersey. On filing the record, a motion was made by the plaintiffs to have the same remanded to the state court, on two grounds: (1) Because the defendant corporation, although chartered by the state of Pennsylvania, had become a citizen of New Jersey, as the lessee of the Morris & Essex Railroad, and by the legislation of the state confirming the said lease; and (2) because the petition for removal was filed too late. 22 FED. REP. 353. After argument and consideration the court held that both grounds failed, and that the cause had been properly removed. Notice is now served upon the defendants of a motion (1) for leave to file in this court, as part of the record of said suit, certain copies of a declaration, demurrer, and joinder in demurrer, duly certi-

fied by the clerk of the supreme court of New Jersey as on file in that court; (2) for this court to issue a writ of *certiorari* to the supreme court of New Jersey, commanding it to make return of the record in said action—and especially of the declaration, demurrer, and joinder in demurrer—as to which a diminution is alleged.

The facts of the case are these: That suit was originally commenced in the state court, by a summons tested November 26, and returnable December 6, 1883. A declaration was filed therein December 10, 1883; a general demurrer, December 22, 1883; and a joinder in demurrer, January 18, 1884. At this stage of the proceedings, the respective parties entered into the following stipulation, dated June 4, 1884, and filed June 6, 1884:

"It is hereby stipulated and agreed by and between the attorneys of the plaintiffs and defendant in the above case (1) that the plaintiffs shall, within twenty days from the date hereof, file an amended declaration; (2) that, from the time of the filing of said amended declaration, the demurrer heretofore filed by the defendant shall be withdrawn and of no effect; (3) that the defendant will plead to said amended declaration within thirty days from the date of service of the same upon its attorneys; (4) that the above shall be without prejudice or costs against either party, but each shall pay their own costs.

"Dated June 4, 1884."

Under this stipulation a new declaration was filed by plaintiffs June 12, 1884, on which an issue was joined by plea on July 5, 1884. The next term of the Hudson circuit court to which the record could be regularly handed down for trial began on the first Tuesday of September following. At that term, and before the trial of the cause, to-wit, on the eighteenth day of October, during the term, the petition for removal, and a bond executed in the form required by the statute, were filed in the state court, and the clerk sent to this court a duly certified record of the case, containing copies of the following papers:

(1) The summons issued; (2) the above recited stipulation entered into by the parties June 6, 1884; (3) the amended declaration, filed June 12, 1884; (4) the plea of the general issue, filed July 5, 1884; (5) the *similiter*, filed July 12, 1884; (6) the petition for removal and the bond accompanying the same, filed October 18, 1884; certifying that they were a true copy of the entire proceedings in said cause as the same remained on file in his office.

It will be perceived that he left out of the record the pleadings that had been filed previous to the stipulation, and which, as the defendant claims, ceased to be a part of the record by virtue of the stipulation. The counsel for the plaintiffs then applied to the clerk of the state court to amend the record by incorporating these pleadings therein, which the clerk declined to do without the order of the court. Application was then made to the state court for an order upon the clerk, and it is conceded that the judges refused to act in the matter. The clerk of the state court has, however, forwarded to the counsel for the plaintiffs copies of these pleadings, with the certificate added, dated January 26, 1885, that they are true copies of the declaration,

(original,) demurrer, and joinder thereto, as the same remained on file in his office. They are annexed to the moving papers on this motion, and we are asked (1) for an order to have them filed as a part of the record of the case from the state court.

It is apparent from the form of the request that the counsel of the plaintiffs have taken notice of the change which the removal act of March 3, 1875, has made in the matter of the copies of the papers to be transmitted from the state to the federal court. Under previous acts the condition of the bond was that the petitioner should enter in the circuit court on the first day of the next session "copies of the process against him and of all pleadings, depositions, testimony, and other proceedings in the cause." The phraseology is changed in the later enactment, and all that is now required is that he shall enter "on the first day of its then next session a copy of the record in such suit." Whether the court should make an order as requested, depends upon the question whether the original declaration, demurrer, and joinder in demurrer, which have been withdrawn from the case by the stipulation of the parties, without prejudice and without costs, are still to be regarded as a part of the record of the suit? They were abandoned and withdrawn by consent. They have no place nor office in the pleadings which led up to the issue to be tried. The record of a suit has been defined to embrace the successive judicial steps which have been taken and are necessary to show jurisdiction and regularity of procedure; the process writ or summons, with proof of service; the pleadings, minutes of trial, verdict, and judgment; and also ancillary and interlocutory proceedings, entering into and supporting the action. 2 Abb. Law Dict. 388. The clerk very properly made the stipulation of the parties, whereby these pleadings were taken out of the case, a part of the record; and quite as properly, we think, declined to incumber the record with what they had agreed should form no part thereof. We must therefore refuse to enter an order to add to the record any papers which do not constitute any part of the record of the suit.

2. The application for a writ of *certiorari* to the state court, commanding it to make return of the record in the cause, is under the provisions of the seventh section of the act of 1873. The section was to be resorted to in a case where a clerk of the state court had refused, on a proper application, to furnish the petitioner with a copy of the record, for the reasons heretofore stated. We are not of the opinion that the clerk of the state court has been derelict in duty, and we decline to order the writ to issue.

It became manifest from statements made on the argument that counsel for plaintiffs was desirous of getting all the proceedings of the state court before this court, to enable him to show that, under the recent decisions of the supreme court, narrowing the interpretation of the act of 1875, the defendant has lost the right of removal. These cases have recently made their appearance in the reports, and,

unless we have misunderstood their purport, they will have the effect of cutting off to a large extent the future removal of causes. We refer to *Alley v. Nott*, 111 U. S. 472; S. C. 4 Sup. Ct. Rep. 495; *Scharff v. Levy*, 5 Sup. Ct. Rep. 360; and *Pullman Palace Car Co. v. Speck*, 113 U. S. 84; S. C. 5 Sup. Ct. Rep. 374.

Although these pleadings have been taken out of the record by the stipulation of the parties, they are, nevertheless, a part of the proceedings in the case, and as such may be used here, when properly verified, to prove what has been done in the state court.

PACIFIC RAILROAD v. MISSOURI PAC. RY. CO.

(Circuit Court, D. Kansas. November, 1883.)

1. REMOVAL OF CAUSE—CITIZENSHIP—CORPORATION, HOW A CITIZEN OF A STATE.

Strictly speaking, corporations cannot be citizens, and in order to hold them amenable to federal jurisdiction, on the ground of citizenship, it is necessary to assume that all the stockholders are citizens of the state by which the corporation was created.

2. SAME—BUSINESS AND OFFICE IN ANOTHER STATE.

A corporation for jurisdictional purposes is a citizen of the state by which it was created, even if all its business is transacted elsewhere, and all of its offices and places of business are outside of the state.

3. SAME—CONSOLIDATED CORPORATIONS—SUIT BY CORPORATION.

A consolidated corporation formed by the union of six corporations, three of which were organized under the laws of Missouri and three under the laws of Kansas, will be presumed to be a citizen of both states, and, when sued in a state court in Kansas by a corporation organized under the laws of Missouri, cannot remove the cause to the federal court.

On Motion to Remand.

James Baker, for plaintiff.

Thomas J. Portis, for defendant.

McCrary, J. This cause having been removed from a state court, is now, by agreement of counsel, submitted as upon motion to remand, upon facts appearing in the record and by a stipulation on file, and which are as follows:

(1) The plaintiff is a corporation organized under the laws of the state of Missouri, but had, at the time this suit was commenced, and still has, its chief place of business in the city and state of New York, and has not had for more than five years any officer, office, or place of business in the state of Missouri; (2) the defendant is a consolidated corporation, formed by the union of six corporations, three of which were organized under the laws of Missouri, and three under the laws of Kansas; (3) the property in controversy was the property of one of the Missouri corporations, if it is owned by the defendant at all. All the interest the consolidated company has in the property is derived from one of the Missouri corporations under the articles of consolidation. The cause was removed solely upon the ground of citizen-

ship, and the question to be determined is whether, upon the foregoing facts, it affirmatively appears that this is a controversy between citizens of different states.

The questions to be determined upon these facts are :

(1) Can the plaintiff be held to be a citizen of New York, although created under the laws of Missouri, upon the ground that its only place of business is, and has long been, in the city and state of New York? (2) If it is held that the plaintiff is a citizen of Missouri for jurisdictional purposes, can it be held, upon the facts above set forth, that defendant is a citizen of Kansas, and not of Missouri?

Upon the first question we have no difficulty. Strictly speaking, corporations cannot be citizens; and therefore, in order to hold them amenable to the federal jurisdiction on the ground of citizenship, it has been found necessary to assume, often contrary to the fact, that all the stockholders are citizens of the state by which the corporation was created. It is only by virtue of this assumption that a corporation can be said to be a citizen of any state. The presumption that all the stockholders are citizens of the state under whose laws they incorporate is a conclusive presumption, and the fact will not be inquired into. The fact may be that not one of the stockholders is a citizen of such state; but if so, it cannot be made to appear. The place of transacting business cuts no figure. The corporation, for jurisdictional purposes, is a citizen of the state by which it was created, even if all its business is transacted elsewhere, and all of its offices and places of business are outside of the state. The state may, and we think should, require all of its corporations to keep their principal office within the state, and to have officers or agents there upon whom service of process may be made. This is the law in many states. If it be the law of Missouri, the plaintiff has evidently violated it. However this may be, we are very clearly of the opinion that the plaintiff company, having been organized under the laws of Missouri, cannot become a citizen of New York, for jurisdictional purposes, by establishing its head-quarters in that state, and failing to keep an office in Missouri. If it continues to be a corporation at all, it is to be regarded as a citizen of Missouri. *Railway Co. v. Whitton*, 13 Wall. 270; *Railroad Co. v. Letson*, 2 How. 497; *Marshall v. Railroad Co.* 16 How. 314; *Railroad Co. v. Wheeler*, 1 Black, 297; *Covington Draw-bridge Co. v. Shepherd*, 20 How. 232.

Upon the second question there is more difficulty. The defendant is undoubtedly a single corporation, although formed by the consolidation of six distinct corporations, three of them having been formed under the laws of Missouri and three under the laws of Kansas. The consolidation was had under the laws of both states, the co-operating legislation of both being clearly necessary to that end. In *Railroad Co. v. Harris*, 12 Wall. 65, it was said: "We see no reason why several states cannot, by competent legislation, unite in creating the same corporation, or in combining several pre-existing corpora-

tions into a single one." And the case of *Railroad Co. v. Maryland*, 10 How. 392, is referred to as recognizing such a power.

Neither of these cases, however, presented the question with which we now have to deal. Here the validity of the consolidation is conceded; but the question is, of what state, if of any, can the consolidated company be said to be a citizen? It is created by the laws of two states. Is it a citizen of both? If not, is it a citizen of either?

We have already seen that a corporation cannot be a citizen in any proper sense of the term, and that such artificial beings are held subject to the federal jurisdiction as citizens, by resorting to the fiction that all the incorporators or stockholders are conclusively presumed to be citizens of the state creating the corporation. What becomes of the fiction when the corporation is created, as in this case, by the laws of several states authorizing the union of several corporations existing in different states? What is to be the presumption in such a case as to the citizenship of the stockholders? Manifestly it cannot be that they are all citizens of either one of the states under whose laws the consolidation was authorized. Before the consolidation there was a conclusive presumption of law that the stockholders in three of the original corporations which were united to form the defendant company were citizens of Missouri, and those of the remaining three, citizens of Kansas. When the six companies were united in one under the laws of both states, we are unable to see how we can say that the same stockholders can be presumed to have suddenly become citizens of one of such states. And still less can we presume, in this case, that they all became citizens of Kansas. In a word, as it seems to us, the fiction above referred to as to the citizenship of stockholders, where the corporation is created by a single state, cannot be applied where the corporation is created by the laws of more than one state; or, if it be applied, so far from enabling us to hold that the corporation may sue or be sued as a citizen of a particular state, it leads to the opposite conclusion. We have thus seen (1) that a corporation cannot be a citizen; (2) but where a corporation is created under the laws of a state, the courts will conclusively presume that the persons composing it are citizens of that state, and therefore will hold the corporation itself amenable to suit in the federal courts the same as a citizen of such state; (3) where, however, the corporation is not formed under or by virtue of the laws of a single state, but under and by virtue of the laws of several states, the presumption, if any is allowed, must be that the persons composing it are citizens of the different states under whose laws the corporation was formed; as, for example, in the present case, that the persons composing the defendant corporation are some of them citizens of Missouri, and others citizens of Kansas.

In order to prevent confusion and misconstruction of our ruling in this case, its exact nature must be kept in view. It is not a case in which a corporation created by one state has been permitted to enter

the territory of another, and there engage in business. In such cases it has been held that there is no new corporation, but only added powers and privileges granted to an existing body, and that it remains a corporation of the state by which it was originally chartered. It refers for the law of its being to the statutes of the state by which it was originally created, although it may have obtained enlarged powers and the right to extend its operations into foreign territory from the legislation of other states. Thus, in *Railroad Co. v. Harris*, *supra*, the corporation was originally created by the state of Maryland, and subsequently authorized to extend its operations into Virginia and the District of Columbia, by appropriate local legislation, declaring that it should have the same rights and privileges in that state and district as in Maryland. It was held that it remained a corporation of Maryland, and that no new corporation was created either in Virginia or in the District of Columbia. In *Railway Co. v. Whitton*, *supra*, the corporation was sued as a citizen of Wisconsin, and it appeared that it had been incorporated under the laws of that state. It was insisted that there was a failure of jurisdiction, because the same corporation had also been chartered under the laws of Illinois, of which state the plaintiff was also a citizen. But the court said: "The answer to this position is obvious. In Wisconsin the laws of Illinois have no operation. The defendant is a corporation, and as such a citizen of Wisconsin, by the laws of that state. It is not there a citizen or corporation of any other state." In other words, as I understand this ruling, it was held that inasmuch as a distinct and separate corporation had been organized under the laws of Wisconsin alone, it was a corporation of that state, and suable as such, notwithstanding the fact that the same incorporation, under the same corporate name, may have been chartered as a corporation under the laws of another state.

But that is not the present case. Here the corporation defendant was not formed under the laws of a single state, but under the laws of two states and by a consolidation, as already explained. The consolidated company cannot point to the laws of either state as the source of its being. It cannot show that it has a legal corporate existence without invoking the statutes of both states, and proceeding in conformity thereto. It cannot claim to be a citizen of each of said states, because, by the law of Kansas, under which the consolidation must have taken place, the several companies were authorized "to consolidate and form *one* company," so that the consolidated company must be regarded as a unit. Besides, as already stated, the presumption that the stockholders are citizens of Kansas, which is the indispensable basis of the claim that the consolidated corporation is a citizen of that state, cannot be allowed for the reasons already stated. This case is also unlike those in which a corporation of one state is authorized to sell, assign, and transfer its property and franchises to a corporation in another state. In such cases the

two corporations are merged into one, and that one is the corporation which purchases the property and franchises of the other. *Antelope Co. v. Chicago, B. & Q. Ry. Co.* 4 McCrary, 46; S. C. 16 FED. REP. 295.

The case of *Railroad Co. v. Wheeler*, *supra*, is analogous to the one now before the court, and the ruling therein seems to us conclusive of the present question. That was a suit brought in the circuit court of the United States for the district of Indiana against Wheeler, who was a citizen of that state; and the declaration stated that the plaintiff was "a corporation created by the laws of the states of Indiana and Ohio, having its principal place of business in Cincinnati, in the state of Ohio," and that it was a citizen of the state of Ohio. The court held that a suit in the corporate name must be regarded as, in contemplation of law, the suit of the individuals composing the corporation, and that, therefore, the action in that case was to be regarded and treated as a suit in which citizens of Ohio and Indiana were joined as plaintiffs in an action against a citizen of the last-named state. "Such an action," said the court, "cannot be maintained in a court of the United States, where jurisdiction of the case depends altogether on the citizenship of the parties. And in such a suit it can make no difference whether the plaintiffs sue in their own proper names or by the corporate name and style by which they are described." And the court further said: "The averments of the declaration would seem to imply that the plaintiff claims to have been created a corporate body, and to have been indued with the capacities and faculties it possesses by the co-operating legislation of the two states, and to be one and the same legal being in both states. If this were the case, it would not affect the question of jurisdiction in this court." The conclusion announced was that, as the plaintiff corporation was composed of citizens of Ohio and Indiana, it could not maintain a suit in a federal court upon the ground of citizenship alone against a citizen of either of those states.

For these reasons we conclude that the case should be remanded to the state court; and it is accordingly so ordered.

JENNINGS v. PHILADELPHIA & R. R. Co.

(Circuit Court, D. New Jersey. December 22, 1884.)

JURISDICTION OF CIRCUIT COURT—RECEIVER APPOINTED IN ANOTHER STATE—ORDER OF PAYMENT OF CLAIM—NEW JERSEY STATUTE—VERDICT—JUDGMENT.

A verdict before entry of judgment thereon creating no lien on real estate in New Jersey, when a receiver for a railroad corporation, against which such verdict has been obtained, has been appointed before such entry by the United States circuit court for the district of New Jersey, in a proceeding ancillary to

a suit in the circuit court for Pennsylvania, the receiver will not be ordered by the court in New Jersey to pay such judgment; but the plaintiff will be compelled to make application for an order for payment to the court in Pennsylvania.

Rule to Show Cause, etc.

Richard & Lindabury, for the rule.

A. G. Richey, for defendant.

NIXON, J. This case comes up on a rule to show cause why the receivers of the Philadelphia & Reading Railroad Company should not be required to pay the judgment recovered March 29, 1884, by the above-named plaintiff, out of the funds of the said company in their hands as receivers. On the service of the rule the receivers made return (1) that they had no moneys in their hands which were applicable to the payment of the judgment; and (2) that the proceedings under which they became receivers were instituted in the circuit court of the United States in the Eastern district of Pennsylvania; that the decree in this court, by which they were appointed receivers, was the result of proceedings ancillary to those in the Pennsylvania court; that all their accounts were settled in the court where they were originally appointed, and the disbursement of all moneys coming into their hands as receivers was made under the direction of said court; and that the application for the payment of the judgment should be made to the United States circuit court for the Eastern district of Pennsylvania, which directs and controls the disbursements as aforesaid.

The application is made here, and supported by the counsel for the plaintiff, upon the ground that the plaintiff acquired a lien by his judgment on the real estate of the insolvent corporation in this state before the appointment of the receivers; which lien the court has power to enforce by an order on the receivers for payment, or by execution against the property affected by the judgment. The decisive question in the case seems to be whether any such lien was acquired. The facts are that the plaintiff, suing the defendant corporation in this court for damages in a case of collision with a train of the Lehigh Valley Railroad Company, at the point where the two roads cross each other, obtained a verdict in said suit on the twenty-seventh of March last. No judgment was entered on the verdict, and no steps taken to enter one, until the sixth day of June following, when the defendant corporation itself applied and obtained a rule therefor. But, in the mean time, proceedings had been taken in the circuit court for the Eastern district of Pennsylvania against the defendant as an insolvent corporation, under which, on June 2d, receivers had been appointed, and on ancillary proceedings in this court, on the same day, the same gentlemen were named receivers here. This was deemed necessary in order to give them the control of the property of the corporation in this jurisdiction. When they took possession, on June 2, 1884, was any lien existing on the real estate which this

court ought to enforce in aid of the plaintiff's judgment? The judgment was formally entered after the date of the appointment of receivers; but the plaintiff's counsel insisted, on the argument, that he had secured a lien on the property in New Jersey by virtue of the provisions of section 194 of the practice act of the state, alleging that the judges of the supreme court of the state were accustomed to treat the verdict, before the entry of a judgment, as a lien upon the real estate of the defendant. He produced no authority, and we have not been able to find any, for such a construction of the words of the section.

Section 192 abolishes judgment rolls as such, and directs how the clerk shall make up a judgment record, to-wit, by entering in a separate book the warrants of attorney, declaration, pleadings, proceedings, and judgment in every civil cause. Section 194 simply provides that, until the clerk shall have done this in a case, "the verdict or rule for judgment in the minutes of the court shall be held and taken, in the court in which the same is obtained, to be the record of the judgment in such cause, and shall be received in evidence in said court as such judgment as fully as if the record had been made up and signed as by said section 192 required."

This is clearly a provision which authorizes a court to treat the entries or rules for judgment in its own minutes as evidence of the record of a judgment, before the clerk has had time to make up the record. If the legislature had intended to do more than this, and to repeal the statute existing continuously since the last century, "that no judgments shall affect or bind any lands, tenements, hereditaments, or real estate but from the time of the actual entry of such judgment in the minutes or records of the court," it would have done so in more explicit terms.

We therefore hold that when the receivers took charge of the property the plaintiff had acquired no lien by virtue of the verdict. The business of the corporation since their appointment has been conducted under the supervision and control of the court in which the receivers were first appointed. Monthly reports reveal to judges there the condition of the estate, and that is the proper forum to which to apply for orders for the payment of claims.

The rule to show cause must be discharged.

HIS IMPERIAL MAJESTY, THE SULTAN OF THE OTTOMAN EMPIRE, v. PROVIDENCE TOOL Co. and others.

(Circuit Court, E. D. New York. August 22, 1883.)

EQUITY JURISDICTION—ADEQUATE REMEDY AT LAW—REV. ST. § 723.

A bill in equity that asserts that plaintiff is entitled to certain property in the possession of the defendant, and prays that it be delivered up, and that defendant may be decreed to specifically perform his contract to deliver it, and may be enjoined from setting up any claim to it, and that if he has any lien thereon redemption may be allowed therefrom, does not state a case within the equity jurisdiction of a United States circuit court, as plaintiff has an adequate remedy at law by the action of replevin.

In Equity.

Evarts, Southmayd & Choate, for complainant.

Butler, Stillman & Hubbard and *B. F. Thurston*, for defendants.

BLATCHFORD, J. The bill in this case is founded wholly on an assertion of the legal title of the plaintiff to the rifles and equipments in question. Its prayer is for a decree that the plaintiff has the title to such property and the right to its possession, and that the defendants have no title to it, or valid lien on it, or right to retain it, and that it be delivered over by the defendants to the plaintiff. A claim of such a character is, in the courts of the United States, under the distinction maintained by the constitution of the United States between law and equity, and enforced by section 723 of the Revised Statutes of the United States, the subject of a suit at law, and a plain, adequate, and complete remedy is afforded by an action of replevin. This principle is established by numerous cases. *Grand Chute v. Winegar*, 15 Wall. 373; *Root v. Railway Co.* 105 U. S. 189, 212.

The bill prays that the tool company be compelled to specifically perform its undertakings with the plaintiff, and that the defendants be restrained by injunction from setting up any right or title to, or lien on, the property. But these prayers do not change the attitude of the case. The tool company agreed to make the articles and deliver them to the plaintiff. The plaintiff alleges that the articles have been made and paid for, and that the title to them has passed to the plaintiff. The case is one of the enforcement of the legal title to chattels in existence, and has no different legal aspect from what it would have had if the chattels had not been made under a contract, but had come otherwise into the possession of the tool company from that of the plaintiff. As to the injunction, that might be asked for in every case of the assertion of a legal title to property by a plaintiff, and thus every case of the kind be made one of equitable cognizance. The bill is not one recognizing a lien and asking to redeem from it. It asserts title and denies any lien, and prays for a delivery of the property; Then it has a second and alternative prayer,

that, as to any of the property on which there is a lien, redemption therefrom be allowed. But the suit is still a replevin suit in the guise of a suit in equity.

The foregoing considerations proceed wholly on the view that the articles are in existence, and have been paid for and belong to the plaintiff; that he makes no claim for damages for the value of the articles; and that damages would not give him what he is entitled to. If he could be compensated in damages, trover would be a plain, adequate, and complete remedy. It may be that, in the course of a replevin suit, if one be brought, a case for equitable interposition may arise. But one does not now exist. The application for an injunction is denied, and the restraining order of November 3, 1882, is vacated.

ALLEN v. O'DONALD and others.

(Circuit Court, D. Oregon. May 8, 1885.)

1. CREDITOR AND SURETY.

A creditor who has or acquires a lien on the property of his debtor as a security for his debt, is a trustee of the same for the benefit of the surety, if there be one, and if by any willful act of his such lien is lost or destroyed, to the injury of the surety, the latter is so far discharged from liability for the debt.

2. SAME—BURDEN OF PROOF.

When a creditor relinquishes a lien he may have on the property of his debtor, in a suit to collect his debt from the surety, the burden of proof is on him to show that the surety was not injured by such relinquishment.

3. EQUITY PLEADING—CONCLUSIONS OF LAW.

It is sometimes necessary and proper in equity pleadings to make deductions from the facts stated that are more or less conclusions of law.

Suit to Enforce the Lien of a Mortgage.

M. W. Fechheimer, for plaintiff.

William H. Holmes, for defendants.

DEADY, J. On November 1, 1871, Thomas Cross, of Salem, Oregon, gave his promissory note to the firm of Allen & Lewis, of Portland, Oregon, for the sum of \$30,000, payable in three years from date, with interest at 10 per centum per annum, payable semi-annually, and to secure the payment of the same he and his wife, Pluma F., on the same day executed and delivered to said firm a mortgage on 15 parcels of land situate in Marion county, and containing in the aggregate about 3,390 acres; and on January 23, 1872, said Thomas Cross gave his promissory note to said firm for the sum of \$10,000, payable in one year from date, with interest at 1 per centum per month, and to secure the payment of the same he and said Pluma F., on the same day, executed and delivered to said firm a second mortgage on the real property aforesaid, together with the south half of block 30 in Salem, and certain parts of lots 1, 2, and 3, in block

20, in said town. On September 16, 1872, said Pluma F. died. On January 22, 1876, said notes being still unpaid, said Thomas Cross and C. M. Cross, his then wife, executed and delivered to C. H. Lewis, a member of said firm, a conveyance, absolute on its face, of all said property subject to said mortgages, but upon the understanding and trust that said Lewis would farm and manage the same, and apply the rents and profits thereof upon the debts secured thereon, and that he might, with the consent of said Thomas Cross, sell and dispose of the whole or any portion of the same and apply the proceeds in like manner. On February 5, 1884, Thomas Cross died, soon after which the notes and mortgages aforesaid were indorsed and assigned by said firm to L. H. Allen, of San Francisco, a member thereof. On August 6, 1884, said Allen brought suit in this court to enforce the lien of said mortgages, alleging that there was then due on the first of said notes \$45,137.04, with interest at 10 per centum per annum from December 22, 1881, and on the second \$10,000, with interest from January 25, 1879, less \$1,686.35 paid thereon. Sundry persons, being the administrators and heirs of Thomas Cross and E. C. Cross, Frank R. Cross and P. May Wilson, the children and heirs of Pluma F. Cross, and C. H. Lewis, are made parties defendant to the bill. On January 20, 1885, an order was made taking the bill for confessed as against all the defendants except E. C. Cross and Frank R. Cross; and on March 10, 1885, they answered the bill; the latter by the former as his guardian.

The answer admits the making of the notes and mortgages, and the amounts due on them, as alleged in the bill, except the amount due on the first note, which is stated at \$45,137.04, with interest on \$30,000 since December 22, 1881, instead of on the larger sum. It also admits the execution of the deed of January 22, 1876, to C. H. Lewis, but denies that it was made on any trust or understanding as alleged in the bill. The answer then states that at and before the execution of the two mortgages, and until her death, Pluma F. Cross was the owner in fee-simple of the two parcels of real property described therein as a portion of the donation of Daniel Leslie, containing 80 acres, and the donation of F. S. Hoyt and wife, containing 131 acres, and otherwise designated in the bill as parcels 14 and 15; that prior to the execution of said mortgages Thomas Cross was indebted to the firm of Allen & Lewis for money theretofore advanced to him in the sum of \$30,000, which he was unable to pay, and to secure the payment of which said notes and mortgages were given; that at the urgent solicitation of her husband and the attorney of said firm, she was induced to join in said mortgage and thus "interpose her said lands as security only for said debt of her said husband." Then follow certain allegations which are excepted to by the plaintiff as impertinent. Briefly they are as follows:

(1) That it was stipulated in said mortgages that in default of payment of the notes, that they should be foreclosed as provided by law, and no other or

different mode of sale of said lands was provided therein or contemplated by the parties thereto. (2) That after the death of said Pluma F. Cross, and in November, 1876, said Thomas Cross entered into an agreement with Allen & Lewis, in pursuance of which they sold and conveyed sundry portions of said mortgaged premises contrary to the terms and conditions of said mortgages, as follows: to J. I. Thompson, 413.06 acres, for \$3,834; to C. C. Kennedy, 160.02 acres, for \$1,680.20; to S. R. Scott, 309.36 acres, for \$3,080; in all 882.44 acres for \$8,594.20, which land was then worth, and would have sold under ordinary circumstances for, \$20,000; that in making said sales said parties expended \$1,500 in surveys, commissions, and agents, and wrongfully charged the same to the proceeds of said sales; that no part of said proceeds were ever credited on said notes or mortgages, and that said sales were made without the consent of the defendants. (3) That the said lands of Pluma F. Cross were, at the time of said sales, and now are, worth not more than \$10,000, and, the premises considered, the same ought to be released and discharged from the operation and effect of said mortgages.

It appearing, from the allegations thus excepted to, that the creditors, Allen & Lewis, voluntarily disposed of a portion of the debtor's property, on which they had a lien for their debt, at a loss or sacrifice of not less than \$10,000, a sum equal to the value of the property which the defendants' mother mortgaged as a security for said debt, they claim that the same is discharged from the operation of the mortgage, and that, therefore, such allegations constitute, as to them, a good defense to the bill.

The argument in support of the exceptions is that, admitting the sale of a portion of the debtor's property at a loss, the conclusion that the property of the surety is therefore released from the effect of the mortgage does not follow, because all the property included in the mortgage is not sufficient to satisfy the debt by more than \$10,000, and therefore it can make no difference to these defendants whether such sum was lost by this disposition of the debtor's property or not. They are not injured in any view of the case, because, after making due allowance for this loss, their property will still be required to satisfy the debt.

It is admitted that Mrs. Cross was only a surety in this transaction for the debt of her husband, and it is not disputed that if the creditors relinquished their lien on any portion of the debtor's property included in the mortgage, without reducing the debt in an amount equal to the value thereof, that the property of the surety is so far a discharge from the lien thereof. This rule is the result of equitable principles inherent in the relation of principal and surety, which require that the property of the former pledged to the creditor for the payment of his debt, shall, for the benefit of the latter, be applied to that purpose. A creditor with such a lien is so far a trustee for all parties concerned, and must not deprive any one of the benefit of it. Upon paying the debt, the surety is subrogated to the right of the creditor in this respect; but if, in the mean time, the latter has done anything to impair the value of such right, the former is so far discharged from his liability. Brandt, Sur. § 370; *Neff's Appeal*, 9

Watts & S. 43; *American Bank v. Baker*, 4 Metc. 177; *Cummings v. Little*, 45 Me. 187; *Hayes v. Ward*, 4 Johns. Ch. 129; *Baker v. Briggs*, 8 Pick. 129.

In *Hayes v. Ward*, *supra*, Chancellor KENT says:

"The surety, by his very character and relation as surety, has an interest that the mortgage taken from the principal debtor should be dealt with in good faith, and held in trust, not only for the creditor's security, but for the surety's indemnity. A mortgage so taken by the creditor is taken and held in trust, as well for the secondary interest of the surety, as for the more direct and immediate benefit of the creditor; and the latter must do no willful act, either to poison it, in the first instance, or to destroy or cancel it, afterwards."

But it is not stated, either in the bill or answer, what is the value of the portion of the debtor's property still covered by the mortgage, and therefore it does not appear whether or not the whole of it was sufficient, if disposed of at a fair value, to satisfy this debt, without recourse upon the surety property.

In round numbers, there is now due on these notes not less than \$80,000. In the argument for the exceptions, it is claimed that the whole property included in the mortgage is not sufficient to pay the debt by a much larger sum than the alleged value of the defendants' property. And if this is so, then the defendants are not injured by what they complain of, and the allegations excepted to would be no defense to the bill, and be clearly impertinent. But the court cannot say judicially what this 3,390 acres of land is worth. It cannot assume that it is only worth \$70,000, and not \$80,000, though it may not fetch either sum when put up at auction. The rule seems to be that the burden of proof is on the creditor, in a case of this kind, to show that the surety has not been injured by the transaction. *Brandt*, Sur. § 370.

It follows that the allegations excepted to are not impertinent, but constitute a good defense to the relief prayed for as to these defendants. The plaintiff must either deny them by a replication, or confess and avoid them by proper amendments to this bill.

The further point made in support of the third exception, that the matter excepted to is a mere conclusion of law, is not well taken. It is sometimes proper and convenient in equity pleading, as a means of indicating the relief to which the party considers himself entitled, or the defense sought to be made, to make deductions from the facts stated that are more or less conclusions of law; and this seems to be the character of this allegation.

The exceptions are disallowed.

MEYERS and another v. SHURTLEFF.

(Circuit Court, D. Oregon. May 13, 1885.)

DUTIABLE VALUE OF IMPORTED MERCHANDISE—VALUE OF COVERING NOT TO BE INCLUDED THEREIN.

Section 7 of the act of March 3, 1883, (22 St. 523,) not only repeals section 2907 of the Revised Statutes, authorizing the value of the "covering" to be added to the wholesale price of imported merchandise for the purpose of ascertaining its dutiable value, but positively prohibits the value of such "covering" from being estimated as a part of such dutiable value, and therefore the value of barrels in which Portland cement is imported cannot be added to the wholesale price of the latter as an element of its dutiable value.

Action to Recover Excess of Duties Paid to the Collector.

Erasmus D. Shattuck and Robert L. McKee, for plaintiffs.

James F. Watson, for defendant.

DEADY, J. This action is brought by the plaintiffs to recover the sum of \$626.71, alleged to be an excess of duties paid to the defendant as collector of this port. It is stated in the complaint that on September 10, 1884, the plaintiffs imported from London to this port 1,073½ tons of Portland cement, contained in 6,439 barrels, and of the value at London of \$3,133.34; that said "barrels were only coverings or holders, and only the usual and necessary outside packages for the transportation and protection of the cement contained therein, and were and are of no commercial value after the removal of the contents thereof; that said barrels were not of any material or form designed to evade duties thereon, or designed for use otherwise than in the *bona fide* transportation of goods, to-wit, cement, to the United States." The complaint then states in detail the entry of the cement at the custom-house, and the valuation of the barrels as a part of the dutiable value of the cement, and the imposition of a duty of 20 per centum thereon, amounting to \$626.71, which the plaintiff, on October 3, 1884, paid under protest, and that said barrels were not dutiable; the subsequent appeal to the secretary of the treasury, and his affirmation of the action of the collector. The defendant demurs to the complaint, for that it does not state facts sufficient to constitute a cause of action.

By the Schedule A of the act of March 3, 1883, (22 St. 493,) "Cement—Roman, Portland, and all others," imported from foreign countries, is made subject to pay a duty of "20 per centum *ad valorem*." The rule prescribed for the government of the collector of customs, in ascertaining the dutiable value of imported merchandise for the purpose of estimating the *ad valorem* duty to be levied thereon, has for the past 20 years, within certain limits, been constantly changing. From the act of July 31, 1789, (1 St. 41,) to that of March 1, 1823, (3 St. 732,) the rule was that the value of "outside packages" should not be considered a part of the cost of the goods. From the latter to

the act of June 30, 1864, (13 St. 217,) the law appears to have been silent on the subject.

By section 16 of the act of August 30, 1842, (5 St. 563,) "the actual market value or wholesale price" of the article imported, "at the time when purchased in the principal markets of the country" from whence imported, together with all costs and charges, except insurance, and including in every case a charge for commissions at the usual rates," is made "the true value at the port where the same may be entered upon which duties shall be assessed."

By section 1 of the act of March 3, 1851, (9 St. 629,) the value of the article is required to be ascertained at "the period of exportation," instead of the "time" of purchase. By section 25 of the act of March 2, 1861, (12 St. 197,) this time is changed to "the day of actual shipment," when the same appears from the bill of lading.

By section 24 of the act of June 30, 1864, (13 St. 217,) "the actual value" of the goods was required to be taken when "on shipboard, at the last place of shipment to the United States;" to be "ascertained by adding to the value of such goods at the place of growth, production, or manufacture, the cost of transportation, shipment, and transshipment, with all the expenses included, from the place of growth, production, or manufacture, whether by land or water, to the vessel in which shipment is made to the United States; the value of the sack, box, or covering of any kind, in which such goods are contained, commission at the usual rate, in no case less than $2\frac{1}{2}$ per centum; brokerage and all export duties; together with all costs and charges paid or incurred for placing said goods on shipboard, and all other charges specified by law.

By section 67 of the act of March 3, 1865, (13 St. 495,) the collector is required "to cause the actual market value or wholesale price" of the goods, "at the period of exportation to the United States in the principal markets of the country" from whence they are imported, "to be appraised, and such appraised value shall be considered the value upon which duty shall be assessed;" and section 24 of the act of 1864, *supra*, is expressly repealed, and also "all acts and parts of acts requiring duties to be assessed upon commissions, brokerage, cost of transportation, shipment, transshipment, and other like costs and charges incurred in placing any goods, wares, or merchandise on shipboard."

By section 9 of the act of July 29, 1866, the pendulum was swung back again to the war tariff of 1864, so that "in determining the dutiable value of merchandise" the collector was required to add "to the cost or to the actual wholesale price or general market value at the time of exportation in the principal markets of the country" from whence the same is imported into the United States, "the cost of transportation, shipment, and transshipment, with all the expenses included, from the place of growth, production, or manufacture, whether by land or water, to the vessel in which the shipment was made to the

United States; the value of the sack, box, or covering, of any kind, in which such merchandise is contained; commission at the usual rates, but in no case less than $2\frac{1}{2}$ per centum; brokerage, export duty, and all other actual or usual charges for putting up, preparing, and packing for exportation and shipment."

These sections of the acts of 1865 and 1866 were carried into the Revised Statutes,—the former being section 2906 of that compilation, and the latter, section 2907. Section 7 of the act of March 3, 1883, (22 St. 523,) repeals the latter of these sections, as well as section 2908, and provides that "hereafter none of the charges imposed by said sections, or any other provision of existing law, shall be estimated in ascertaining the value of goods to be imported; *nor shall the value of the usual and necessary sacks, crates, boxes, or covering of any kind be estimated as part of their value in determining the amount of duties for which they are liable*: provided, that if any packages, sacks, crates, boxes, or coverings of any kind shall be of any material or form designed to evade duties thereon, or designed for use otherwise than in the *bona fide* transportation of goods to the United States, the same shall be subject to a duty of 100 per centum *ad valorem* upon the actual value of the same."

It is understood that the action of the collector in this case was had in obedience to the instructions of the treasury department, acting under the advice of the department of justice contained in an opinion of January 11, 1884, in which it is said that the only change affected by section 7 of the act of 1883, "as regards the basis on which *ad valorem* duties are to be estimated," "is to exclude from such basis all costs and charges which, under the law as it previously stood, were required to be *added* to the current or actual market value or wholesale price of the merchandise in the principal markets of the country whence the same was imported, or of the country of production or manufacture, as the case might be. Thus the current or actual market value or wholesale price in these markets, which is to be appraised, is now made the *sole basis* for estimating such duties."

The "costs" and "charges" of which these statutes speak, unless otherwise expressly stated, are the items of expense incurred by the importer in and about the purchase of goods, and afterwards, and before their arrival at the port of entry. They do not, unless specially mentioned, include the cost of the sack, box, or covering in which the goods are usually contained and purchased. And it may be admitted that when the statute declares "without more"—without qualification—that the dutiable value of imported merchandise is "the actual market value or wholesale price" in the principal markets of the country whence the same is imported, that such value includes the cost of the sack, box, or covering in which it is usually contained and purchased. *Cobb v. Hamlin*, 3 Cliff. 200. The cost or expense of the covering usual and necessary for the protection and transpor-

tation of an imported article from the place of purchase, is, as a matter of fact, an element of its value at such place. And the only question in this case is whether or not congress has said, without qualification, that the dutiable value of this cement is "the actual value or wholesale price" in London. And, *first*, although the "actual value" of an article in the country where purchased, does, in the abstract, include the cost of the outside package in which it is contained and placed for shipment, yet it is plainly inferable from the terms of the legislation on the subject, as above stated, that whenever congress has intended to include that expense in such value as a basis for estimating duties, it has expressly said so. To go no further back than 1864, that act expressly provided that the "dutiable value" of goods should be their value on shipboard, to be ascertained by *adding* to their value at the place of growth, production, or manufacture, among other things, "the value of the sack, box, or covering of any kind" in which they are contained. The act of 1865 simply made the "dutiable value" of goods their "actual market value" at the period of exportation, and expressly repealed section 24 of the act of 1864, requiring the value of the "covering" to be considered in ascertaining such "market value," while the act of 1866 simply restored the rule of valuation prescribed by the act of 1864.

From this statement of congressional action or legislative habit on this subject, it may fairly be inferred that the expense of the "covering" of imported merchandise is never to be included in ascertaining the "dutiable value" thereof, unless the statute expressly so provides. And therefore, if the act of 1883 did nothing more than repeal section 2907 of the Revised Statutes, (section 9 of the act of 1866,) authorizing the value of such "covering" to be *added* to the "wholesale price," in determining the "dutiable value" of this merchandise, there would be no legislative authority for adding the value of the barrels to the value of the cement, as a basis of estimating the duty on the latter. But when it is considered that the act of 1883 not only repeals section 2907 of the Revised Statutes, authorizing the value of the barrel to be added to that of the cement, but also expressly prohibits the value of the former to "be estimated as a part of the value" of the latter "in determining the amount of duties for which it is liable," the case is too plain for argument. The mere statement of it is sufficient. There is no room for construction or difference of opinion.

The act of 1883 is both explicit and peremptory. It not only prohibits the "charges" or expenses incurred in and about the purchase of the goods and their shipment from being added to their actual value or wholesale price, but it goes further, and, apparently out of abundance of caution, adds: "Nor shall the value of the usual and necessary sacks, crates, boxes, or covering of any kind, be estimated as part of their [imported goods] value in determining the amount of duties for which they [imported goods] are liable."

The demurrer in this case admits that the value or cost of the bar-

rels in London was estimated in ascertaining the dutiable value of the cement, and that the former is the usual and necessary covering for the protection and transportation of the latter. It is impossible to sustain the legality of this valuation, or the collection of the duties thereon, without absolutely ignoring this prohibitory clause in section 7 of the act of 1883, as seems to have been done in the opinion of July 14, 1884.

The demurrer is overruled.

NORRIS and others v. HASSLER.

(Circuit Court, D. New Jersey. March 12, 1885.)

1. WITNESS FEES—MILEAGE—TRAVELING EXPENSES.

A witness who has been served with a subpoena and received money for traveling expenses cannot refuse to obey such subpoena because the proper amount of mileage has not been paid.

2. SAME—TENDER—CONTEMPT.

In the courts of the United States, witnesses, if they have the means, are obliged to obey the process of the court and attend, whether their fees are advanced or not, and a witness who can pay his expenses and refuses to attend because the money is not tendered him, may be punished for contempt.

3. SAME—EXEMPTION OF WITNESS FROM SERVICE IN OTHER SUIT.

The exemption of a witness or party to a suit from service of process does not extend to service of a subpoena to testify in the same cause on which he is giving attendance.

On Rule to Show Cause, etc.

NIXON, J. Under section 725 of the Revised Statutes, power is conferred upon the courts of the United States to punish for contempts of their authority by fine and imprisonment. The proviso of the section includes within the penalty "disobedience or resistance by any * * * witness to any lawful writ, process, order, rule, decree, or command of the said courts." This authority is exercised by the courts for two purposes: (1) To punish the offender for the disrespect to the court; and (2) to compel his performance of some act or duty required of him by the court which he refuses to perform. See *In re Chiles*, 22 Wall. 168.

Upon affidavits filed, making a *prima facie* case, a rule has been issued in the above cause, and served upon the defendant, requiring him to show cause before the court why he should not be adjudged to be guilty of contempt in not obeying a *subpoena duces tecum*, duly served, to appear before the examiner in Elizabeth on the twenty-fourth of January last. At the hearing two reasons were relied on by the defendant why the rule should not be made absolute: (1) Because the defendant was necessarily absent in New York on the day on which the subpoena required his attendance here; (2) because the subpoena was not legally served.

1. The proofs do not show a necessary and unavoidable absence, but one voluntarily assented to by the defendant as a pretext and excuse for not obeying the writ. It is true that he was engaged as a party and witness before a referee in the city of New York on the day of the return of the subpoena requiring his attendance at Elizabeth; but all the evidence contradicts the allegation that he was necessarily there. If he had manifested the slightest desire to obey the writ, the hearing in New York could have been arranged by him so that obedience would have been not only possible, but easy.

2. Two grounds were assigned why there was no legal service of the subpoena. The first is that the full amount of witness fees was not paid. The counsel for the complainants testifies that before the subpoena was served upon the defendant he examined the New Jersey Atlas, prepared by Beers, Comstock & Kline, and measured the distance from Elizabeth to Jersey City, and from Jersey City to Englewood, the residence of the defendant, and ascertained that the distance from Elizabeth to Jersey City was 12 miles, and from Jersey City to Englewood 13 miles. He then handed to the witness the sum of \$4,—\$1.50 for fees and \$2.50 for mileage, being 10 cents per mile for going and returning the 25 miles. But there seems to be a distance of about one mile between the two railroad stations at Jersey City which the sum paid did not cover.

Several suggestions might be made in reply: (a) The shortage in the payment of mileage was so small that the maxim "*de minimis non curat lex*" is fairly applicable. (b) The defendant accepted and receipted for the \$4 without the intimation of any objection as to the amount, and it may be fairly inferred from such action that the excess was waived. See *Andrews v. Andrews*, 2 Johns. Cas. 109. (c) The defendant had then in his pocket \$1.50 of the complainants' money which had been paid to him on the service of another subpoena to testify on that day on behalf of the complainants, and which had been superseded by the subpoena *duces tecum*. It is a reasonable suggestion that if a gentleman should retain money paid to him for a service which was not performed, he should be willing to apply it on account of another service, substituted for the first. But, apart from these considerations, it has been held that, in the courts of the United States, witnesses, if they have the means, are obliged to obey the process of the court, and attend, whether the fees are advanced or not. In such a case, Judge DRUMMOND says: "An attachment would issue, and the court would punish a man who could pay his expenses and would not come because the money was not tendered." *U. S. v. Durling*, 4 Biss. 510. The defendant has not put his non-obedience to the writ on the ground of not having the means to pay the expenses of travel.

The second ground is that the subpoena was served while the defendant was attending before the examiner as a party to the pending litigation. It is undoubtedly now the established law that parties

and witnesses are not only privileged from arrest on civil process, but also from the service of summons in civil actions, while attending court. The propriety of such a rule for witnesses is clear. They are compelled to attend by virtue of the process of the court, and the court feels under obligation to protect them, not only while attending, but in going and returning. My attention, however, has not been called to a case, nor do I think that one exists, where such an exemption has been extended to the service of a subpoena to testify in the cause on which they are giving attendance; and it does not come within the reason of the rule. There are a number of cases in the reports where proceedings for attachment against witnesses have been taken for their refusal to obey the process of subpoena, served in the very presence of the court; but in none of them has the suggestion been made that such a service was unlawful. See *Jupp v. Andrews*, Cowp. 845; *Pitcher v. King*, 2 Dowl. & L. 755; *Bowles v. Johnson*, 1 W. Bl. 36. That a party to a suit can be compelled by a subpoena *duces tecum* to produce papers and documents to be used in the trial as evidence is no longer an open question. *Murray v. Elston*, 23 N. J. Eq. 212.

All the reasons assigned by the defendant for not obeying the writ and producing the papers required rather aggravate than excuse or justify his refusal. The rule must be absolute. As the object of the proceeding is to compel the defendant to perform an act or duty which appears to be within his power, the judgment to be entered will be largely controlled by his conduct hereafter.

In re BROCKWAY, a Bankrupt.

(Circuit Court, S. D. New York. September 13, 1882.)

BANKRUPTCY—REFUSAL OF DISCHARGE—SECOND APPLICATION—EVIDENCE—RES ADJUDICATA—AMENDATORY ACT OF JULY 26, 1876.

A bankrupt having applied for his discharge, it was denied by the district court, because his application was not made within one year from the date of adjudication of bankruptcy. Specifications opposing the discharge had been filed by creditors, including, among other grounds of objection, that the bankrupt had not kept proper books of account, and proofs were taken upon the issue, but were not considered by the court. Subsequently, and after the passage of the act of July 26, 1876, allowing an application for discharge to be made "at any time after the expiration of 60 days, and before the final disposition of the cause," the bankrupt made a second application for discharge in the same proceeding, which was opposed by the same creditors upon the same specifications, together with additional grounds of opposition. The proofs taken on the first application were used by the opposing creditors upon the second application, and by these proofs alone it was made to appear that the bankrupt had not kept proper books of account, and on that ground the discharge was denied. *Held*, on appeal to the circuit court, (1) that the proofs taken on the former application were competent; (2) that the former decision, denying the discharge, was conclusive between the bankrupt and his creditors, and a bar to the second application; (3) and that the subsequent amendment of the bankrupt act did not impair or affect the controlling force of the previous adjudication.

Bankruptcy Appeal. For decision of district court see 12 FED. REP. 69.

M. H. Regensberger, for petitioner.

A. C. Brown, for opposing creditors.

WALLACE, J. The bankrupt having applied for his discharge, it was denied by the district court, because his application was not made within one year from the date of the adjudication of bankruptcy. Specifications opposing the discharge had been filed by creditors, including, among other grounds of objection, that the bankrupt had not kept proper books of account, and proofs were taken upon the issue; but these proofs were not considered by the court, it having been held that the application was too late. Subsequently, by the act of July 26, 1876, (19 St. at Large, 102,) the section of the bankrupt act (section 5108, Rev. St.) requiring the application for discharge to be made within a year, having been amended so that it could be made "at any time after the expiration of sixty days, and before the final disposition of the cause," the bankrupt made a second application for discharge in the same proceeding. The discharge was opposed by the same creditors, upon the same specifications, together with additional grounds of opposition. The district court denied the discharge, because the bankrupt had not kept proper books of account. 12 FED. REP. 69. The proofs taken upon the first application were used by the opposing creditors upon the second application, and it was by these proofs alone that it was made to appear that proper books of account had not been kept by the bankrupt. The learned district judge held that, the issue being the same, the parties the same, and the proceeding for a discharge being in the same bankruptcy, the proofs taken upon the former application were competent. It is now urged by the bankrupt that this conclusion was erroneous.

Treating both applications as in substance one proceeding, there is no reason why the depositions used on the first occasion should not be competent upon the second. Unless the second application is to be deemed a rehearing of the original application, the bankrupt is finally precluded from obtaining his discharge. Upon a rehearing, the proofs originally taken are always admissible. *Daniell*, Ch. Pr. c. 32, § 2.

But I am constrained to hold that the order denying the discharge made upon the first application is a fatal obstacle in the way of any discharge. The order was, in effect, a final adjudication adverse to the right of the bankrupt to a discharge. So long as it remains in force, it is conclusive between the bankrupt and his creditors. It matters not that it was termed an order instead of a decree. *Dwight v. St. John*, 25 N. Y. 203. It was a decision upon the merits of the controversy, because it proceeded upon the ground that the bankrupt had not complied with a condition of the bankrupt act which was vital and imperative, if not jurisdictional. *Re Wilmott*, 2 N. B. R.

214; *Re Martin*, 2 N. B. R. 548; *Re Sloan*, 12 N. B. R. 59. Undoubtedly that decision would not preclude a new bankruptcy proceeding, nor, probably, a discharge in such proceeding, if the bankrupt could have shown himself entitled to one. *Re Farrell*, 5 N. B. R. 125; *Re Drisko*, 13 N. B. R. 112, and 14 N. B. R. 551. For the purposes of the present bankruptcy that decision must be deemed *res adjudicata*, that the bankrupt is not entitled to a discharge, because he has not complied with a condition essential to his right. It was a condition which could not be waived by a creditor, and which the court was bound to consider as a prerequisite to a discharge.

The subsequent amendment of the bankrupt act did not impair or affect the controlling force of the previous adjudication. Assuming, what may well be controverted, that the amendment may be given such retroactive effect as to authorize an application for a discharge in a pending proceeding, although the year from the date of the adjudication of bankruptcy had expired, it certainly cannot operate retroactively to overthrow a prior judgment. A retrospective construction to a statute is never favored; neither will it be inferred that congress intended to exercise a doubtful power. It is, at least, doubtful whether the act would be within the legislative competency, if intended to effect such a result. *State of Pennsylvania v. Wheeling Bridge*, 18 How. 421.

The order of the district court is affirmed.

UNITED STATES v. LANDSBERG.

(Circuit Court, S. D. New York. December 22, 1882.)

CRIMINAL LAW AND PROCEDURE—PERJURY—MATERIAL MATTER—REV. ST. § 5392
—CROSS-EXAMINATION BEFORE UNITED STATES COMMISSIONER.

Where a party charged with counterfeiting, on examination before a United States commissioner, testifies, on cross-examination, in answer to a question, that he has never been in prison, when he has been in a state prison, such false answer amounts to "material matter," within the meaning of Rev. St. § 5392, and an indictment for perjury will lie.

Motion for New Trial and in Arrest of Judgment.

J. G. Agar, Asst. U. S. Dist. Atty., for the United States.

R. N. Waite, for defendant.

Before WALLACE, BENEDICT, and BROWN, JJ.

BENEDICT, J. The accused, having been convicted of perjury, now moves for a new trial and in arrest of judgment. The principal question presented for determination is whether the crime of perjury was committed by the accused when he made the false statement, under oath, which is set forth in the indictment. This statement was made under the following circumstances, as shown at the trial: The ac-

cused had been arrested by virtue of a commissioner's warrant, upon a charge of having uttered counterfeit coin. He demanded an examination, and, upon such examination, duly held before the commissioner, he offered himself as a witness in his own behalf, and was duly sworn as such. Upon his cross-examination, in answer to a question put without objection, he testified that he had not been in prison in this state, or any other state, when the fact was that he had been imprisoned in the state prison of this state, and also in the state prison of New Jersey. Thereafter, the present indictment was found against him, in which the perjury assigned is the testifying, under the circumstances above stated, that he never was in prison in this state, or any other state.

On the part of the accused the point made is that the false matter so stated by the accused before the commissioner was not material matter, within the meaning of the statute, and therefore the crime created by the statute was not committed.

An essential element of the offense created by the statute (section 5392, Rev. St.) is the materiality of the matter charged to have been falsely stated. The words employed in the statute are "material matter." These words were, doubtless, adopted from the common law, and they must be given a signification broad enough to cover, at least, cases of perjury at common law. The rule of the common law in regard to perjury is thus stated by Archbold: "Every question in cross-examination, which goes to the witness' credit, is material for this purpose." Archb. Crim. Pl. & Proc. 817, (Eng. Ed.) The same rule was declared by the twelve judges in *Reg. v. Gibbons*, 9 Cox, C. C. 105.

The inquiry here, therefore, is whether the imprisonment of the accused in this state and in New Jersey was calculated to injure his character and so to impeach his credit as a witness; for it is not to be doubted that when the accused offered himself as a witness, he placed himself upon the same footing as any other witness, and was liable to be impeached in the same manner. Upon this question our opinion is that the matter stated by the accused as a witness had an obvious bearing upon the character of the witness, and could properly be considered by the commissioner in determining what credit was to be given to the testimony of the witness in respect to the crime with which he stood charged. In *Reg. v. Lavey*, 3 Car. & K. 26, the accused, when a witness, had falsely sworn that she had never been tried in the Central criminal court, and had never been in custody at the Thames police station. On her trial for perjury these statements were ruled to be material matter, and the conviction was sustained. In *Com. v. Bonner*, 97 Mass. 587, a witness had been asked "if he had been in the house of correction for any crime." Objection to the question on the ground that the record was the best evidence was waived, and the case turned upon the materiality of the question. The matter was held to be material. The present case is

stronger, for here no objection whatever was interposed to the inquiry respecting the imprisonment of the accused. Having made no objection to the inquiry, and gained all the advantages to be secured by his false statement, it may perhaps be that it does not lie in his mouth now to say that his statement was not material. See *Reg. v. Gibbons, supra*; *Reg. v. Mullany*, Leigh & C. 593. But, however this may be, it is our opinion that the statement he made was material matter, within the meaning of the statute, because calculated to affect his credit as a witness.

The other points discussed have received our attention, and are thought to be untenable. They are not such as require attention in this opinion. The motions are denied.

HARTFORD WOVEN-WIRE MATTRESS CO. v. PEERLESS WIRE MATTRESS CO.

Circuit Court, D. Connecticut. April 14, 1885.)

1. PATENTS FOR INVENTIONS—WIRE MATTRESSES—FARNHAM PATENT—REISSUE No. 7,704—NOVELTY.

Reissued patent No. 7,704, granted to the Hartford Woven-wire Mattress Company, as assignee of John M. Farnham, for an improvement in bedstead frames, on May 29, 1877, *held* not void for want of novelty, and infringed by defendants.

2. SAME—PERKINS PATENT No. 109,446.

Patent No. 109,446, granted George C. Perkins for an improvement in woven-wire fabrics for mattresses, dated November 30, 1869, *held* void for want of invention.

In Equity.

Charles E. Perkins, for plaintiff.

Wm. Edgar Simonds, for defendant.

SHIPMAN, J. This is a bill in equity to restrain the alleged infringement of reissued letters patent No. 7,704, granted May 29, 1877, to the plaintiff, as assignee of John M. Farnham, for an improvement in bedstead frames, and also of letters patent No. 109,446, granted November 22, 1870, to George C. Perkins for an improvement in woven-wire fabrics for mattresses. The original Farnham patent was dated November 30, 1869. The description of the Farnham invention, as given in the original and reissued specifications, is contained in the opinion of this court in *Woven-wire Mattress Co. v. Wire-web Bed Co.* 8 FED. REP. 87.

The four claims of the reissue are as follows:

"(1) The combination of the side-bars and end-bars, and elastic coiled wire fabric, D, attached only to the end-bars, with the end-bars of the frame elevated above the side-bars, so that the fabric will be suspended above the side-bars from end to end of the frame. (2) The combination in a removable bed-

bottom, or bedstead frame, of the side-bars, A, standards or corner pieces, B, end-bars, C, and the elastic fabric, D, combined and arranged substantially as and for the purpose specified. (3) The inclined double end-bar, C, of the bedstead frame, arranged substantially as and for the purpose herein shown and described. (4) The standards, B, constructed as described, arranged longitudinally adjustable on the side-bars of a bedstead frame, to permit the inclined end-bars to be set a suitable distance apart, as set forth."

The third and fourth claims are substantially identical with the two claims of the original patent.

The object of the invention was to provide a frame by means of which the elastic, woven-wire fabric, which is the subject of letters patent to Franz Rudolph Wegman, dated March 6, 1866, could be conveniently and securely held. The invention consisted in clamping the two ends, only, of the fabric between double inclined end-bars, so that the entire strain of the weight upon the bed-bottom being lengthwise rather than crosswise, and in the direction of the greatest elasticity of the fabric, will also come upon the edge only of the end-bars; and further consisted in connecting the side-bars and end-bars by longitudinally adjustable standards, or corner pieces, which would permit the inclosed end-bars to be adjusted so as to stretch the fabric, if desired.

The object of the first claim of the reissue was to enlarge the patent so that inclined end-bars need not be indispensable, but that the invention should be made to consist, so far as these bars are concerned, in end-bars elevated above the side-bars. The elevation necessarily results from the method in which the frame is constructed, but the feature of the invention which was a novelty, and which gave to the first claim of the original patent its value, was the inclined end-bars. So also the words "attached only to the end-bars," are an undue enlargement of the original patent, if the invention is permitted to depend upon that feature. At the same time that feature is a part of the structure which indispensably belongs to it, and which the drawings exhibited, and when the claim is limited, as it must be, to double inclined end-bars, there is no expansion of the original patent. It is a matter of common knowledge that the fabric was always attached only to the end-bars, in the sense that it was supported entirely by those bars. The curtain or fringe, which sometimes hung from the end-rails to the side-rails as an ornament or finish, never was attached to the side-bars so as to have any "pull" upon them.

The intent of the second claim of the original patent was to eliminate the inclination of the end-bars and the longitudinal adjustment of the standards from the description of the invention; but the claim must be construed to require both those features, or their manifest equivalents, known to be such at the date of the invention. While protesting against this construction of the first and second claims, the learned counsel for the defendant admits that it leaves to them life and validity.

The novelty of the first and third claims was considered and sus-

tained in the *Wire-web Bed Case*, 8 FED. REP. 87, and by Judge BLODGETT in *Whittlesey v. Ames*, 13 FED. REP. 895. The infringement of those claims can hardly be doubted, after the testimony of the president of the defendant corporation, who admits that his company sold frames with inclined end-rails, though he denies that they were intentionally made so as to infringe. The standards of the second and fourth claims are thus described in the specification of the reissue:

"To the ends of each side-bar are secured, by means of bolts, *a, a*, upward projecting standards, *B, B*, made of metal or other suitable material. These bolts pass through short longitudinal slots in the standards, whereby the latter may be adjusted to stretch the cloth when desired. These standards are grooved or have ribs on their inner sides by which the ends of the end-bars, *C, C*, are held. The end-bars connect the side-bars and their standards with each other. * * * The end-bars are held in inclined positions, as shown in Fig. 1, by the ribs or grooves in the standards, and are held in place by means of screws, *c*, which are fitted through the standards, or by other equivalent devices."

These standards are upwardly projecting iron chairs, to which the end-bars are fastened and in which they rest, and which are secured to the side-bars by bolts passing through slots, and thus the side-bars are longitudinally adjustable so that the end-bars may be moved to tighten the fabric. It is plain, the elastic bed-bottom being suspended entirely from the end-bars, that a great strain will come upon them, and that each bar must be firmly secured to each of its neighbors. This necessity calls for a standard or support which shall bind the bars together, so that the strain shall not move them, and yet it must be capable of adjustment, so that the fabric may be tightened or loosened, if need be.

The novelty of the standard is attacked by letters patent No. 26,575, granted to A. M. Dye, December 27, 1859. The object of his invention was "to obtain a facile mode of straining or tightening the webbing of the [bed] bottom," and consisted in attaching the end-bars to the side-bars by means of dovetailed projections upon the bottom of the end-bars, which slide in dovetailed slots cut in the tops of the side-bars, and by a screw-bolt which passes through a hole in the dovetailed projection and beyond it into the slot, and is held firm by a nut which presses against the projection. This is a method of fastening the side-bars and end-bars together, and of longitudinal adjustment of the side-bars for the purpose of tightening the webbing, but is a very different thing from the longitudinally adjustable standard of Farnham, which rigidly binds end-bars and side-bars together. The Dye arrangement has no standard. On the contrary, the end-bar slides in a slot in the side-bar. The two systems are upon a different principle.

The defendant uses the Farnham standard without a slot in the standard, but it is made longitudinally adjustable on the side-rail in the following way: A slot is made in the rail into which a projection on the inside of the standard enters; a screw bolt runs longitudinally

through this projection and holds the side-bar firmly in its place, and is capable also of adjusting the side-bars relatively to the end-bars.

In the plaintiff's device the slots are in the standard, and the bolts pass laterally through the slots. In the defendant's device the slot is in the rail, and the bolt passes longitudinally through the slot. In each case the standard is longitudinally adjustable on the side-rails for the purpose of permitting the end-bars to be set at a suitable distance apart.

The change in the location of the slot makes it necessary that the screw which holds the rail and the standard together should move longitudinally instead of laterally. Thus far there is no change in function; there is merely a mechanical change in the form and arrangement of the parts. In the defendant's device the screw is of itself available in stretching the fabric, whereas in the plaintiff's device the fabric must be stretched by some force extrinsic to the standard; and the screws hold it after it is stretched. The defendant has thus obtained an effect additional to the one theretofore produced, but, having taken the Farnham standard and all its beneficial results, the infringement is not mitigated because another result has been super-added.

The Perkins patent was for an improvement upon the Wegman patent of March 6, 1865. The Wegman invention consisted "in constructing a mattress of spiral wire springs, linked or braided together and stretched upon a frame. * * * The springs are made of steel or other wire, wound into a spiral form by proper machinery, and linked together so that each convolution of the spring passes through two or more of the adjoining springs." The patentee also said that the spiral wire springs will ordinarily be arranged double, that is, consisting of two series of springs interwoven together, but that a greater number of spirals can be linked together to give greater strength and stiffness to the web. The Perkins invention is said in the specifications of the patent to consist "in forming cords of several spiral metallic springs in parallel coils wound together in the manner hereinafter described, and also in weaving them into a woven-wire fabric of any of the usual forms made of coiled wire for the purpose of stiffening such portions as may be necessary. Condensing somewhat the language of the specifications, "the spiral wheels from the cords are woven or coiled together, so that the convolutions of one wire lie close to and parallel to the next. The cords can be formed by introducing the end of each coil separately at one end of the cord and turning it through to the other end." In mattresses these cords are placed near the edge, and are also placed at distances apart through the fabric so as to give it the desired stiffness.

From the quotation which has been given from the Wegner patent, from the history of the improvement as detailed by the witnesses, and from inspection of the article itself, it appears that the improvement was not an invention, but was a matter of ready mechanical adjust-

ment. The recent decisions of the supreme court are emphatic in demanding for a patentable invention more than the novelty and utility which may be expected to result from the special knowledge and intelligent skill of the mechanic in the branch to which the invention belongs. *Hollister v. Benedict Manuf'g Co.* 113 U. S. 59; S. C. 5 Sup. Ct. Rep. 717; *Thompson v. Boisselier*, 5 Sup. Ct. Rep. 1042.

Let there be a decree for an injunction and an accounting with respect to the Farnham patent, and for a dismissal of so much of the bill as relates to the Perkins patent. The costs pertaining to each issue are to be taxed in favor of the successful party, but the excess only of one over the other is to be paid.

MUNDY v. KENDALL and others.

(Circuit Court, D. New Jersey. March 16, 1885.)

PATENTS FOR INVENTIONS—INFRINGEMENT—PRELIMINARY INJUNCTION—LACHES.

Where a patentee has known of infringement by a party of his patent, and acquiesced therein for a considerable length of time, a preliminary injunction will not be granted, without an explanation of such acquiescence.

NIXON, J. This is a motion for a preliminary injunction against the infringement of reissued letters patent No. 9,289, and is resisted by the defendants on the ground that the mechanism used by them does not infringe the complainant's invention. The original patent was numbered 158,967, dated January 19, 1875, and was granted to the complainant for improvement in friction-drums. This was surrendered and canceled, and the reissue was granted July 13, 1880, on amended specifications. Three new claims were added to the reissue, and the single claim of the original patent was retained. The bill of complaint only alleges the infringement of that claim. .

The question, on this motion, lies in a very narrow compass. The validity of the patent has been sustained, and the claim construed by Judge WHEELER, in *Mundy v. Lidgerwood Manuf'g Co.* 20 FED. REP. 114. In deciding the motion, I shall deem the patent valid, and accept the construction given to it by the learned judge in that case. The invention relates to new and useful improvements in friction-drums for pile-drivers and hoisting-machines, and is said in the specifications "to consist in making the friction surface of the drum of pieces of wood confined endwise in a shell formed on the inner side of the gear-wheel; such pieces of wood being dove-tailed in, and turned at an angle of 30 to 40 degrees, to fit within a conically recessed disk on the drum." The claim is for a combination as follows:

"(4) The combination of a tubular and sliding drum, A, loose on a shaft, G, and a friction-cone, D, of the fast-driven spur-wheel, E, having spring,

P, to repel the said cone, and provided with a side flange supporting the cone, N, as and for the purpose described."

It contains six elements: (1) a drum; (2) a shaft; (3) friction-cone; (4) a spur-wheel; (5) a spring; and (6) a side flange. The harmonious connection of these parts in an organized mechanism constitutes the complainant's friction-drum; and the proofs show that its addition to a hoisting-engine has been found so useful, and its use so popular in the trade, that it has become quite difficult to sell a hoisting-engine unless it is supplied with a friction-drum containing the essential features of the complainant's invention. The machine of the defendants which is alleged to infringe has substantially the same organization. It has the tubular and sliding drum; the shaft in which the drum runs loose; a friction-cone; a driving-wheel fastened to the shaft; springs to regulate the pressure between the friction surfaces, and to throw the parts out of connection with promptness when required; and a side flange to support the friction surface. The differences are that the friction surface of the complainant's patent is wood, and that of the defendant's, leather; that the complainant has one spring to regulate the pressure, and the defendant, two; that in the complainant's machine the bearing of the friction surface is between the inner face of the drum-flange and the outer face of the friction-cone, while in the defendant's it is between the outer face of the drum-flange and the inner face of the friction-cone. But these changes are merely mechanical, or the substitution of well-known equivalents.

I should have no doubt about the propriety of issuing the injunction if it was not so plainly to be inferred from the complainant's affidavits that he has been familiar with the defendant's infringement, and has assigned no reason why he has not proceeded more promptly in stopping it. The affidavits nowhere disclose when he first had knowledge. A patentee need not expect to obtain a preliminary injunction in this district where he has known of the defendant's infringement, and has acquiesced in the same for any length of time, without first explaining the reason for his acquiescence. As this matter was not adverted to, by the counsel on either side, at the hearing, I will give the parties 10 days in which to supply affidavits on the subject of the knowledge and acquiescence of the complainant in this regard. When these affidavits are put in, I will determine whether an injunction should be ordered or refused, or whether the proper relief will not be an order that the defendants give a bond, with satisfactory security, for the payment of all damages which may arise for infringement after the date of this application if the complainant's patent shall be sustained in final hearing.

RAILWAY REGISTER MANUF'G CO. v. NORTH HUDSON C. R. CO.
and others.*(Circuit Court, D. New Jersey. February 3, 1885.)*

1. PATENTS FOR INVENTIONS—INFRINGEMENT—DEFENSE OF IRREGULAR ISSUE BY PATENT-OFFICE.

In a suit for infringement a patent cannot be invalidated by showing that the requirements of the statute, to be observed by the commissioner of patents in order to its issue, have not been regarded.

2. SAME—DURATION OF PATENT—IMPROPER ISSUE—FOREIGN PATENT.

Where letters patent have been issued by the patent-office for a period of less than 17 years, because of a reference to a supposed foreign patent, and the inventor has refused to accept them, and on further examination such letters are canceled and a new patent issued, the time intervening between the issue and allowance of the patent should not be deducted from the term of the patent, but the patentee be allowed to enjoy his monopoly for the full term of 17 years.

In Equity.

NIXON, J. When the above case came up for final hearing, the counsel for the defendants raised two preliminary questions, which were supposed to be decisive, and which, if ruled in favor of the defendants, would relieve the court from the duty of considering the controversy upon its merits. The two questions were (1) whether the complainant's patent was not invalid because no written specifications and claim were, in fact, signed by the inventor, nor was his signature attested by two witnesses, as required by the statute, before the letters patent could be issued; (2) whether the letters patent were not void because issued for a greater length of time than the statute allowed. The court considered these matters of sufficient gravity and importance to request the counsel of the parties, on a preliminary argument, to confine themselves to their discussion.

1. The facts in regard to the first question are these: On the twenty-ninth of December, 1877, John B. Benton, the inventor, made application in writing to the patent-office for letters patent for "improvement in fare registers." It consisted of a petition, oath, specification, and six claims, appointing C. C. Beaman, Jr., Esq., his attorney, with full power of substitution and revocation, to prosecute the application, and to make alterations and amendments therein. The specification was signed by the applicant and attested by two witnesses, and was verified by the oath of the patentee that he was the original and first inventor. On the third of January, 1878, the patent-office gave notice that the first, second, third, and sixth claims were rejected, having been anticipated by other patents. Matters thus stood till February 10, 1879, when Mr. Beaman gave notice to the commissioner of patents, to associate with him Messrs. Baldwin, Hopkins, and Peyton, as attorneys in the case. On the twenty-ninth of March following, the patent-office, at the request of Baldwin, Hopkins, and Peyton, erased the entire specification before filed, except the signatures,

and in lieu thereof, inserted new specifications and claims. These new specifications were not signed by Benton nor attested by any witnesses. They were a substitute for the former, at the request of the attorneys, and contained 16 instead of 6 claims.

Owing to suggestions of anticipation made to the attorney of the applicant, the third, fourth, eleventh, twelfth, thirteenth, fourteenth, and fifteenth claims were erased on May 19, 1879, and the first, third, fourth, and fifth, as re-numbered, on the seventh of August following. Other changes were made; and on August 20, 1879, the commissioner of patents declared a preliminary interference with a pending application of Fowler and Lewis, filed April 2, 1879, as to the first, second, and third claims, as they then stood. These three claims were again amended November 20, 1879, the first interference dissolved; and on the eighteenth of December following a second interference was declared upon the amended claims. After being involved for some time in the technicalities of the patent-office, Lewis and Fowler seem to have withdrawn from the interference proceedings, and the complainant had the patent of its assignor, Benton, allowed with the then claims as last amended; which, it is alleged by the complainant, were merely a fuller restatement of the invention claimed by Benton in the fifth claim of his original application. The defendants, on the other hand, insist that they are for an entirely different invention. Upon this important question in the suit, I shall express no opinion until it is more fully presented and argued by the respective parties.

Outside of that question, I do not find any irregularity in the method of procedure which authorizes me to declare the patent void. There is a long list of cases holding that patents cannot be invalidated by proving that the requirements of the statute to be observed by the commissioner in order to their issue have not been regarded. Section 4920 of the Revised Statutes enumerate the five special defenses which may be pleaded in a suit for infringement. If congress had intended that the validity of patents might be assailed collaterally for other reasons, it would have said so in explicit terms. The only defenses set up in the answer in this case are (1) that Benton was not the original and first inventor of the alleged invention in the complainant's patent; (2) that the matters and things patented had been in prior use more than two years before the time when the application for the letters patent was made; (3) non-infringement; and (4) that the fare registers used by the defendants are embodied and contained in certain letters patent granted to Lewis and Fowler. No suggestion is made that the patent is void for fraud or irregularity in obtaining it. The supreme court in *Rubber Co. v. Goodyear*, 9 Wall. 797, held that congress did not mean a patent to be abrogated collaterally, but had left the remedy, in such a case, to be regulated by the principles of general jurisprudence, quoting with approbation the remark of Chancellor KENT, in *Jackson v. Lawton*, 10 Johns. 23,

that "unless letters patent are absolutely void on the face of them, or the issuing of them was without authority, or was prohibited by statute, they can only be avoided in a regular course of pleading, in which the fraud, irregularity, or mistake is regularly put in issue." In the recent case of *Giant Powder Co. v. Safety Nitro Powder Co.* 19 FED. REP. 511, Judge SAWYER says that the supreme court has over and over again affirmed the principle that "all questions of fact behind the patent are to be examined, heard, and conclusively determined by the commissioner of patents." See, also, on this point, Curt. Pat. § 274; *Hartshorn v. Eagle Shade Roller Co.* 18 FED. REP. 91, and cases there cited; *Crompton v. Belknap Mills*, 3 Fisher, 541; *Mowry v. Whitney*, 14 Wall. 434.

2. The second question may be disposed of in fewer words. On the argument I was inclined to the opinion that the complainants' patent must be reckoned void because it was practically granted for a longer term than the law allowed, but on careful examination of the facts I am not sure that this is a correct view of the transaction. It appears that while the proceedings for the patent were pending an English patent, granted to one Towle, dated November 2, 1877, was introduced into the case, not to show that the inventor, Benton, had patented the invention abroad, but to prove its non-patentability here by reason of the anticipation there. Benton met the reference; and from the fact that a patent was granted to him, it is presumed he satisfied the proper officers of the department that the date of his invention was anterior to the date of the English patent. This claim was allowed July 24th, and the letters patent were issued August 17, 1880. It does not appear when the patentee received them; but, on the fifth of October following, these letters patent, as granted, were returned to the office, with the statement of the solicitors that they had not been and could not be accepted by the inventor because not issued for 17 years, as the law authorized and required. It seems that before forwarding them some of the officers of the patent-office had printed over the specification the words "Patented in England, November 2, 1877." The legal effect of such an indorsement was to limit the life of the patent, as issued, to the period which the English patent had to run. It is conceded that this was a mistake, and that the patent-office had inadvertently assumed that the Towle English patent had been proved to have been obtained by or in the interest of Benton.

The commissioner of patents at once ordered the letters patent numbered 231,207 "to be returned to the original files of the application and to be canceled, and that letters patent in due form for the invention therein described be issued to John B. Benton, pursuant to his petition and the record in the case. The cancellation followed and letters patent No. 233,915, and dated November 2, 1880, were issued for the full period of 17 years from their date. If the first patent had been accepted by the patentee and he had brought suit

upon it against infringers, or had claimed any privileges or exercised any rights of ownership under it, a grave question would arise whether afterwards the commissioner had any power to make any change, except by surrender and reissue under the provisions of section 4916 of the Revised Statutes; but he did nothing of the sort. Under the patent law the invention and the government were parties to a contract, and when the officers of the government said to him in effect, "Accept of a monopoly of your invention for a less period than seventeen years," he had a right to reply, "No; I repudiate such a contract; give to me what the law allows." And when it is given to him, the time intervening between the issue and allowance of his patent should not be deducted from the term of the patent unless he has derived some advantage therefrom. He will only enjoy his monopoly for the 17 years. If the complainant should have a decree for infringement, damages and profits will only be allowed, on the accounting, from the date of patent.

The case must be heard upon the merits.

NOTE.—Since preparing the foregoing opinion my attention has been called to the recent decision of the supreme court in *Mahn v. Harwood*, 5 Sup. Ct. Rep. 174. I have examined the case with care, and do not find anything therein which affects or controverts the reasoning and conclusions in the above case.

NEW YORK BELTING & PACKING Co. v. MAGOWAN and others.

(Circuit Court, D. New Jersey. December 10, 1884.)

PATENTS FOR INVENTIONS—INFRINGEMENT—PRELIMINARY INJUNCTION—WANT OF NOVELTY.

The novelty of the patent being in doubt, the application for a preliminary injunction is refused, on condition that defendants execute a bond to secure complainant on the accounting, if, upon final hearing, the patent is sustained, although the infringement is clearly shown.

On Motion for Preliminary Injunction.

NIXON, J. This is an application for a preliminary injunction. I have no difficulty on the question of infringement. The exhibits of the defendants' manufacture, both in 1882 and 1884, show quite clearly, to my mind, that they are infringements of the complainant's patent. But the evidence of the defendants, and especially the affidavits of the expert, Weigand, throw some doubt on its novelty. Under the circumstances, I regard it as a proper case in which to refuse an injunction, if the defendants will execute a bond to secure the complainant on the accounting, if, upon final hearing, there shall be a decree sustaining the validity of the patent. The injunction is therefore withheld, provided that the defendants, within 10 days,

shall file a bond to the complainant corporation, in the penal sum of \$10,000, conditioned for the payment of profits and damages for all subsequent infringement, if the patent shall be finally sustained; the bond to be approved by the clerk, and the defendants to file an account, under oath, every 60 days, of the rubber manufactured and sold by them, of the kind and character shown in the exhibits.

THE ALASKA and her Cargo.¹

(District Court, S. D. New York. April 17, 1885)

1. SALVAGE—RUDDERLESS STEAMER.

The steamer Alaska, of the Guion line, while on one of her regular voyages from Liverpool to New York, encountered heavy weather, and when she was some 600 miles from New York, her rudder was found to be broken and unserviceable. She accordingly lay to, while her captain exhibited signals of distress, and attempted various expedients for steering her, none of which proved available. At the end of two days the steamer Lake Winnipeg, of the Beaver line, observed the signals and came to her assistance. At an interview between the captains of the two steamers, it was agreed that the captain of the Lake Winnipeg should assist the Alaska to New York by allowing herself to be towed and to serve as a rudder for the Alaska, which was the faster steamer. Chains were passed from each stern-quarter of the Alaska to the bows of the Lake Winnipeg, distant some 90 fathoms, in such a manner that the Lake Winnipeg, by altering the direction of her bow, would slue the stern of the Alaska to one side or the other, and thus keep her head pointed in the required direction. The vessels proceeded in this way to New York, with the exception of some 149 miles, which the Alaska during 18 hours of one day ran alone, keeping in the desired direction by means of her sails. On the fourth day they arrived in New York; and on the day after arrival, and without making a previous demand, the owner of the Lake Winnipeg filed a libel for salvage. The Alaska, with her cargo and freight, was valued at \$1,041,542, while the Lake Winnipeg, her cargo and freight, were worth between \$325,000 and \$350,000. *Held*, that \$26,039, or 2½ per cent. of the value of the Alaska, and cargo was a proper salvage award. *The Great Eastern*, 3 Moore, P. C. (N. S.) 31. The facts of her salvage case stated.

2. SAME—AMENDMENT TO LIBEL—GENERAL REPAIRS TO SALVING VESSEL—EVIDENCE.

In addition to salvage, the libellant claimed a large sum for general damage to the Lake Winnipeg. After the return of this vessel to Liverpool from New York, she was put upon a dock; and it was alleged that various injuries were then discovered, which were claimed to have been the result of her service to the Alaska. The original libel was thereupon amended on the trial to take in this claim. *Held*, that such injuries, if proved, might be recovered; but that the evidence was insufficient to charge the Alaska specifically with the general repairs referred to. But in fixing a gross award full consideration was given to the Lake Winnipeg's liability to general injury in such a service, and an allowance made sufficient to cover all such damage as might naturally and reasonably be deemed incident to her peculiar service.

3. SAME—LIABILITY OF VESSEL FOR SALVAGE DUE BY CARGO.

A ship is not liable for the proportion of salvage due from her cargo.

4. SAME—COSTS.

Respondents claimed that costs should not be allowed (1) because there was no demand before suit; and (2) because excessive bonds for 20 per cent. of the

¹Reported by R. D. & Edward Benedict, Esqs., of the New York bar.

value of the cargo were taken. *Held*, that the circumstances of this case were so peculiar, and a claim of salvage necessarily so indefinite, that a previous demand was immaterial. It was necessary for the libellant to file its libel at once to enforce its claim against the cargo before it was delivered. Also, though stipulations were taken on account of the cargo to the amount of 20 per cent., there was no evidence of any objection to giving such stipulations, and they were taken upon the simple written obligation of the insurers, without sureties. Costs were allowed, with the exception of the depositions taken in Liverpool as to the alleged general damages.

In Admiralty.

Foster & Thompson, for libellants.

Wilcox, Adams & Macklin, for the Alaska.

Scudder & Carter and Geo. A. Black, for Atlantic Mutual Insurance Company.

BROWN, J. The libel in this case was filed to recover compensation for salvage services, rendered by the libellant's steamer Lake Winnipeg to the steam-ship Alaska, in assisting her to New York, from the fifth to the eighth of February, 1885. The Alaska is an iron passenger steam-ship, of the first class, having but four equals afloat. She is of about 6,930 gross tons, 525 feet long, by 50 feet deep. Her power is 1,800 nominal, working up to 11,300 horsepower, and her ordinary full speed is from $17\frac{1}{2}$ to 18 knots per hour. She left Liverpool for New York on January 24th, with a cargo of fine goods, and 291 passengers. After three or four days of fair weather, during which she made her usual course, she encountered one of the severest of the Atlantic storms, lasting from Tuesday, the 27th, until Saturday, the 31st, when the weather became moderate, and so continued, with the exception of an ordinary gale on Monday, until Tuesday, February 3d. About 8 o'clock in the morning of that day, her rudder was found to be broken and unserviceable. Immediate efforts were made to repair and use the broken rudder, and when this was found to be impracticable, the use of heavy stream cables running aft of the ship were tried as a substitute for a rudder; but it was found insufficient for a ship of her great size. All of Tuesday and Wednesday were employed in these efforts, the ship meantime lying to, and drifting some 50 miles to the eastward. Three black balls were exhibited by day, and three red lights by night; and rockets were also sent up to attract attention, and call in the aid of vessels that might come within sight. About 8 o'clock in the evening of Wednesday, the Lake Winnipeg, bound from Liverpool to New York, observing these signals nearly abeam, and about 12 or 13 miles distant to the northward, bore down towards the Alaska, and came to at a little distance on her starboard side. Capt. Murray of the Alaska thereupon went in a small boat to the Lake Winnipeg, and arranged, in an interview with Capt. Gould of the latter, that the Lake Winnipeg should assist him in proceeding to New York by allowing the use of the Lake Winnipeg as a rudder, to be fastened astern of the Alaska by means of two chain cables extending from

each side of the stern of the Alaska to the windlass of the Lake Winnipeg. The vessels at this time were about 600 miles from New York, and about 190 from Halifax.

On account of the great size of the Alaska, Capt. Gould was at first unwilling to undertake to proceed with the Alaska to New York, but wished to go to Halifax instead; but upon the urgent request of Capt. Murray, after conference with his officers, he agreed to go with her to New York. It was agreed to use the cables of the Lake Winnipeg; and thereupon, about 10 o'clock, Capt. Murray returned to the Alaska. After getting in his own cables, which were still out, he exhibited a blue light, the signal agreed upon, whereupon the Lake Winnipeg came up astern within 50 or 75 fathoms' distance. A small boat was then manned and sent out from the Alaska, with ropes, to the Lake Winnipeg, where the ropes were bent upon the cables, which by that means were hauled to the Alaska by her crew, and made fast to the stern bullards of the Alaska, one upon each side. The length of the cables between the two vessels was about 90 fathoms. On the Lake Winnipeg, they passed through the hawse-pipe on each side, through a "compressor," and thence to the windlass where they were attached. A compressor is a somewhat recent device, placed a little forward of the windlass in the direction of each hawse-pipe, designed to keep the hawser in place, and to steady and relieve in some measure the strain on the windlass.

The officers and crew of the Alaska were occupied until about 4 o'clock on the morning of Thursday, the 5th, in getting the cables aboard and in readiness. The ordinary full speed of the Alaska being from 17 to 18 knots, and that of the Lake Winnipeg from 10 to 12 knots, it was arranged that the speed of the Alaska should be reduced for the rest of the voyage. The arrangement with the engineer's department was such that full speed should consist of 46 revolutions only per minute, instead of 61; half speed, 36 revolutions, instead of 45; and slow, 26 revolutions, instead of 32. To prevent any undue strain upon the cables before the action of the two vessels was fully proved, the Alaska started up moderately, and proceeded for a time under the reduced half speed only; and the speed of the Lake Winnipeg was regulated so as to approach as nearly as possible the speed of the Alaska, keeping the cables moderately taut. All orders for steering were given from the Alaska by signals. If the Alaska wished to veer to starboard, the head of the Lake Winnipeg was put to port so that she would go off the port quarter of the Alaska, and thereby, drawing the Alaska's stern to port, direct her head to starboard, as desired. And, *vice versa*, if the Alaska wished to go to port, the Lake Winnipeg was steered to starboard. The direct course for New York was about W. $\frac{1}{2}$ N.

By the above arrangement the vessels proceeded without difficulty in the desired course, and the Alaska was soon put at her reduced full speed. During the 19 hours following, up to 11 o'clock of Thurs-

day night, they made about 211 miles, when the wind having again increased to a moderate gale from the northward, it was deemed prudent, to prevent the possible parting of the cables, to go "dead slow;" *i. e.*, just enough to keep headway on, or about two to three knots per hour. This was maintained until about 4 o'clock in the morning of Friday, the 6th, when the wind and sea having moderated, the Alaska proceeded at her reduced full speed as before. During the following 13 hours, up to about 5 o'clock P. M. of that day, they made about 138 miles, when the weather again becoming boisterous, with thick snow, making it difficult to see signals, the speed of the vessels was reduced to "dead slow" as before, namely, two or three knots only. In the mean time it had been arranged by signals that a green light exhibited by the Lake Winnipeg should direct the Alaska to go ahead at full speed; a blue light, that she should stop.

The testimony showed that the effect of a high wind upon a propeller not kept to her course is to send her bows off some 10 or 12 points from the wind, on account of the greater free-board forward. The wind at this time being to the northward, the Alaska, while going "dead slow" only, gradually fell off to about a south-westerly direction. Between 11 and 12 P. M. the wind moderated, so that it was possible to proceed. According to the testimony of the Alaska's witnesses, the Lake Winnipeg, by some maneuver to the starboard, swung the stern of the Alaska still further to the southward, so that her head went round as far as S. S. E., bringing the wind on her port side. The Winnipeg afterwards went upon her port quarter to slue the Alaska's stern to the eastward, and in a measure did so. At 11:53 the Alaska was put at half speed, and shortly afterwards, as it would seem from the engineer's log, a signal light was exhibited from the Lake Winnipeg, which numerous witnesses from the Alaska testify was a green light; several witnesses from the Lake Winnipeg testify with equal positiveness that it was a blue light. The Alaska, understanding this light as a signal to go ahead full speed, gave this order to her engineer at 12:10; and she was accordingly gradually brought to her full speed of 46 revolutions. Shortly afterwards both cables parted, and the Alaska's engines were immediately stopped at 12:17. One cable was found snapped at the stern of the Alaska, and the other at the bow of the Lake Winnipeg. The cable hanging from the Alaska was hauled in and recovered by her. The Lake Winnipeg was unable to haul in the cable hanging from her bow; and after several hours' attempt to do so, slipped it, and it was lost. By the parting of this cable, and the rebound of the short piece on the Lake Winnipeg, one of her compressors was damaged, and the steam-gear of the windlass also so much damaged that it could not be used. On Saturday morning, at about day-break, the Alaska, after hauling in the cable, and the wind being favorable, proceeded towards New York without the Lake Winnipeg in tow as a rudder, but signaled the latter not to abandon her, to which the latter by signals agreed.

The evidence shows that a propeller, when under suitable headway, naturally runs up head to the wind; and in like manner, under reversed engines, will go up stern to the wind's eye. When the wind is anywhere forward of abeam, sails may be made use of, and so trimmed that, in combination with some changes in speed, a steamer can be kept within one or two points of her desired course, making, not a straight course, but a somewhat zigzag path towards her destination. When the wind is aft of abeam, if she has no temporary rudder, she must lay to; and if upon a lee shore, she could crawl off by reversing and going into the wind's eye. During Saturday, the wind being favorable, the Alaska proceeded on alone, using her sails as above stated, from about 4 A. M. until about 10 P. M., making 149 miles. The Lake Winnipeg at about the same time that the cables broke, had one of her feed-pumps broken, occasioned, as it is said, through the "racing" of the engine, upon going astern, resulting in the loss of two knots' speed. She pursued the Alaska during Saturday as fast as she was able, being sometimes nearly hull down. About 10 o'clock, the wind having died away, and the Alaska being, therefore, unable to steer her course, the remaining cable was again sent aboard the Lake Winnipeg, as soon as she had come up, and made fast as before. They were then about 175 miles from Sandy Hook. They got under way at about one and a half o'clock on Sunday morning, and arrived inside of Sandy Hook at about 4 P. M., having taken a pilot aboard off Fire island at about noon. The Lake Winnipeg then left her, and proceeded up the bay; and the Alaska was subsequently taken by 10 tugs to her wharf.

The Lake Winnipeg is an iron-screw propeller, about 325 feet long and 3,300 tons gross tonnage, belonging to what is known as the "Beaver Line," running from Liverpool to Montreal in summer, and to New York in winter. Her value at this time was about \$250,000, and her cargo about \$95,000. Besides her master, she had 3 officers, a chief engineer and 4 assistants, and 46 other men, forming the ship's company. Upon this trip she had 3 saloon passengers, and 21 steerage passengers. She left Liverpool on the afternoon of January 22d, passed through the hurricane in the succeeding week with difficulty, but without apparent serious injury; and, but for the detention in assisting the Alaska, would have reached Sandy Hook on the morning of February 7th, instead of the afternoon of February 8th.

The libel was filed on the eleventh of February, the day after the Alaska reached her dock. The vessel being in custody and not bonded, the taking of testimony was immediately commenced, and a large mass of evidence has been taken. On the thirtieth of March, upon affidavits showing that the Lake Winnipeg, after her return trip to Liverpool, on being put upon the graving dock, had been found to have sustained considerable damage, said to be attributable to her service to the Alaska, depositions were ordered to be taken before the American vice-consul there on that subject, and the log of the Lake

Winnipeg upon her return trip to be produced. The evidence thus taken was received during the hearing of the cause, and an amendment to the libel allowed, alleging damages received from rendering the services to the amount of some £7,500.

The principal contention in the case has been as regards the basis upon which compensation for the Winnipeg's services should be awarded. The libel alleges the case to be a very meritorious salvage service; that the Alaska when reached by the Lake Winnipeg "was virtually at the mercy of the winds and waves; that in the course of the efforts to rescue her, and during the gale of Thursday night, the vessels became unmanageable and were stopped; that the Lake Winnipeg was in constant danger of collision; that it was necessary to watch every motion of the Alaska, and to work the helm and engines of the Lake Winnipeg accordingly; that the following night, during the gale with snow, the most unremitting diligence was required from the Lake Winnipeg to prevent a collision between the two vessels, which would have resulted in the foundering and total loss of both; that but for the libellant's services the Alaska would have been exposed to great risk of total loss, and would probably have been totally lost; and that the value of the Alaska and her cargo was upwards of \$1,250,000."

The answer avers in substance that the Alaska, though without a rudder, was in no danger; that in requesting the Lake Winnipeg to serve as a rudder, "the sole purpose of such request was to accelerate the passage to New York;" that though the progress of the Alaska was retarded through the want of a rudder, yet that "no danger was apprehended by either her officers, passengers, or crew, nor did any danger at any time exist;" that neither of the vessels was at any time unmanageable, and avers that "no collision, with proper precaution, could have happened then, or at any time, and that after the Lake Winnipeg was attached, the Alaska's engines kept working slowly ahead, so as to prevent any possibility of accident."

The Alaska, it is urged, was at no time in any danger, or even any reasonable apprehension of danger, notwithstanding the loss of her rudder, because, among the numerous devices that may be resorted to for steering purposes, some would certainly have been found to answer the purpose, although the means tried on the first two days had proved unsatisfactory, those means having been first tried, because, if successful, they would have permitted the Alaska to proceed under full speed; and, *second*, because even without a rudder, the vessel was not unnavigable, but could have made her desired course whenever the wind was forward of abeam; and whenever not favorable to her progress, she could, by backing, at all times have kept out of danger, and thus in time have reached port. The evidence showed one or two instances of steamers navigated in this manner. Capt. Price, on a passage from Melbourne to England, in an iron steamer of 3,000 tons burden, lost his rudder while running south of New

Zealand, and brought his ship 14,000 miles safely around Cape Horn to England, with the use of a temporary rudder, consisting of two pieces of timber lashed together. Capt. Sumner, in April, 1871, master of the steamer Virginia, of the National line, 3,500 tons, lost his rudder in a gale, about 1,100 miles from New York, and arrived at Sandy Hook on the 18th without assistance, using a hawser and a spar tow, but "found the head sails set back of more service than either, on the average." Capt. Kemble, in command of the wooden steam-propeller Knickerbocker, of the Cromwell line, 1,150 net tons, in a voyage from New Orleans to New York, in April, 1884, lost his rudder at 3 o'clock in the afternoon of Sunday about 150 miles S. S. W. of Hatteras. His course was N. E. and under favorable winds from that direction he came within 100 miles of Sandy Hook by the use of his propeller with sails, in the manner above described, without any rudder, and without loss of time. The weather then becoming mild, he got in place a temporary rudder made from spars and spar lumber, with which he reached New York some 16 or 17 hours only behind time.

These instances are sufficient to illustrate, what is doubtless true, that a steamer, in other respects staunch and well equipped, though of the size of the Alaska, is not in a desperate situation from the loss of her rudder merely, and in abundant sea-room is not in immediate danger. In the numerous cases of salvage reported, very few are found arising upon a loss of the rudder only. It is, perhaps, a fair inference from this circumstance that, in most cases where a rudder has been lost, some of the many devices which are available for steerage purposes have been successfully employed, so as to avoid calling in salvage assistance. One case of this character, that of *The Dido*, 2 Paine, 243, arose in this district some 50 years ago, in which, upon appeal to the circuit court, a decree of Bertr, J., in the district court, amounting to \$5,000, was reversed by Mr. Justice Thompson, who intimates the opinion that the brig, being complete in all other respects, and not being unnavigable through the mere loss of her rudder, was not liable for salvage service on being towed in. "If the vessel was navigable so as to be able to avoid any threatened danger, although navigated with greater difficulty and delay, it ought not to be considered a case for salvage." The case, however, was not finally decided upon this ground. The brig had been taken in charge by the libelants, who were pilots, at a point about 25 or 30 miles from Sandy Hook, and about 10 miles distant from shore, and they had towed the vessel into the harbor. They afterwards, by mutual agreement, submitted the question of their compensation to the board of wardens, in accordance with the agreement between the captain and the pilots when they took charge of the ship. The wardens had allowed \$162.50. The libelants, dissatisfied, brought a suit for salvage in the district court, where a salvage award was allowed. Upon appeal, the award of the board of wardens only was allowed,

on the ground that when the service was entered upon, neither party understood or intended it to be a salvage service. In the case of pilots it is well settled that salvage compensation will not be allowed them except in extraordinary cases of difficulty, where their services are clearly outside the sphere of their official duties. *Hobart v. Drogan*, 10 Pet. 108; *The Æolus*, L. R. 4 Adm. & Ecc. 29; *The John Andries*, Swab. 226, 303. It was upon this principle, and on the understanding of the parties themselves, that the judgment in the case of *The Dido* was finally rested.

A later case, very conspicuous at the time, of a salvage award growing out of the loss of a rudder, is the case of *Towle v. The S. S. Great Eastern*, which also arose in this district, and was heard before SHIPMAN, J., whose opinion is reported in full in the *New York Transcript* of November 13, 1864. The *Great Eastern* left Liverpool, September 10, 1861, for a voyage to New York, with about 400 passengers and an equal number of officers and crew. When two days out, and about 280 miles west of Cape Clear, in a heavy storm, her paddle wheels were carried away. But she also had a screw propeller uninjured, by which she could make very good headway. On the night of the 12th she rolled with such violence in the trough of the sea as to carry from side to side of the ship all the movable objects on her deck and in her cabins. Much of her furniture was destroyed, several of her crew and passengers injured, and a great part of her luggage drenched and crushed into a mass of worthless rubbish. During that night her rudder-shaft had been twisted off below all the points of connection with the steering-gear, and the ship lay helpless in the trough of the sea, rolling heavily with every swell. Her sails were blown away in a subsequent attempt to control her movements by them, and no means were left by which her head could be brought up, and her position on the sea changed. She was as unmanageable as if her rudder had been entirely gone. The only way of getting any control of the motions of the ship was to secure some kind of efficient steering-gear by attaching it to the rudder-shaft below the point of fracture, and connecting it with the wheel. During Friday and Saturday the weather had moderated. During these two days Capt. Walker and the chief engineer had tried various devices for making use of what remained of the rudder, as well as independent expedients for steering the vessel; but all without success. The libellant was a civil and mechanical engineer, who was a passenger on the ship. He had been watching the efforts for her relief, and had formed a plan of his own. This plan was at first rejected by the captain, but about 5 o'clock on Saturday afternoon, having apparently lost confidence in his own expedients, he authorized the libellant to try his plan, and placed a sufficient number of men at his disposal. His work was completed at 5 p. m. the following day, and was found to be entirely successful. The plan adopted was the use of chains in connection with the shaft and the rudder in its disabled condition. During the same time some inde-

pendent means were also employed by the captain and officers in other ways towards the same end. But the court found that the efficient means were those adopted and carried out by the passenger.

Upon the libel for salvage services not much question seems to have been made that the service itself fell within the description of salvage services. The court, in reference to this point, say: "That the peril of the ship was great, and her position critical, in the judgment of her commander, is evident from the fact that he intrusted to this stranger a work, upon the result of which her salvation depended, and which for two days had utterly baffled him and his engineers." The chief point in litigation was whether the libellant, being a passenger, was entitled to claim a salvage reward. The authorities on this subject are fully reviewed by the court, and the conclusion arrived at that, though passengers are required to do ordinary work, such as pumping, in aid of a ship in distress, without any claim for compensation, yet they may justly claim salvage for services of an extraordinary character beyond the line of their duty, such as mere ordinary service in pumping, or working the ship by the usual and well-known means; and \$15,000 were, therefore, awarded to the libellant. See *The Connemara*, 108 U. S. 352, 358; S. C. 2 Sup. Ct. Rep. 754. As the newspaper report of this case is not easily accessible, I have quoted from it more largely, considering its interesting and novel features, than I should otherwise have done.

From the widely dissimilar cases of *The Dido* and *Great Eastern*, it is apparent, what is indeed otherwise sufficiently obvious, that the mere loss of the rudder is not in itself a conclusive circumstance as to the danger in which a ship should be regarded, and that its importance depends on the other circumstances of the case. Chief among these are the size of the vessel herself; for, upon this mainly depend the readiness, the effectiveness, or the difficulty with which temporary substitutes may be supplied. Next are the other means of control at command, the season, the weather, and the situation of the ship. With small vessels, there is usually no difficulty in supplying speedily some efficient substitute for a lost rudder. In a vessel of the size of the *Great Eastern*, whose tonnage is not stated in the opinion above referred to, but which in another case—*The Great Eastern*, 3 Moore, P. C. (N. S.) 31—is stated to have been 13,344 tons burden, it may be very difficult or impossible to supply an effective temporary rudder in time to avert disaster. Upon the more modern views of the nature of salvage services, I think a vessel of any considerable size that had lost her rudder would be deemed a proper subject of salvage. In the case of *The Anders Knape*, a steam-ship of but 401 tons, (4 Prob. Div. 213,) Sir ROBERT PHILLMORE says: "This vessel had been on the sand and had sustained some damage to her rudder. She was, therefore, in a condition in which salvage service might be rendered to her."

The *Alaska*, though of considerably less tonnage than the *Great Eastern*, yet, in comparison with vessels of ordinary size, somewhat

approached her in magnitude, being somewhat above half the latter's tonnage. That there was no small difficulty in providing suitable steering appliances after the loss of her rudder is sufficiently evident, not merely from the great size of the ship, but also from the loss of two days' valuable time in the unsuccessful effort to provide them. There were doubtless various other expedients that might have been tried; and I have little doubt that sooner or later, had no assistance been availed of, her master would have found some means of steering her. But in the mean time she was clearly in an unseaworthy condition. She would be exposed, therefore, to more than ordinary hazards in the severe gales incident to the most boisterous season of the year. The evidence shows, it is true, that with favorable winds forward of abeam, a propeller may pursue her course through the use of her sails and her propeller so as to make a zigzag course towards her destination. That this cannot, however, be safely relied on in a severe gale by a very large steamer is rendered pretty certain from the experience of the Great Eastern, whose sails in a similar attempt were blown away. Nor could she trust to herself at all in a calm, or under the influence of gales near a land-locked coast, or in the vicinity of reefs or shoals, or when subjected to tides and currents near land, since, under these circumstances, she would have no means whatever of avoiding them; nor had she any available means of avoiding collisions with other vessels.

Upon the question whether the Alaska was in a fit condition to pursue her voyage towards New York, at that season, without any temporary rudder, I must find that the conduct and judgment of Capt. Murray, under the circumstances, furnish the most conclusive evidence. He was within 600 miles of New York; only about 32 or 33 hours' distance with the Alaska's usual speed, and scarcely more than 48 hours' distance under half speed of her engines. On Tuesday morning, when the loss of the rudder was discovered, the wind was W. N. W., and, according to her log, continued from that to W. by N. during nearly all of Tuesday and Wednesday. The wind, therefore, was from a favorable quarter. The captain was most anxious to reach port speedily. Had it been deemed safe or prudent to proceed towards the coast without a rudder, by a zigzag path, through the use of the sails and the propeller, it cannot be doubted that he would have done so. That he did not proceed, but spent two days, in the mean time drifting E. S. E. some 53 miles, in the attempt to supply a temporary rudder, I must hold to be conclusive proof that it was not safe or expedient to do so with a vessel like the Alaska at that season. Her situation, therefore, was that of a great and valuable ship disabled in an essential part, and unable, in the judgment of her most competent commander, to proceed with safety towards her port of destination until the want of a rudder was in some way supplied; while the means and the time necessary to supply this want were, to some extent at least, uncertain. That such a vessel, in such

a situation, was a proper subject of salvage assistance I cannot doubt; nor that the service rendered was one of no inconsiderable merit. In the case of *The Reward*, 1 W. Rob. 177, Dr. LUSHINGTON, in distinguishing a towage service from a salvage service, says:

"Mere towage service is confined to vessels that have received no injury or damage, and mere towage reward is payable in those cases only where the vessel receiving the services is in the same condition she would ordinarily be in without having encountered any damage or accident."

It was upon this distinction that in the case of *The Emily B. Souder*, 15 Blatchf. 185, only a towage reward was allowed; because the steam-ship, when taken in tow from 50 to 100 miles distant from New York, was in the same condition as to her motive power as when she left St. Thomas, being under no additional disability, and desiring only to expedite her progress.

It is urged that in the present case Capt. Murray, when the services of the Lake Winnipeg were secured, desired only to expedite his progress to New York; and in one sense this is doubtless true. But the ship was not in the same condition in which she had hitherto been; and she had been for two days drifting to the eastward because she could not proceed with safety. Exhibiting signals, flash-lights, and rockets, to attract the attention and aid of vessels within sight, are further strong evidences of the Alaska's need of assistance. Such signals are always held significant of the intention of the parties. *The Jubilee*, 42 Law T. (N. S.) 594. To disregard such signals is a gross breach of maritime obligation; to exhibit them when there is no need of assistance would be a wanton breach of good faith upon the sea. The signals in this case were given, as the sequel shows, not to attract attention merely, but to obtain help. To tow or to steer another vessel that is under no necessity whatever of such a service, but desires it only for her mere convenience in reaching port a little earlier, is wholly outside of the business of such vessels as the Lake Winnipeg at sea. Such service in departing from the proper business of her voyage is not expected to be asked or given, except under some reasonable apprehensions of difficulty or danger; and that is a sufficient basis for a salvage award. In the case of *The Alphonso*, 1 Curt. 376, 378, CURTIS, J., says:

"The relief of property from an impending peril of the sea, by the voluntary exertions of those who are under no legal obligation to render assistance, and the consequent ultimate safety of the property, constitute a case of salvage. It may be a case of more or less merit, according to the degree of peril in which the property was, and the damage and difficulty of relieving it. But these circumstances affect the degree of the service, not its nature."

In the case of *The Charlotte*, 3 W. Rob. 68, 71, it is said:

"It is not necessary that the distress should be actual or immediate, or the danger imminent and absolute. It is sufficient if, at the time the assistance is rendered, the ship has encountered any damage or misfortune which might possibly expose her to destruction if the service were not rendered."

This expression of the law has been since repeatedly affirmed and followed. *The Strathnaver*, L. R. 1 App. Cas. 58, 65; *The Saragossa*, 1 Ben. 551, 553. So, in the case of *The Raikes*, 1 Hagg. 247, it was held to be sufficient that the vessel is "in a situation of actual apprehension, though not of actual danger." *The Phantom*, L. R. 1 Adm. & Ecc. 58; *The Joseph C. Griggs*, 1 Ben. 81. And "the degree of danger," says Dr. LUSHINGTON, "is immaterial in considering the nature of the service." *The Westminster*, 1 W. Rob. 232. In the recent case of *McConnachie v. Kerr*, 9 FED. REP. 50, where the services were denied to be of a salvage character, this court, upon a careful consideration of the subject, defined a salvage service as "a service that is voluntarily rendered to a vessel needing assistance, and is designed to relieve her from some distress or danger, either present or to be reasonably apprehended;" and a towage service as "one which is rendered for the mere purpose of expediting the voyage, without reference to any circumstances of danger." Affirmed on appeal. 15 FED. REP. 545. The same views are clearly expressed by BLATCHFORD, J., in the case of *The Leipsic*, 10 FED. REP. 585, 589.

In endeavoring to fix a suitable salvage reward for the services rendered, all the circumstances of both vessels have to be considered.

1. The *Alaska* was not at the time in any immediate peril; although, as the log shows, the sea was high, and she was lurching heavily. She was staunch in every respect, and there appears to have been no apprehension on the part of her officers, crew, or passengers of any immediate danger. During the two days, while the different devices for steering were tried, the ordinary life of the passengers, with their games and pastimes, went on as usual. There is no evidence of any lack of confidence in the master's ability, sooner or later, as I have said, to reach New York or some other port without assistance, either by some successful expedient for steering, or by proceeding on in favorable weather without it. The small stock of surplus coal, however, leaves a steamer like the *Alaska* no great latitude for experiments, or for proceeding long much otherwise than directly upon her course. But it has been held in many cases that the ability of steamers to reach some port by sail does not prevent a towage service from receiving a suitable salvage reward; although the ability of the ship in this respect bears directly upon the amount awarded. See cases of *The Saragossa*, *The Colon*, and other cases *infra*, 613 *et seq.*

The loss of the rudder to a vessel like the *Alaska* was certainly a serious loss. This loss might, perhaps, have been supplied; but until it was supplied she was unable to proceed with safety, unless attended by a companion to assist her in case of need. In the mean time, through her temporary disability in the most boisterous season of the year, she was subject to liabilities of additional disaster or accident greatly beyond the perils incident to her ordinary condition. Until effective steering appliances were obtained, although she was

not in immediate danger, there was, in my judgment, reasonable apprehension of danger, and that in no small degree. Moreover, the business interests of the ship, and of the line of which she was a part, as well as the comfort of her passengers, demanded that she should reach port as speedily as possible, without exposure to the delays and the perils of a reliance upon her own unaided and uncertain efforts. It was in this situation that the assistance of the Lake Winnipeg was urgently sought. With her, as an escort merely, ready to give aid when needed, the Alaska might, perhaps, with favorable winds, have safely gone on, steered by her sails, as she was steered all day Saturday. Had she, with such winds and such an escort, reached port safely, without any need of attaching the Lake Winnipeg as a rudder, the Lake Winnipeg would still have been entitled to some salvage award for thus attending and standing by; because her presence would have enabled the Alaska to do what she could not otherwise safely have ventured to do, viz., take the chance of the winds and weather in approaching the coast from her position at that season. Instead of adopting this course, the Lake Winnipeg was attached at once on tow of the Alaska, and put to service as a rudder. A sailing vessel, it is said, might have been used for the same purpose. If so, a sailing vessel would evidently have been less convenient, and less expeditious; and the experience of the Chateau Margaux, about a year ago, as reported, would indicate that a sailing vessel could not certainly have been relied on for such a purpose.

2. The services of the Lake Winnipeg, as a rudder made fast to the Alaska by two cables, were by no means free from danger. The situation of vessels in tow, one of another, upon the ocean, in tempestuous weather, is always attended with danger. Constant vigilance is necessary to avert it. The evidence shows unremitting care, and the necessity of frequent maneuvering of the Lake Winnipeg in this service. In the case of *The Daniel Steinman*, 19 FED. REP. 918, 921, BENEDICT, J., observes: "In such a service, care and watchfulness will not always prevent disaster;" and Sir ROBERT PHILLIMORE, in deciding the case of *The City of Chester*, 26 Mitch. Mar. Reg. 111, says: "It is well known to the elder brethren that in all these cases of large steam-ships rendering services to each other there is very great danger, and they will require skillful navigation to avoid it." An instance of damage by collision during a salvage service, and of a counter-claim in consequence, is found in the case of *The Baltic*, L. R. 4 Adm. & Ecc. 178.

In this case the sea had been high, and there was still a heavy swell when the service of the Lake Winnipeg commenced. On Thursday night, and again on Friday night, there was a sufficient gale with head winds to make it prudent, if not actually necessary, for the ships to lie to. The Lake Winnipeg stopped her engines, and the Alaska proceeded at the rate of but two or three knots; only sufficient to keep the cables taut. Part of the time on Friday night there was

snow, so that the signals could be discerned with difficulty. The evidence on the part of the Lake Winnipeg shows constant attention to the engines, and the frequent changes that were necessary in her management. Her commander had little rest during the entire service, and the regular watches were much broken up. On Friday night, shortly after the vessels had resumed their course, the cables parted. The evidence leaves some doubt as to the circumstances that led to this accident. But there is no doubt that there was a misunderstanding between the two vessels as to the signal intended to be given. A green light was seen by the Alaska, when a blue one was intended to be exhibited by the Lake Winnipeg. Had there been a misunderstanding in the opposite direction, a much worse disaster than the breaking of the cables might have happened. If no error or mistake were made, there was not, indeed, great danger. But the Lake Winnipeg, in undertaking this service, was subject to the great dangers that might easily and naturally happen through mistakes or errors notwithstanding the best intended efforts.

3. The Lake Winnipeg with her cargo was of the value of \$325,000 to \$350,000. While rendering this service to the Alaska she sustained some undoubted injuries and losses, viz.: the loss of her chain cable, damage to her windlass and hawse-pipe forward, and to one feed-pump in the engine department. These losses and injuries were not serious or of any very great value. Compensation for such losses and injuries as immediately and plainly grow out of the salvage service is always made in some form, either by a specific allowance in addition to the salvage award, or by taking it into consideration in fixing a gross sum. Besides these certain items of loss, a large claim has been presented, not in the original libel, for alleged additional injuries of a more general character, through general strain of the Lake Winnipeg, as shown by the starting of some of the plates and waterways amid-ships, and various other general injuries, and need of general repairs about her stern and rudder, and in the engine-room and machinery. These general repairs were only found necessary upon a survey of the Lake Winnipeg at Liverpool after her homeward trip next subsequent to her arrival with the Alaska at New York. They are alleged to have been the result of her services to the Alaska, and they have caused me considerable embarrassment.

It is not until recently that any such consequential injuries of a general nature have been made the subject of a claim for specific compensation. The difficulty of proving such specific injuries of a general character, and of distinguishing them from the perils of the sea proper, is very great. In the recent case (1884) of *The City of Chester*, L. R. 9 Prob. Div. 182, specific evidence of such general injury was rejected altogether in the court below; but in the gross award to the ship allowance was made for such liability to injury. On appeal, the evidence was held competent; but the libellant was put to his election to accept the gross award of £4,500 to the ship, as made

by the court below, or else to take £1,000 only as salvage reward, together with such further particular damage, as he could prove arose from the salvage services. *Bird v. Gibb*, (*The De Bay*.) L. R. 8 App. Cas. 559. While the subsequent need of these general repairs to the Lake Winnipeg is not doubted, the evidence that it arose through the aid rendered to the Alaska rests wholly upon the testimony of surveyers, inspectors, and the experts who examined her on the graving dock at Liverpool, and who gave their testimony there. Several of these witnesses on the part of the libelants, on their direct examination, testify that in their judgment these injuries, taken as a whole, are not such as would naturally be expected through heavy weather alone, but are to be ascribed to the unnatural strain, twisting, or torsion to which the Lake Winnipeg was exposed while her head was held, as it were, in a vice, by the cables attached to the Alaska, in the high seas, and unable to accommodate herself to the waves by her natural freedom of motion. Still, the judgment of these witnesses appears to be rather a theoretical judgment than to rest upon any proved facts. The careful cross-examination of these witnesses sufficiently discloses the uncertainty that attends their evidence and their opinions on this subject. The examination and survey made by them at Liverpool seem also to have been made for the purpose of procuring evidence of this character to be used against the Alaska; and yet no notice of this survey was given to her owner or agent there, nor had he any knowledge of it, or opportunity to make examination. One of the inspectors thus employed by the libelants for the purpose disagreed with the others, and his testimony contrary to the rest was given on behalf of the respondents. Moreover, the log of the Lake Winnipeg shows that upon her return voyage she experienced weather of extraordinary severity; it abounds with expressions showing this almost from the beginning to the end of the voyage; it refers to masses of water taken aboard, and to injuries to the windlass and her chain covers forward, and to other severe injuries on deck, such as only extraordinary weather could produce. These circumstances were not made known to the witnesses and to the cross-examining counsel. The Lake Winnipeg, moreover, was not in any essentially different situation while steering the Alaska from that of disabled steam-ships in tow of other salving steamers, except that she had much more control of her own motions.

Cases of the latter kind are very numerous, many of them showing towage during weather much worse than that experienced during the four days the Lake Winnipeg was rendering her services to the Alaska. No evidence was given, drawn from these familiar instances, to support the hypothesis of the libelants' experts; nor did they substantiate their views by any proof of knowledge of similar general injury undoubtedly arising from the use of cables in towing. Again, had these injuries arisen from the service to the Alaska, they should have been apparent on the arrival of the Lake Winnipeg at

New York, and would naturally have caused an examination and repair by the libelants here. Nothing of that kind took place. On the other hand, one of the most competent experts, in the discharge of his duties to the insurance companies here, made what he deemed a sufficient preliminary examination upon the arrival of the Lake Winnipeg in New York, to determine whether or not it was necessary for her to go to the dry-dock for a more thorough survey, and for repairs. He found her in good condition, and saw no evidence of any such need of general repair as is now alleged. Other experts, as well as the one alluded to in Liverpool, testified upon the trial that the repairs to the Lake Winnipeg afterwards found necessary are only such as could be fully accounted for by the remarkable weather and strain of the ship, as described in the log on her subsequent voyage. For these reasons I must regard the evidence taken at Liverpool as insufficient to charge the Alaska specifically with the general repairs referred to. But in fixing a gross award, and in the share apportioned to the ship, full consideration will be given to her liability to such general injury, and an allowance made sufficient to cover all such damage as might naturally and reasonably be deemed incident to her peculiar service in the weather and other circumstances proved. In the case of *The City of Chester*, where the towing vessel, the Missouri, was subjected to greater strains, because the City of Chester, the vessel towed, was a much heavier vessel than the Lake Winnipeg, £4,500 were allowed by the court below.

Independently of the injuries and repairs just referred to, considering the disabled condition of the Alaska, her inability at that time to proceed safely towards her port of destination, her signals for assistance, the uncertainty as to her ability to extemporize an effective rudder, and thus reach port without at least very considerable delay, and the reasonable apprehension as regards what might happen to her in the mean time, if unaided, in the most tempestuous season of the year, and her consequent safety or security; considering also the great value of the ship and cargo, and the number of passengers on board, and the value of the Lake Winnipeg, which was employed in the service, and her cargo, and the additional danger to which they were exposed; and the promptitude, fidelity, and complete success with which the service was rendered,—there is clearly sufficient in the case to entitle the Lake Winnipeg, her officers and crew, to a substantial salvage reward.

It was practically immaterial to the Lake Winnipeg whether she was serving as a rudder in tow of the Alaska, or whether she was towing some smaller vessel astern of herself. In the absence of precise precedents to serve as a guide in fixing the amount of salvage, under the circumstances above stated, the cases of salvage services rendered to steamers whose engines, machinery, or propeller shaft were disabled, and in which the steamers, by the use of their sails and rudder, were still in a condition to make some progress on their voyage,

or to reach some port, seem to me to furnish the best analogy, and, on the whole, a tolerably fair one.

The principles which should guide the court in fixing salvage compensation have been recently stated by Mr. Justice BRADLEY in the case of *The Suliste*, 5 FED. REP. 102, as follows:

"Salvage should be regarded in the light of compensation and reward, and not in the light of prize. The latter is more like a gift of fortune conferred without regard to the loss or sufferings of the owner, who is a public enemy; while salvage is the reward granted for saving the property of the unfortunate, and should not exceed what is necessary to insure the most prompt, energetic, and daring effort of those who have it in their power to furnish aid and succor. Anything beyond that would be foreign to the principles and purposes of salvage; anything short of it would not secure its objects. The courts should be liberal, but not extravagant; otherwise that which is intended as an encouragement to rescue property from destruction may become a temptation to subject it to peril."

It is clear that masters of vessels, under some apprehension of danger, but not in immediate peril, ought not to be deterred from accepting proffered aid, or from seeking it when advisable, by the fear of its unreasonable cost. The following are a few of the numerous cases of disabled machinery, in which a salvage award was given for services in towing, though the vessel had the use of her sails and rudder, and might have made some port:

The Saragossa, 1 Ben. 553; value of the ship and cargo about \$100,000; towed by the *Charles W. Lord*; value of ship and cargo, \$434,000; time, 36 hours; award, (9%,) \$9,000.

The Colon, 4 FED. REP. 469; 2,686 tons; value of the ship and cargo, \$480,000; towed by the *Etna*; 1,274 tons; value of ship and cargo, \$200,000; time, four and one-half days; award, (2½%,) \$10,000.

The Leipsic, 10 FED. REP. 585; 2,000 tons; value, \$250,000; towed by the *Grecian*; 1,092 tons; value, \$90,000; award, (2½%,) \$5,500. The services in the case of the *Leipsic* were less urgent than in this.

The City of Berlin, 37 Law T. (N. S.) 307; 5,491 gross tons; value, \$1,100,000; towed by the *Spain*, of 4,512 tons; value, \$750,000; time three and one-fourth days; award in court below, £2,000, increased on appeal to (14-5%,) £4,000. (1877.)

The City of Richmond, 25 Mitch. Mar. Reg. 271; gross tonnage, 4,623; value, \$2,500,000; towed by the *Circassia*; 4,272 tons; value, \$750,000; time, 54 hours; award, (1½%,) £7,000. (1880.) The great value of the ship and cargo salvaged were here specially noted in making this large award.

The Silesia, L. R. 5 Prob. Div. 177; 3,156 tons; value, \$500,000; towed by the *Vaderland*; 2,748 tons; value, \$350,000; time, three days; award, (7%,) £7,000. (1880.) The *Silesia* was in a much more dangerous condition. The *Vaderland* went back, losing six days' time; and the loss of £500 on the charter of another vessel was included.

The Hanover, 28 Mitch. Mar. Reg. 81; 2,572 tons; value, \$350,000; towed by the Persian Monarch; 3,922 tons; value, \$700,000; time, seven days; award, ($5\frac{1}{2}\%$) £4,000. (1883.)

The Lisbonense, 28 Mitch. Mar. Reg. 1,422; tonnage, 1,681; value, \$220,000; towed by the Pascal; 1,950 tons; value, \$360,000; time, six days; award, ($6\frac{1}{2}\%$) £3,000. (1883.)

The Horace, 29 Mitch. Mar. Reg. 310; 1,060 tons; value, \$150,000; towed by the Historian; 1,830 tons; value, \$400,000; time, six days; award, ($7\frac{1}{2}\%$) £2,400. (1884.)

The France, 29 Mitch. Mar. Reg. 310; 4,281 tons; value, \$500,000; towed by the Marengo; 2,270 tons; value, \$300,000; time, four days; award, ($3\frac{1}{2}\%$) £4,500. (1884.)

The Daniel Steinman, 19 FED. REP. 918; 1,790 tons; value, \$252,000; towed by the Republic; value, \$780,000; time, 36 hours; award, (10%,) \$25,000. (1884.)

In some of the above cases there were much greater urgency and greater apprehension of danger than in the case of *The Alaska*; in others, particularly in those of *The Leipsic* and of *The Colon*, there were less. Upon the diverse evidence as to the value of the Alaska, ranging from \$400,000 to \$750,000, I adopt that of \$550,000, as her value in the condition in which she arrived in port; her freight, which was saved, \$12,042, making \$562,042; her cargo, it was agreed, was worth \$474,533,—making the aggregate value of ship and cargo \$1,041,575. The value of the Lake Winnipeg and her cargo, as above stated, was from \$325,000 to \$350,000. The award, which it seems to me, under the circumstances of this case, will do justice to all parties, will be an allowance of $2\frac{1}{2}$ per cent. of the value of the ship and cargo as above found, amounting altogether to \$26,039; of which I allow \$7,000 to the master and crew, and the residue to the owners, of the Lake Winnipeg. The award is made in the form of a percentage for convenience in apportioning the share of the cargo among the great number of cargo owners; and not because a percentage, by itself considered, affords any proper criterion of a salvage award. This apportionment to the steamer, while not covering the full claims for the repairs in Liverpool, which are not satisfactorily proved to have been made necessary by her service to the Alaska alone, is, nevertheless, intended to cover such special damages as were proved, and also to include a fair allowance for such consequential damages as she might naturally be subjected to in rendering this peculiar service in tempestuous weather on the high seas, as was done in the case of *The De Bay*, 8 App. Cas. 559, and of *The City of Chester*, 9 Prob. Div. 182.

If the allowance to the master and crew in this case is less than one-half that allowed to the passenger in the case of *The Great Eastern*, *supra*, it will be noted, on reference to the opinion of SHIPMAN, J., that the Great Eastern was clearly in a situation of present and immediate peril, which was certainly not the case with the Alaska. The award of \$15,000 in that case was properly much less than here, not-

withstanding the greater danger of the Great Eastern, because there it all went to the passenger himself for his ingenuity and services during a single day, rendered, in part, even, for his own safety; and no other property was there employed or put at risk in the salvage service; while in this case property to the amount of a third of a million dollars was employed, and exposed to more or less increased hazard. If, on the other hand, a larger sum than I have given is awarded in a very few of the cases above cited, it must be observed that the Alaska was not in immediate danger; she was not disabled in her motive power; all the towing was done by herself; the Lake Winnipeg could not have towed her, and was not desired to do so. During one-fourth of the time the Alaska proceeded alone, making about 149 miles unattended; and during most of the time the Alaska could have made her own way, needing only an escort for service in case of actual need. The amount awarded seems to me fair and liberal under the peculiar facts of this case.

Of the amount awarded to the master and crew, \$2,000 is apportioned to the master, \$500 each to the first officer and chief engineer, and the remaining \$4,000 to the other officers and crew, in proportion to their wages.

The respondents claim that costs should not be allowed to the libellant—*First*, because there was no demand before suit; and, *second*, because 20 per cent. bonds were required. The circumstances of the case, however, are so peculiar, and a claim of salvage is necessarily so indefinite, and the defense has exhibited such a very different view of the case from that of the libellant, that it is manifest that a previous demand would have been an idle ceremony, and is therefore immaterial. No offer was made by the respondents. The amount of bonds asked from those representing the cargo does not concern the claimants of the ship. The steamer has been undergoing repairs here, and loading for a voyage, which is advertised for Tuesday next. Though not giving any bonds or stipulation for herself, she has not been obstructed or detained by the libellants an hour in the whole course of the suit. Moreover, as the Alaska commenced her discharge on the day of her arrival, and her cargo would be immediately distributed, some of it being in fact delivered on the following day, it was incumbent upon the libellants, if they would secure a salvage award against the cargo, to proceed without delay, since the ship is not liable for the salvage due from the cargo. *The Pyrennee*, Brown & L. 189; *The Col. Adams*, 19 FED. REP. 795.

There was also additional reason for commencing the suit, in order to take immediately the testimony of the witnesses who were about to depart. Though stipulations were taken on account of the cargo, to the amount of 20 per cent., there is no evidence of any controversy or any objection to give stipulations to this amount. The great bulk was covered by insurance; and the stipulation was taken upon the simple written obligation of the insurers, without sureties, and without for-

mal justification. The suit also has, at every step, been prosecuted with great diligence, so as to reach a judgment before the Alaska should need to depart. So far, therefore, is the case from presenting any evidence of harsh or oppressive conduct on the part of the libelants' proctors, that it seems to me eminently the reverse of that, both as respects the ship and the stipulators for the cargo. The libelants' proctors, in consulting the interest and convenience of both ship and cargo, have more than met all the obligations of professional courtesy; and there is no reason, therefore, for withholding the usual allowance of costs. To this I make a partial exception as respects the expense of the depositions taken at Liverpool, for the reason that the survey there was taken without notice to the respondents, and that the facts were not presented to the witnesses and the opposing counsel, in reference to the circumstances of the last trip, which had an essential bearing upon the whole examination. This portion of the costs is therefore disallowed. A decree may be entered in conformity with this opinion.

THE CITY OF NEW YORK.

(District Court, S. D. New York. April 29, 1885.)

1. COMMISSIONERS' REPORT—EVIDENCE AS TO VALUE OF VESSEL—BEST EVIDENCE.

A collision occurred between the steamer City of New York and the iron bark H., which resulted in the total loss of the bark and injury to the steamer. On the trial both vessels were found in fault, the damages were directed to be divided, and the matter referred to a commissioner to take proof of damage. In the testimony as to the value of the bark, it was shown that no sale of an iron vessel had ever taken place in New York, and market value could not be proved here. Libelants offered the testimony of one witness, an insurance inspector, who had seen the bark six years before; but they did not issue a commission to Dundee, where the bark was built, to obtain evidence of her value, either from cost of construction or from known sales of similar vessels. Respondents' witnesses, who were equal as experts to the witness of the libelants, put a lower value on the bark. *Held* that, as libelants had not produced the best evidence in their power, the estimates of respondents' witnesses must be adopted.

2. SAME—EVIDENCE AS TO VALUE OF STORES.

Testimony as to the ship's stores was given chiefly by the mate of the bark, who made a list of them from his recollection. No evidence was given as to the actual purchase of stores. *Held*, that the estimate of the value of a vessel ordinarily includes her usual outfit. As there was nothing in the mate's testimony to indicate how much of the stores of the bark was in excess of her usual outfit, some deduction must be made on this account.

3. SAME—ALLOWANCE FOR SUPPOSED STORES.

Stores which it was alleged such vessels as the H. usually carried, but which were not included in the mate's list, and as to which there was no direct evidence, *held*, disallowed.

4. SAME—DEPRECIATION OF CARGO—INVOICE VALUE THE STANDARD.

The cargo of the bark was sugar, laden at Havana. It was proved that on such a cargo as this there is a loss of weight, from Havana to New York, of from 3 to 5 per cent.; and, as the bark was lost within half a day's sail of New York, the owners of the steamer contended that a deduction to that amount

should be made from the invoice weight. *Held*, that the rule allowing the invoice value of the cargo at the port of shipment applies to the value of the cargo there as a whole, and that no deduction for natural loss or shrinkage in weight merely could be allowed.

5. SAME—AGENCY COMMISSION.

The steamer was obliged to put back to New York for repairs, and part of her cargo was there taken out and stored on the steamer's wharf. An allowance was made to the owners of the steamer for their expenses in unloading and loading again, and for storage; in addition to which they claimed an agency commission for care of cargo. *Held*, that such claim, in addition to storage, should be disallowed, it appearing that they had stored the cargo in their own buildings.

In Admiralty.

Scudder & Carter and Geo. A. Black, for libelants.

A. O. Salter, for respondents.

BROWN, J. In the above cause of collision, the court having previously held both vessels in fault for the loss of the iron bark *Helen* and her cargo, in June, 1879, (15 FED. REP. 624,) upon the coming in of the commissioner's report on damages, numerous exceptions have been filed by both parties. The examination by the commissioner of the many details of the case has been made with care, and I do not find sufficient reason to attempt any better solution of most of the difficulties presented. Some modifications as to the value of the ship and her stores should, I think, be made, with a view to require, in such cases, the production of the best evidence, rather than approve a practice which would rest content with evidence of a less satisfactory character.

1. As to the value of the bark, the libelants produced but one witness, a marine insurance surveyor and inspector. He saw her once in 1873, when he examined her for the purpose of rating, and classed her as "A1 $\frac{1}{2}$." He did not value her at that time, and had not seen her since. It was part of his business to keep posted in regard to reports of sales of vessels. No sales of iron-ships, however, have ever been made in this port; and he had no actual experience, either in buying, selling, building, or equipping such vessels, and had no personal knowledge of the sales or cost of construction of iron vessels like the *Helen*, or of any other iron vessels, though he had frequently valued them for insurance purposes. This witness valued the bark, at the time of her loss in 1879, at \$15,000. This evidence was objected to by the claimants' counsel as incompetent. The commissioner at first rejected, but afterwards received it. The vessel belonged in Dundee, where her owners resided. It would not have been difficult for the libelants to prove her actual value by persons in Dundee or in England, that had knowledge of the bark and of her real value, based upon their experience in the sales of such iron vessels, or in the cost of building and equipping them, and upon their yearly depreciation. I am inclined to think that the testimony of this witness was rightly received as not wholly incompetent. His large and constant experience in the valuation of vessels generally, and his knowl-

edge, though indirect and at second hand, of reported sales and of the construction of iron ships abroad, with his valuations of them for insurance purposes here, makes him competent, I think, to give an estimate of their value when no better evidence can be had. For some purposes, in the course of admiralty proceedings, such as in appraisements for giving security, the estimates of such witnesses would be practically sufficient. But it is far from satisfactory as a sole reliance when the final question comes, how much money shall be paid for the actual value of such a vessel lost? The best evidence that can be obtained with reasonable ease and convenience ought then to be required in place of the estimates of such witnesses. There is no reason to suppose that entirely satisfactory evidence could not easily have been obtained by commission. So far as I have ascertained, the previous cases, and they are many, in which the estimates of experts have been received, these estimates were based upon a knowledge of sales of similar vessels, or of other facts bearing upon their actual cost and market value.

The libellant having rested upon the estimate of this witness, the claimant presented the testimony of a similar witness equally well qualified in general respects; but he had never seen the vessel. He estimated her value at \$13,815, which valuation the commissioner adopted. A second witness for the claimant, who also had never seen the bark, but had more practical acquaintance with the construction of iron vessels, their cost from time to time, and with sales of such ships, estimated her at \$3,000 less.

Where the best evidence presumably in the power of the libellant to give, is not furnished, lower estimates by the respondents' witnesses that are, at least, equally well qualified, ought to be adopted. Upon this ground I reduce the valuation of the *Helen* to \$12,500.

2. Somewhat similar considerations apply to the evidence submitted by the libellant as to the amount of the ship's stores and her outfit, not included in the estimate of the value of the vessel. The mate, in his original deposition in the cause, made out a list of items called "Stores on board the late bark *Helen*." The list consists of some 50 different items, beginning with "2,240 lbs. (one ton) of bread." The whole list, being valued by other experts here, amounts to \$3,769.81. About one-half of this amount is made up of five hawsers, three new sixty-fathom lines, two coils ratlines, one-inch three-line manilla; and four new sails are added, making \$418 more. The mate testified that in March previous, the ship had been fitted out for a three years' cruise; and in another place he says the bark took in stores at Havana, and at the time of the loss had some of the stores that he took in there. Here, again, no evidence was offered of the actual purchase of such a large quantity of stores, although it was presumably easily within the libellants' power to produce such proof. The mate's testimony was an estimate from recollection. The estimate of the value of a vessel, moreover, ordinarily includes her usual outfit, and em-

braces such spare sails, rope, and hawsers as are usual. There is nothing in the mate's testimony to indicate with any certainty how much of such articles was in excess of such a reasonable and ordinary outfit of the ship. Upon this ground I disallow one half of the new sails, namely, \$209.25, and one quarter of the charge for hawsers and lines, namely, \$450.

3. Three hundred dollars, moreover, was allowed upon the hypothetical testimony that such a ship must have had other articles that the mate failed to specify in his list; such as tea, tobacco, etc., which it is said such vessels always have. I cannot sanction such hypothetical charges when other evidence is in the power of the party. As respects such articles, moreover, there is no evidence that any stock worth mentioning remained on hand when the bark had arrived within a day's sail of New York; or that they were not designed to be replenished here, in the same way that other stores had been taken in at Havana. This item must, therefore, be disallowed.

4. The claimants further contended that they were entitled to a reduction of from 3 to 5 per cent. on the invoice value of the cargo of sugar, which amounted to \$19,260.57, on the ground that it was proved that there is always a shrinkage in weight to the extent of from 3 to 5 per cent. I do not think this deduction comes fairly within the rule applied in cases of collision, that adopts the value at the port of shipment rather than that at the port of destination. The rule is designed to exclude anticipated profits. The ultimate object is to determine the actual loss at the time and place of collision. This is found, say the supreme court, by taking "the prime cost, or market value of the cargo at the place of shipment, with all charges of lading and transportation, including insurance and interest, but, without any allowance for anticipated profits." *The Scotland*, 105 U. S. 24, 35; *The Aleppo*, 7 Ben. 120, 133; *The Lively*, 1 Gall. 315, 322. The loss or shrinkage referred to here is not a special loss arising through any perils of the seas or washing away, which would doubtless be deducted, if proved; but the natural shrinkage in weight that accompanies all transportation of such cargoes. The "prime cost of this cargo," as it existed at the moment of collision, was its cost as a whole at Havana. Though not physically identical with the shipment at Havana, through a shrinkage in weight, it was commercially identical. The loss of weight is made up by the increase in value,—not the market value, but the intrinsic value,—which remains the same for the cargo as a whole. The intent of the rule above referred to is, therefore, carried out by retaining unchanged the gross value of the cargo as a whole, the same as at the port of shipment. This exception is, therefore, disallowed.

5. As respects the exceptions on the part of the libelant, it would appear that the omission of the proportionate part received for old copper was an oversight which should be corrected. I think also that the allowance of \$333.33 as an agency commission to the claimants

for care of the cargo must, in this case, be disallowed. They placed the cargo, or so much of it as was unladen, in buildings upon their own wharf; and they have been otherwise allowed for all the labor and expense attending it, and also a charge for the storage of it, as well as for watchmen. I do not understand that there was any additional responsibility on the part of the claimants not compensated for by these items; and when they store the goods themselves, and receive compensation for storage, and do not procure it elsewhere or by other means, I think that an additional commission cannot be allowed. *The Edward Albro*, 10 Ben. 668, 685; *The J. C. Williams*, 15 FED. REP. 558, 560.

Having deducted \$450 from the stores included in the Whitlock estimate, a deduction of 10 per cent. from the price of such articles new will be a sufficient abatement on what remains of that list, making that list of items \$2,574.28 instead of \$3,310.31.

I do not find any sufficient reason for modifying the other items excepted to on either side. The result of these modifications is to reduce the libellant's claim, with interest, by \$2,311.42, making his claim, including cargo, \$50,981.33; and to reduce the defendants' claim, including interest, by \$873.18, making their claim amount to \$7,876.39. One-half the difference between these sums is \$21,552.47, for which sum, with interest from March 24, 1885, the libellant is entitled to judgment, with costs.

Any further questions as respects liability for cargo are reserved.

AALHOLM v. A CARGO OF IRON ORE.¹

(District Court, S. D. New York. March 22, 1885.)

1. DEMURRAGE—EXCEPTIONS IN CHARTER—"FROST."

The charter of the bark E. from Carthage to New York provided that she should take on board "say 600 tons of iron ore, to be loaded and discharged at the rate of 70 tons per * * * day;" the cargo "to be received and delivered as customary," and "to be delivered as directed by the consignees," the charterers to have "the option of averaging the days for loading and discharging," etc., "lay days to commence at six o'clock in the morning, after the ship is reported, and all ready to load or discharge;" and among the exceptions to demurrage charges was hindrance from "frost." The claimants first directed the ship to Jersey City, but on the captain's objecting, they agreed that she might go to Atlantic docks, Brooklyn, and there discharge in lighters. While there, the weather became very cold, and the accumulated ice delayed the discharge by making it difficult for the lighters to be shifted in order to trim the cargo, and this libel was filed for eight days' demurrage in consequence. Two of the days were lost at Carthage. *Held*, that the wedging in of the lighters by the ice, and the consequent delay in discharge, was a result of "frost," such as to bring the delay under that exception in the charter-party.

¹ Reported by R. D. & Edward Benedict, Esqs., of the New York bar.

2. SAME—"CUSTOMARY" MODE OF UNLOADING.

The libelants claimed that the cargo might have been trimmed faster by employing men with wheelbarrows, instead of trusting to moving the lighters. It appeared that this method was employed when the lighters became actually frozen in, and it was applied with reasonable diligence. *Held*, that such was not the "customary" mode of unloading and trimming in lighters; that the "customary" mode being all that this charter-party required, extraordinary diligence was not obligatory on the charterer to avoid the consequences of the "frost," which was excepted.

3. SAME—COMMENCEMENT OF LAY DAYS.

The charter-party provided that lay days should commence from 6 o'clock of the morning, after the vessel was ready to discharge. *Held*, that the time could be counted only from the time of the ship's actual readiness to begin the discharge, either upon the wharf or into lighters, whichever was agreed upon, both modes of discharge being in use. As she never got a berth at a wharf, and as a discharge in lighters was the mode agreed on, it was immaterial whether, under the actual circumstances, she could have discharged sooner or not, by going to a berth along-side a wharf, the captain having made no objection to a discharge in lighters, or to the place adopted.

4. SAME—TWO DAYS' DEMURRAGE.

As no excuse was offered for the two days' delay at Carthagena, and the time was not made up at the end of the voyage, *held*, that the ship should be charged for two days' demurrage.

In Admiralty.

This libel was filed to recover demurrage for the detention of the Norwegian bark *Emigrant*, in the loading and discharge of a cargo of iron ore, under a charter of that vessel from Carthagena, Spain, to New York. The charter provided that she should take on board "say about 600 tons of iron ore, to be loaded and discharged at the rate of 70 tons per weather working day of 24 hours, Sundays and holidays excepted;" the cargo "to be received and delivered in turn, as customary, at the ports of lading and discharge," and "delivered as directed by the consignees," the charterers to have "the option of averaging the days for loading and discharging, in order to avoid demurrage;" "lay days to commence at six o'clock in the morning, after the ship is reported and all ready to load or discharge, of which the captain is to give notice in writing to the shippers and consignees;" "demurrage over and above the said lay days, £8 per day of 24 hours, except in case of any hands striking work, frosts or floods, revolutions or wars, or any unavoidable accidents which may hinder the loading or discharge." The number of lay days was not specified.

The vessel took on board at Carthagena 560 tons of ore, occupying 10 weather working days, and arrived with it at New York on the twenty-second of January, 1881. After being first directed to go to Jersey City, to which objection was made by the captain, she was directed to Atlantic docks, Brooklyn, to be discharged in lighters. The discharge was commenced on the twenty-seventh of January, as soon as the bark was ready, but was not completed until the eleventh of February. Two days' time having been lost at Carthagena, the libelants claimed that but six remained available to the claimants, leaving eight days' detention, for which demurrage was claimed.

Butler, Stillman & Hubbard & Mynderse, for libelants.

Jas. K. Hill, Wing & Shoudy, for claimant.

BROWN, J. The claimants, by their charter-party, had a right to direct the ship to her place of discharge. They first directed her to a dock at Jersey City. The captain objected to going there, reporting to the claimants that on inquiry he had been told that there was not sufficient water at the dock assigned. The evidence as to the actual depth of water there is, however, inconclusive and unsatisfactory. Had the unloading taken place at the dock at Jersey City, the discharge would have been made into cars rapidly and without interruption. The ship was at that time just outside of the Atlantic docks, Brooklyn. Upon this objection of the captain, the claimants told him that he might go into Atlantic docks, and that they would discharge on lighters there. The captain, accordingly, moved inside the docks, but did not get a berth along-side any wharf; and the claimants had lighters in readiness, before the ship was prepared with proper appliances, or "ready to discharge." There was some ice inside the Atlantic docks when the ship moved in; but no objection was made to this dock on that account, nor does the libel claim that the assignment to these docks was, under the circumstances, improper. The continued and increasing cold caused such an accumulation and freezing up of the loose ice within the docks that the necessary changes in the position of the lighters in order to receive the ore could not be made without numerous delays. The actual discharge commenced on the twenty-seventh of January, and was not completed until the eleventh of February, occupying 14 working days. The stipulated rate of 70 tons per day would have occupied but 8 days. I am satisfied from the evidence that the entire detention was caused through ice from increasing and continued cold weather, after the ship had taken up her position within the docks, and after the lighters were along-side. There was no delay in bringing the lighters along-side from first to last.

The customary mode of discharging iron ore in New York is either upon the dock or upon lighters. When discharged in lighters, the usual practice is to move the lighter along from time to time beneath the place where the ore is dumped. The difficulty here was that the lighters were so wedged in by the ice that great delays were caused, first, in the shifting of the lighters, in order to trim the cargo properly, and, afterwards, in trying to trim the cargo without shifting. The libelants claim that the cargo might have been trimmed faster by employing men with wheelbarrows to trim the cargo by wheeling it fore and aft, instead of moving the lighter. But that was, at best, a slow mode of loading; and it was very speedily adopted when the lighters became frozen in, and it was applied with reasonable diligence. That was not, however, the customary mode of unloading into lighters; and the "customary" mode of unloading was all that this charter-party required. In *Tapscott v. Balfour* (L. R. 8 C. P. 46, 53) it was held that these words refer specially to the *mode* rather than to the time of unloading; while in *Postlethwaite v. Freeland* (5 App. Cas. 599) the words

"all dispatch according to the custom of the port" were held to put the ship to all the risks of the customary disabilities and detentions of the port through lack of lighters procurable by the charterers.

If, in the present case, the detention by ice in handling the lighters during the process of unloading was a detention by "frost" "hindering the discharge," within the meaning of these words in the charter-party, then the detention in this case is within the exception of the charter, and the defendants are not liable unless the detention could have been avoided by ordinary and reasonable diligence. The evidence satisfies me that from the first all the usual men were employed, and ordinary diligence was used, for trimming the cargo and for changing the lighters; and that, when it became apparent that more men were needed to trim the cargo, ordinary diligence was used in getting additional men with wheelbarrows for that purpose. Extraordinary diligence and efforts to this end certainly are not obligatory on a charterer in order to avoid the consequences of the very cause that is contemplated and provided for in the exception. The requirement to discharge 70 tons per day was subject to this exception of "frost."

I see no reason to doubt that the obstruction in moving the lighter caused by ice, as the result of "frost," is within the meaning of this exception of the charter-party. Frost here means freezing; and it includes any freezing that would hinder or obstruct the loading or unloading of the ship. This is the most natural, if not the only, meaning that the word "frost" could have in this connection. In the cases of *Kay v. Field*, 8 Q. B. Div. 594, and 10 Q. B. Div. 241, and *Coverdale v. Grant*, 8 Q. B. Div. 600, and 9 App. Cas. 470, both of which were elaborately considered, no question was made that an impediment through ice was within the meaning of the exception of "frost" in the charter-party. But it was held that it did not apply to impediments by ice in transporting the goods from some other place to the place of loading; but only to such impediments existing at the very place of loading or unloading. Such is precisely this case. *Hudson v. Ede*, L. R. 2 Q. B. 566 and L. R. 3 Q. B. 412; *The Norman*, 16 FED. REP. 879.

The charter-party in this case provided that the time was to be counted only from 6 o'clock of the morning next after the vessel "is reported and all ready to load or discharge, of which the captain is to give notice to the consignees." This manifestly means a present readiness to commence the actual discharge. No time can be counted, therefore, as lay days, except from the time of the ship's actual readiness to begin the discharge, either upon the wharf or upon lighters. *Carsanego v. Wheeler*, 16 FED. REP. 248; *Teilman v. Plock*, 17 FED. REP. 268, and 21 FED. REP. 349; *Murphy v. Coffin*, 12 Q. B. Div. 87. The ship accepted the proposed discharge upon lighters as the mode of discharge in this case. She never got a berth along-side a wharf where she was ready to discharge in any different manner. The exceptions of the charter-party must, therefore, be applied to the

mode of discharge agreed upon and followed by the parties. *Gronstadt v. Withoff*, 21 FED. REP. 253, 255. No question arises as to what delays might have been experienced in attempting to unload at a berth along-side the wharf; for the ship never got a berth, nor attempted to get one. There is no reason to suppose, however, that she could have obtained a discharging berth instantly. The disadvantage to the ship, by that mode of discharge, might have been equally great, since, by the terms of this charter, the lay days would begin only from the time of actual readiness to discharge at the berth. Cases *supra*; and see *Robertson v. Jackson*, 2 C. B. 412; *Leidemann v. Schultz*, 14 C. B. 38; *Lawson v. Burness*, 1 Hurl. & C. 396; *Kell v. Anderson*, 10 Mees. & W. 498.

No evidence being offered to excuse the two days' delay at Carthage, and the lost time not being made up through any more rapid discharge here, so as to fall within the average clause of the charter, the libelants are entitled to a decree for two days' demurrage, and to that only, amounting to £16, with interest and costs.

GILLET V. BOWEN.

(Circuit Court, D. Colorado. 1885.)

1. CORPORATIONS—TRUST RELATIONS BETWEEN OFFICERS AND CORPORATION—STOCKHOLDERS.

While the officers of a corporation occupy trust relations to it, and in the faithful performance of such trusts they would indirectly subserve the interests of other stockholders, trust relations to the corporation do not, as to the stockholders, create trust relations *inter sese*.

2. SAME—TRUST NOT SHOWN—EVIDENCE.

On examination of the evidence in this case, *held*, that no trust as between the parties is shown, and that the fraud charged is not proven.

In Equity.

L. S. Dixon and Thos. Macon, for complainant.

Decker & Yonley, for defendants.

BREWER, J. Out of the tangled and voluminous testimony in this case I have deduced these facts:

(1) In August, 1875, the San Juan Consolidated Mining Company was organized as a corporation, under the laws of the territory of Colorado, with a capital stock of 20,000 shares of \$100 each; the incorporators being the complainant, the defendants Bowen and Tankersley, and George M. Binckley. To this corporation these several incorporators conveyed certain mining claims and properties owned by them, receiving in payment therefor, each, 3,875 shares of the stock. Subsequently, and during the fall of that year, the remaining 4,550 shares were, with the exception of five shares, issued to defendant Bowen and others for the purchase of other mining properties. The four incorporators above named constituted the first board of directors. Defendant Tankersley was president; Binckley, vice-president; complainant, superintendent; and defendant Bowen, secretary and treasurer. These officers remained unchanged during the transactions which form the basis of this litigation. While the stock of this corporation was large, yet, until 1880, its value was wholly speculative, a mere guess at the undiscovered bowels of the hills, so much so that in 1879 defendant Tankersley sold to defendant Bowen 3,800 shares, and a note of \$6,000, given by the corporation, for \$1,000.

(2) Whatever trifling legal business—and it was but trifling—the firm of Tankersley & Bowen, or either of them, may have transacted for complainant and Binckley prior to the organization of the company, after that time, neither as a firm nor individually were they the attorneys of, nor did they occupy confidential relations to, complainant or Binckley. In their subsequent dealings with each other in respect to stock matters, these four incorporators dealt at arm's length. I consider this an important fact, for if defendant Bowen, with whom this controversy really is, either individually or as a member of the firm of Tankersley & Bowen, was the attorney of or occupied other confidential relations to complainant or Binckley, then it

devolves upon him to show the good faith and sufficient consideration of the subsequent transactions, while if not, it devolves upon complainant to show the bad faith and lack of consideration. A good deal of testimony was introduced for the purpose of showing such confidential relations, but it seems to me of the weakest and most frivolous character. It is not pretended that there was any formal retainer, or that any fees were paid. Binckley claims that he had paid Bowen in advance, in that, 20 years prior thereto, he had, as editor of a country paper in Iowa, supported Bowen in a canvass for the legislature. He seems to think that such support gave him a permanent lien on Bowen's professional services, and established life-long confidential relations. Doubtless the parties were, at the time, friendly, and as friends confided in each other. They worked together in a common effort to develop the mining properties of the corporation in which they were stockholders. As officers of the corporation, they occupied trust relations to it, and in the faithful performance of such trusts they would indirectly subserve the interests of the other stockholders. But trust relations to the corporation do not, as to the stockholders, create trust relations *inter sese*. Whatever duties they owed to the corporation, as between themselves they dealt at arm's length, and neither had special charge of the other's interests. I fail to see any satisfactory testimony showing that Bowen was ever employed by Binckley or complainant, or ever acted as an attorney in respect to their stock or individual properties, or occupied any other confidential relations to them in respect thereto.

(3) On or about the twenty-eighth of October, 1875, a contract in writing was entered into between complainant, Binckley, and Bowen, on the one side, and Tankersley on the other, by which, in consideration of \$500,000 of the stock of said company, to be delivered to Tankersley by the other parties, he agreed to purchase and put up, during the spring of 1876, on the property of said company, a 10-stamp mill and convey the same to the company. Of this \$500,000 of stock, Bowen was to give \$125,000, and Binckley and complainant the rest, in equal proportions. At the time, or within two or three days thereafter, Binckley and complainant gave \$375,000 in stock to Tankersley, and this stock is the subject of the present controversy. Now, what was the effect of this contract as to the title to this stock? Obviously to vest it absolutely in Tankersley. He did not hold it as trustee. It was not placed in his hands to be used by him as their agent in procuring the mill. It was given to him in consideration of his procuring the mill. It was payment in advance. They relied on his promise, and if he failed to perform that promise their recourse, or that of the company, the beneficiary in the contract, was not upon the stock, but against him. This is the fair interpretation of the contract as, in the bill of complaint, it is charged to have been made. It is true, complainant and Binckley say that they understood that Tankersley was to return the stock if he failed to procure the mill, and Tankers-

ley says that when he got from them the stock, two or three days after the contract, he promised to return it if he did not get the mill. But this arrangement, if made, was an after agreement, not a part of the original contract, and unknown to Bowen. So far as that contract is concerned, the stock was to be immediately delivered, and according to Bowen's testimony was, in fact, delivered as payment in advance, and the parties trusted to Tankersley's promise and responsibility for the fulfillment by him of his agreement.

(4) Soon after this contract and the receipt of the stock, Tankersley went to Chicago to make arrangements for the mill. In so going, and while there, he was at some little personal expense, the amount of which is not disclosed; neither is any repayment of these expenses by the contracting parties or the company shown, save as by the arrangement hereinafter mentioned. He did not in fact procure any mill in Chicago, but about the first of January, 1876, was notified by Bowen by telegraph not to purchase any, because he (Bowen) had obtained in Denver a 30-stamp mill. He immediately came to Denver, and there an arrangement was, on the third day of January, made between himself and Bowen on the one side, and J. B. Chaffee on the other, for the erection of a 30-stamp mill. The contract between the parties is as follows:

"EXHIBIT A.

"Memorandum of agreement made and entered into this third day of January, A. D. 1876, by and between Jerome B. Chaffee, of the city of Denver and territory of Colorado, party of the first part, and Thomas M. Bowen and Charles W. Tankersley, of the county of Rio Grande and territory aforesaid, parties of the second part.

"Witnesseth, that the said party of the first part, for and in consideration of certain stipulations and agreements hereinafter mentioned and agreed to by the parties hereto, has agreed, and does by these presents agree and bind himself, to furnish and erect, at a point to be selected by himself, and approved by the parties of the second part, in the Summit mining district, in Rio Grande county, in the territory of Colorado, a good thirty-stamp quartz-mill, complete and suitable for working gold ores, with proper machinery and steam-power for operating said mill and machinery for saving gold, together with a suitable building to cover said mill and machinery, the whole to be erected and completed at the cost and expense of the said party of the first part as early in the spring and summer of the year A. D. 1876 as is practicable, or the weather will permit.

"It is further agreed by and between the parties hereto that when said mill is completed and ready to operate, as hereinbefore mentioned, and in good running order, the said party of the first part shall have, and hereby has, the option to accept such propositions as the said parties of the second part may make, in full payment for said mill and machinery; or, in case of refusal to accept such proposition or propositions on the part of the said party of the first part, then the said party of the first part hereby binds himself to sell and deed to the said parties of the second part all of said mill and premises for their own free use and benefit, upon the following terms, to-wit: the first cost of said mill to be twelve thousand dollars, (\$12,000,) and such other cost as may arise in transporting said mill from Gilpin county to the above-named location in Rio Grande county, and also all cost and expense in erecting the same, and putting the same in running order, and completing the same, and

also the building inclosing the same. The terms of payment to be as follows. to-wit: The first twelve thousand dollars to be paid in quarterly payments at the end of each quarter from the day the said party of the first part shall decline the proposition or propositions made by the said parties of the second part; the remainder to be paid in quarterly payments in like manner, but during the following year,—the said amounts to be put into notes in amounts corresponding with the payments as above mentioned, and signed by the said parties of the second part, and drawing interest at the rate of eighteen per cent. per annum from date until paid, and secured by trust deed upon said mill and premises, and also by one-quarter of the paid-up stock of the San Juan Consolidated Mining Company, a company organized under the laws of the territory of Colorado and owning mining property in the said Summit mining district; said quarter of stock in said company amounting to five thousand dollars at par value; said stock to be held by the said party of the first part as additional security to said notes, and collateral thereto.

"It is further agreed that the said parties of the second part shall furnish, free of expense, to the said party of the first part, a good and suitable site upon which to locate and erect said mill, deeding the same to the said party of the first part at or before the commencement of erecting the same. The said party of the first part agrees to keep accurate account of all cost and expense of transporting and erecting said mill and building, together with all cost and expense of every nature, to put the same in good working condition, and exhibit the same, with all proper vouchers attesting the same.

"In case the said party of the first part shall elect to sell the said mill, as aforesaid, then said party shall deliver the same over to the said parties of the second part upon a full compliance on their part of all the stipulations and obligations relating to them herein contained.

"The proposition referred to in the foregoing, to be made by the parties of the second part, shall be made by them to the said party of the first part in writing, and at or within ten days from the time said mill shall be ready to run. In case of neglect or refusal to make such proposition, or in case of refusal on the part of said party of the first part to accept said proposition, then the said parties of the second part hereby bind themselves to take said mill and premises, and pay for the same upon the terms herein named, and to execute said notes and trust deed, and deliver the same to the said party of the first part; and the said party of the first part shall thereupon deliver peaceable possession of said mill and premises to the said parties of the second part. In case said mill is not ready to operate by the first day of August, A. D. 1876, then the third quarterly payment aforesaid shall be postponed, and not become due until sixty days after said quarterly payment would have become due by the maturity of said note.

"It is further agreed that the trust deed aforementioned shall provide that if default be made in any payment when due and payable, it shall render the whole amount of deferred payments due and payable, and notice shall be given in said trust deed of thirty days for any foreclosure. In case of neglect or failure of either party to comply with the stipulations and conditions herein mentioned, the other party shall not be bound by this agreement. In case of the death of either one of the parties of the second part a faithful compliance by the other shall be binding upon the said party of the first part.

"Witness our hands and seals, at the city of Denver, Colorado territory, this third day of January, A. D. 1876.

"JEROME B. CHAFFEE. [Seal.]

"THOMAS M. BOWEN. [Seal.]

"CHAS. W. TANKERSLEY." [Seal.]

On the next day the stock named in said agreement, to-wit, \$500,-000,—\$375,000 of which was, by the admissions in the pleadings,

the stock in controversy,—was turned over to Chaffee, and the following receipt therefor given:

“EXHIBIT B.

“(In duplicate.)

“Received of Thomas M. Bowen and Charles W. Tankersley five thousand shares, of one hundred dollars each, (\$500,000,) of the stock of the San Juan Consolidated Mining Company, to be accepted as their proposition to me, as mentioned in an agreement dated January 3, A. D. 1876, between them and myself, or to be held by me as the collateral security mentioned in said agreement for the payments from said Bowen and Tankersley to myself, as I may elect to decide.

J. B. CHAFFEE.

“*Denver, January 4, 1876.*”

It will be noticed that this contract was not made between Chaffee and the company, but between him and Tankersley and Bowen. The latter were not authorized by the company to make any such contract; did not assume to act for the company in respect to it; and were personally entitled to all the benefit, and liable for all the obligations, thereof. In short, it was a purely personal contract between them and him. Whether they should turn it over to the company, and if so, upon what terms, were matters to be decided subsequently, and upon proper arrangements with the company. The fact that they were officers of the company gave it no claim upon the contract.

(5) Soon after making this contract Bowen and Tankersley returned to Del Norte and advised complainant—Binckley being away—of its terms. During the spring and summer of 1876, Chaffee proceeded with his contract, removed the mill to San Juan county, and erected it on ground belonging to the company. Obviously all parties assumed that the mill was to become the property of the company, and that it was to provide for payment of the contract price. Yet Chaffee had not agreed to accept the company as purchaser, and Bowen and Tankersley had not turned the contract over to the company. They were waiting to make something out of the transaction for themselves personally. About the first of July, 1876, Chaffee came to Del Norte, the mill being nearly completed, to arrange for payment. The cost of removal and erection was found to be \$20,000, which, with \$12,000, the first cost, made \$32,000 due Chaffee. The situation was as follows: The company had entered into no contract and made no promises. Tankersley had contracted with Bowen, Binckley, and the complainant to put up a 10-stamp mill, and received from them \$500,000 in stock as payment in advance. He had put up no 10-stamp mill. The company was the beneficiary in this contract. Chaffee had contracted with Bowen and Tankersley to put up a 30-stamp mill, and convey the same to them for \$32,000, secured by their notes and deed of trust upon the mill and mill-site, and also by \$500,000 in stock of the company. This stock he then held, it being the stock delivered to Tankersley under his contract. The mill had been put up on ground belonging to the company. After considerable negotiation it

was agreed between Chaffee, Bowen, and Tankersley that the mill should go to the company; that a deed of trust, on the entire property of the company should be executed to secure \$32,000 of notes of the company payable to Chaffee; that Chaffee should take, in full payment of his claim, \$20,000 of these notes, and the \$500,000 of stock then in his hands as collateral; and that \$12,000 of the notes should be given to Tankersley to be divided between him and Bowen in consideration of their turning the benefit of their contract over to the company, and in payment for their services in the matter; and that 10 of the stamps in the 30-stamp mill should be accepted by the company, the beneficiary, as a full discharge and satisfaction of the Tankersley contract. It is true, Tankersley denies any knowledge of, or participation in, any such arrangement; but the testimony overwhelmingly proves that his denial is not to be believed; that the arrangement was made as above stated; and that he was a party to it; and, further, that he received and retained \$6,000 of the notes, and afterwards surrendered them to the company and received new notes therefor, the latter being the notes which, with his stock, he sold to Bowen in 1879. In addition to the positive testimony of witnesses, reference may be made to the novation contract signed by Chaffee.

"EXHIBIT C.

"Know all men by these presents, that, whereas, on the third day of January, 1876, Jerome B. Chaffee entered into a contract with Thomas M. Bowen and Chas. W. Tankersley for the erection, in the Summit mining district, Rio Grande county, Colorado, of a thirty-stamp quartz-mill, complete, with machinery and steam-power for running the same; and, whereas, it has been agreed by and between said parties that said mill, machinery, and power shall be transferred and conveyed to the San Juan Consolidated Mining Company direct from said Chaffee upon the following terms, to-wit: One-third of said mill, machinery, and steam-power being to satisfy and fill a certain contract existing, whereby said Chas. W. Tankersley agreed to erect on the property of said company a ten-stamp quartz-mill, for which said one-third of said thirty-stamp mill, machinery, and steam-power it is agreed that said Chaffee shall receive in full payment therefor the \$500,000 of full-paid non-assessable stock of the said San Juan Consolidated Mining Company, now in his hands, received by him from said Bowen and said Tankersley, under said contract, dated January 3, A. D. 1876; and for this other two-thirds of said mill, machinery, and steam-power, the board of trustees of said company has agreed to pay said Chaffee the sum of \$32,000, payable in installments, and represented by eight promissory notes, secured by deed of trust on the whole of said thirty-stamp mill, and the property of said company: now, therefore, in consideration of the premises and such novation, and the sum of one dollar, paid by said parties each to the other, it is mutually understood and agreed that, by the agreements hereinbefore set forth, the said contract between the said Chaffee and the said Bowen and Tankersley, dated January 3, A. D. 1876, is fully complied with and satisfied, and each of the parties thereto are hereby fully released in the premises.

"In witness whereof, we hereto set our hands and seals this day of _____, A. D. 1876.

J. B. CHAFFEE,

"_____."

"_____."

[Seal.]

[Seal.]

[Seal.]

—And to the bill of sale signed by Bowen and Tankersley, and written on the back of the receipt given by Chaffee in January, of the stock as collateral, which bill of sale reads as follows:

"We have sold the whole of the stock mentioned in this receipt to Jerome B. Chaffee in payment for the 30-stamp mill.

[Signed]

"August 16, 1876.

"THOMAS M. BOWEN.

CHAS. W. TANKERSLEY."

It is not, so far as the controversy between complainant and Bowen is concerned, very material whether, as an independent fact, Tankersley was party to this arrangement or not. The significance of the testimony in respect thereto is this: The complete overthrow of Tankersley's testimony, coupled with the obvious fact that, though nominally a defendant, he is really the suggester and promoter of this suit, casts large discredit on his entire testimony. In whatever of wrong was done to complainant and Binckley he was equally guilty with Bowen, and his apparent disclosures do not spring from any honest desire to make atonement therefor, but from unworthy motives as against Bowen. Under such circumstances a court may well be excused for placing little reliance upon his testimony.

(6) In pursuance of this arrangement, on the sixth of July, 1876, a meeting of the directors of the company was held, the complainant being present, and a resolution passed directing the issue of \$32,000 in notes, and the execution of a deed of trust upon the property of the company as security therefor. And on August 16th a meeting of the stockholders was also held, at which complainant was also present, and at which three resolutions were passed, the complainant voting for all of them; the first authorizing the notes and deed of trust as above, and the third reading as follows:

"Resolved, *third*, that the thirty-stamp mill complete, including crusher, transferred to this company by Jerome B. Chaffee, includes the ten-stamp mill agreed to be erected by Charles W. Tankersley; and the said Tankersley is hereby fully receipted, and a full compliance with said contract on his part is hereby acknowledged; and that the \$32,000 of notes executed and delivered to Jerome B. Chaffee shall be deemed and held full payment for the other twenty stamps, power, and machinery for running twenty stamps of same included in said thirty-stamp mill, the purchase whereof is hereby expressly authorized, ratified, approved, and confirmed."

Thereafter the notes and deed of trust were executed; Chaffee received \$20,000; Tankersley, \$12,000; \$6,000 of the latter Tankersley gave to Bowen, and with this and a note of his own of \$4,600, the latter purchased the \$500,000 of stock from Chaffee. The stock thus passed into Bowen's hands, and was afterwards sold by him. The complainant, having bought out Binckley, now claims that of this stock \$375,000 was theirs when pledged, in the first instance, to Chaffee; that no change in that respect was made with their knowledge or assent, and that Bowen, buying from Chaffee, simply bought from a pledgee with notice of the pledge; and the \$32,000 of notes secured by this pledgee having been paid by the company, they are reinvested

with full title; and that he must respond to them for the value of this stock of theirs which he has converted.

Obviously the pivotal question now is as to their knowledge of and assent to the arrangement above named, or at least so much thereof as surrendered their stock in consideration of what was received by the company. And this question is very doubtful. I have had little trouble in tracing the course of events up to this point, but upon this I am much at a loss to determine the real truth. Both Binckley and the complainant testified that they knew nothing of any such arrangement; that they were informed of the contract of January 3d, and that the stock had been put up as collateral; and never knew of any change. Bowen, on the contrary, testifies that they were both informed of the change, and assented to it. He does not claim that they were told of the manner in which the stock and notes were divided between Chaffee, Tankersley, and himself; that, he testifies, he considered a private matter between the three, in which they had no interest, but that they were fully informed that 10 stamps of the Chaffee mill were to be taken by the company as a full performance by Tankersley of his contract, and, of course, if his contract was performed, he was entitled to retain the stock.

When there is such a direct contradiction in the testimony of the parties interested, we must look at their conduct and the surrounding circumstances to ascertain the truth. These matters, I think, plainly tend to sustain Bowen's testimony, and, while I may not notice all, I will mention some that have forcibly impressed me. And *first*, it must be borne in mind that the arrangement was in fact made as stated; the third resolution passed at the stockholders' meeting, and for which complainant voted. They had agreed to give and had given this stock to Tankersley upon his agreement to put up a 10-stamp mill. Of course, when he performed this contract, even if the stock was put in his hands simply in trust, as complainant and Binckley claim, the stock became his absolutely. Their title to the stock, their right to its return, their interest in it, was then wholly gone. And in this condition complainant votes for a resolution which, after referring to the 10-stamp mill contract, reads that "Tankersley is hereby fully receipted and a full compliance with said contract on his part is hereby acknowledged." How any person of ordinary intelligence could have assented to such a resolution, and still supposed that that contract was to be considered as unperformed and set one side, and the original owners of the stock reinvested with title thereto, is difficult of comprehension. Grant that it might have been fuller and more specific, might have stated that the original donors of the stock surrendered the same and all their claims thereto to Tankersley,—and still the import would have been the same, and the meaning but little more obvious. Full compliance with the contract is, in terms, admitted. Full compliance divested them of all claims to the stock; and yet now they say that they supposed all the time that the stock was theirs.

Again, they knew that Tankersley must have been to some expense by reason of his trip to Chicago. Whether they knew all the expense to which he had gone, is uncertain. But they nowhere pretend to have reimbursed or offered to reimburse him these expenses. Can it be that they supposed Tankersley was so generous as to donate these expenses? It is true that in January, 1877, a year after the Chicago trip, the company allowed Tankersley a few hundred dollars for money advanced by him, above the \$6,000 in notes heretofore referred to, and it is possible that this allowance was for these expenses, but the testimony fails to show that it was. Again, if this stock was still theirs, why should they, owning less than half the stock in the company, advance three-fourths of the pledge. And when, as they soon did, they parted with substantially all the rest of the stock owned by them, why did not they insist that Tankersley, who had put up nothing in this pledge, should put up \$125,000, and thus release to them for disposal a like amount? Still again, a very natural inquiry which suggests itself, and it would seem must have occurred to complainant, is, of what special advantage was the stock as collateral when a deed of trust on the entire property was held? The latter took all, while the former only covered a part. I do not mean that the stock did not have some special value in view of the ease with which it could be disposed of and its proceeds applied on the debt, but that was a value more easily appreciated by a shrewd and speculative business man than by one uneducated and ignorant; and an effort is made to picture the complainant and Binckley as of the latter class.

But further, and very strongly, the subsequent conduct of the complainant and Binckley indicates, to my mind, that they understood that they had given up this stock. Within a few months both left the San Juan country, having disposed of substantially all the other stock owned by them in the county; and from that time on until about the commencement of this suit, in 1883, they acted as though they had no interest in the company. They moved from place to place, never apparently concerning themselves with any of the affairs of the company, having no correspondence with its officers, and acting towards it as any stranger might be expected to act. Statements of complainant are testified to—some of which he denies, and some he attempts to explain—which emphasize his belief that he had no remaining interest in the company. When this conduct is placed along with the fact that in the fall of 1879 a rich deposit was discovered, and that in 1880 and 1881 over \$300,000 was taken from the mine,—a fact not concealed, but notorious,—one is forced to the belief that they supposed they had no further interest in the mine, and that want of interest must have resulted from their having given up the stock in controversy, as defendant Bowen testifies, or from a belief that the pledgee had disposed of it to pay his claim. If the latter was the truth, it seems to me that, beyond question, inquiry would have been made. No man, especially no poor man, as each of the parties was, will remain silent

when a possibility of wealth belonging to him is suggested. In short, for I do not care to protract this opinion, I cannot reconcile voting for this resolution, and the subsequent indifference of the parties to the prospects and affairs of the company, with their present claim that they never knew nor assented to the giving up of this stock. It is not in accord with my convictions as to the probable conduct of ordinary men; and here I refer to what I said in the opening of this opinion, that, there being no confidential relation between Bowen and the complainant or Binckley, it devolves upon the complainant to prove that Bowen's conduct was wrongful, and not upon Bowen to prove that it was rightful. Doubts in the matter are to be resolved against the complainant. One thing more I should mention; I have spoken of complainant and Binckley as though they occupied the same position as developed in the testimony. This is not strictly true. Complainant was present at the directors' and stockholders' meeting; Binckley was not. The former's relations to the actual management of the affairs of the company seems to have been more intimate than the latter's. And still, if I may so define it, it seems to me that Bowen and Tankersley occupied one relation to the company and these transactions, while complainant and Binckley occupied another and partially antagonistic; and, further, that the relations between the two latter seem to have been such that it is only fair to presume that what one knew and assented to the other did also. Hence I have not distinguished between them, but have spoken of them as agreeing in knowledge and action. I do not know that I can add anything more to express my conclusions, or the reasons therefor, unless I were to go into the mere details of the testimony, and that would be a protracted and useless labor. My conclusion therefore is that the wrong charged upon the defendant Bowen is not proved. Of course, in the view I have taken, the matter of amendment to the answer is immaterial. A decree will be entered dismissing the bill.

CLAYBROOK and others *v.* CITY OF OWENSBORO and others.

(Circuit Court, D. Kentucky. March 8, 1884.)

1. CONSTITUTIONAL LAW—ACT DISCRIMINATING BETWEEN WHITE AND BLACK IN DISTRIBUTION OF SCHOOL-FUND VOID.
Former opinion, 16 FED. REP, 297, adhered to.
2. SAME—MANDATORY INJUNCTION.
The United States circuit court for the district of Kentucky has no power to issue a mandatory injunction requiring a distribution of the money raised from taxation for public schools, under the acts of the Kentucky legislature passed in 1881, as there is no authority in said act for such distribution, and complainants have no contract which the court can enforce by affirmative relief.

In Equity.

Bagby & Marshall, for complainants.

Sweeney, Owen & Ellis, for defendants.

BARR, J. This case is before me on the merits, and after a careful consideration of the arguments presented by the learned counsel representing the defendants, I see no reason to change the views expressed in the opinion filed when the temporary injunction was granted. The schools organized and sustained in Owensboro, under the act of 1871 and its amendments, are in fact and in law part of the common-school system of this state. They may be called "public schools," but this makes no difference. These schools are common alike to all white children of school age, and are sustained by taxation. Taxation to sustain schools is permitted because the education of the children of a state is a recognized governmental purpose. If the state can constitutionally exclude colored children from all benefits arising from this tax, levied as it is for a governmental purpose, because white people pay the tax, there is no good reason why the state may not limit and distribute the benefit of government in every respect according to race or color, and in proportion to the taxes paid by each race or color. This discrimination in the benefit of the taxes raised under the act of 1871 is, I think, denying colored children of Owensboro the equal protection of the law, and within the inhibition of the fourteenth amendment to the federal constitution.

The affidavits which were before me when the temporary injunction was granted, proved that there were about 500 colored children of the school age, and about 800 white children of that age, in the city of Owensboro; but the depositions now in the record show that this was a mistake. The evidence now in would indicate there was in 1882 one colored child of the school age in said city to three white children of that age; hence, if the funds arising from taxes, raised under both the act of 1871 and the act of 1881, were distributed between the colored and white children of the school age, it would be about one dollar to the colored schools to every three dollars to the white schools. If this court had the power to issue a mandatory injunction requiring a distribution of the money raised from this tax, it should take into consideration the sums received by the colored schools under the act of 1881. But after a careful consideration of the question I cannot satisfy myself that the court has authority in this action to order the payment of any part of the money raised by and under the act of 1871 to complainants, or to the trustees of the colored schools of Owensboro. The difficulty in the way of granting such affirmative relief is that there is no legislative enactment authorizing such a use of any part of the money raised under this act, neither have the complainants, or those they represent, any contract right which this court can enforce in this action by affirmative relief.

It may be that the entire act of 1871, and amendments, is unconstitutional,—a question not now decided. But if it be assumed that the state can constitutionally levy the same rate of tax upon colored

and white people by separate and distinct acts, as has been done under the acts of 1871 and 1881, and that the only objection to the act of 1871 is that the benefits arising from the taxes raised are confined to the white race, and that the other parts of this act remain in full force, how is this court to administer this fund without legislative authority, or contract right? It is, however, the right, as well as the duty, of this court to declare a legislative enactment unconstitutional if it be unconstitutional, and, in a proper case, enjoin persons from acting under the authority of such an act.

The bill prays that on final hearing the defendants be adjudged and decreed to distribute the taxes, arising from this levy for school purposes, under the act of 1871, in accordance with law and equity, and for all proper relief in the mean time; and for a restraining order, preventing the payment out of any money raised under this law for school purposes. The temporary injunction restrained the city of Owensboro from paying out a certain proportion (5-13th) of the money raised for school purposes under this law, upon the idea that this would fully protect any right complainants might sustain upon final hearing; and I understand from the manner which the case has been prepared and argued by counsel representing complainants that if complainants cannot get from this court an affirmative order distributing to the colored schools of Owensboro a part of this fund, they do not desire an injunction prohibiting the payment of all of the money raised under the act of 1871, but only such a proportion as would cover the proportion which the colored school would receive were there a division according to the number of children of school age. If I am correct in this, complainants may have a decree enjoining and restraining the proper parties from applying to the use of the schools organized for and at which white children only are allowed to attend one-fourth of the money heretofore, or which may be hereafter, collected under the authority of the act of 1871 and its amendments. This decree will not apply to money raised and paid out prior to the temporary injunction, and will leave undisturbed the other three-fourths of the money raised under said act. If, however, counsel for complainants think they are entitled and desire an injunction restraining the collection or payment of any taxes under this act of 1871, they must give notice to the opposite counsel, and I will hear an argument upon this question either by brief or orally, or both, as either counsel may wish.

See *U. S. v. Buntin*, 10 FED. REP. 730 and note, 737.—[ED.]

MURPHY v. WESTERN & A. R. R. and others.

(Circuit Court, E. D. Tennessee, S. D. April Term, 1885.)

1. CARRIERS OF PASSENGERS—SEPARATION OF PASSENGERS ON ACCOUNT OF COLOR.

A railroad company may set apart certain cars to be occupied by white people, and certain cars to be occupied by colored people; but if it charges the same fare to each race it must furnish substantially like and equal accommodations.

2. SAME—DUTY TO PROTECT PASSENGERS FROM INSULT AND INJURY.

It is the duty of a railroad company to protect its passengers from insult and injury so far as it can, and if the conductor and brakeman on a train conspire with passengers thereon to remove another passenger who has a right to be on such train, or see such passengers eject their fellow-passenger, and make no effort to prevent it, or make no attempt to repair the mischief by restoring him to his seat, the company will be liable.

3. SAME—DUTY OF PASSENGER.

While a railroad company is held to a rigid accountability as to its duties to its passengers, a passenger is required to demean himself in such a way as not to be offensive, vulgar, obscene, or coarsely disagreeable to his fellow-passengers, or expose them to suffering or danger; and if he fail in these respects he may be removed by the train-men from the train; and in such removal they may use as much, and no more, force as is necessary to his removal.

4. SAME—LIABILITY OF PASSENGER FOR TORT.

A passenger who enters a car and forcibly ejects a fellow-passenger therefrom is liable therefor.

5. SAME—MEASURE OF DAMAGES FOR EJECTION FROM TRAIN.

If a colored man enters a car set apart for white people with knowledge of that fact, so that he may be removed from the car and train for the purpose of bringing suit for damages against the railway company for such removal, the jury may consider that fact in mitigation of damages, and should not allow liberal and exaggerated compensation for his mental sufferings; but if no such intention appears, he may be allowed full and liberal compensation for his sufferings and other injuries, and such sum as punitive damages as the jury may think right in preventing the recurrence of the like mischief.

Charge to Jury.

W. J. Clift and Wheeler & Marshall, for plaintiff.

Clift, Bates & Cooke, for defendants.

Key, J., (orally.) In order to be prepared to decide legal controversies justly, the judge and the members of the jury should be careful to avoid the influence of partiality or prejudice. We belong to the white race, while the plaintiff is a colored man. During the entire period of our recollection there have been bitter controversies and conflicts over the condition and circumstances, and rights of the colored race in this country. From these much bad blood, hostile feeling, and prejudice have resulted. Indeed, race prejudice, in all ages, and in all parts of the earth, has been the fruitful source of animosity and war. On the other hand, the principal defendant is a railroad, and in this state, as well as in a great part of our country, railroads have been the subjects of much denunciation and abuse, and of popular hatred. It is your duty to steer clear of all these influences upon one side as well as the other, and I believe you will do so. The ancients often painted Justice as blindfolded, so that parties could not be seen, and holding the scales with even hand. So we

should be careful not to know the parties to this suit, and to try the cause as the law and testimony demand.

Railroads have become the great instrumentalities by which the transportation of freights and passengers is conducted. The immensity of their business and extent of their powers make them the anxious objects of legal authority and regulation. They are, in a large sense, public institutions subject to public control. This regulation and control must be reasonable. The nature and vastness of their business require great skill, judgment, discretion, and capital, and they must be allowed to use and exercise the means and powers necessary to the conduct of their business.

The plaintiff in this case says that he purchased a first-class ticket for his passage over the Western & Atlantic railroad from Dalton, Georgia, to Chattanooga, Tennessee; that he took his seat in the rear car of the train without objection; that after the train started the conductor came to him and told him that people of plaintiff's color were not permitted to ride in that car, and that he must go forward into another car; that he offered the conductor his ticket, but the conductor declined to take it, and plaintiff refused to go into the forward car; that the conductor afterwards sent the porter of the train, who was a colored man, for his ticket, and he gave it to him. Not far from the same time, he says, a brakeman came to him and told him that colored people were not permitted to ride in that car, and asked him to go forward, but he refused, and the brakeman took plaintiff's baggage, without permission, into the forward car; that on the departure of the train from a station between Dalton and Chattanooga two passengers, who took the train at that station, came to his seat and seized him roughly and told him he must go into the other car, and dragged him from his seat, to which he clung as long as he could, and that, in doing so, his hand was bruised or lacerated so that it bled and pained him for some time after, and his back was wrenched so that he could do nothing for some days. These men hurried him forcibly out of the car into the forward car. That the officers and employes of the train did not interfere, though some of them saw the transaction, to prevent its occurrence. These passengers left the train at the next station, and one of them, and the conductor and a brakeman of the train, are sued along with the railroad.

The defendants do not controvert or deny that the material statements of plaintiff are true. Defendants' witnesses say that the rear car of the train was reserved as a car for ladies and those who escorted them. There were no ladies in the car; the car had few passengers, and none of them accompanied ladies. No ladies entered the car until the train reached the station upon leaving which he was ejected from the car. The train-men saw the plaintiff ejected from the car; did not interfere; did not say anything about it then or afterwards to plaintiff, or those who did eject him. The train-men say they did not conspire with those who removed plaintiff, or have any knowledge or

understanding that plaintiff was to be driven from the car. According to the testimony of defendants the young man who sold newspapers, fruits, etc., on the train, styled by the witnesses "The Butcher," and who was not in the employ of the railroad, but in that of the Southern News Company, was the active party in fomenting the trouble upon this occasion. He is examined as a witness for the defendants, and shows evident pride in the part he performed. According to his account he discovered that the train-men were not sufficiently resolute in turning the plaintiff out of the car. He appealed to the passengers to aid him in doing so. They told him that they had no objection to plaintiff's retaining his seat, as he had as much right to his seat as they had to theirs. When the train arrived at Ringgold, Georgia, two gentlemen took passage on the train, accompanied by ladies. This witness told them that they had better not enter the ladies' car, as there was a negro in it, whereupon these two passengers joined the news butcher in the expulsion of the plaintiff.

My observation has convinced me that those who are most sensitive as to contact with colored people, and whose nerves are most shocked by their presence, have little to be proud of in the way of birth, lineage, or achievement. I cannot tell how these things are as to this witness. There is no controversy as to the facts in this case. I am of the opinion that a railroad company may set apart a particular car for the use of ladies, and those accompanying them, and exclude all other passengers from it. But the plaintiff was not ejected from this car because he was accompanied by no lady, but because he is a man of color. Had he been accompanying a lady, the result, as to him, would have been the same, and she would have been required to go with him. Colored people, whether male or female, were not allowed to ride in the ladies' car. Again, I believe that where the races are numerous, a railroad may set apart certain cars to be occupied by white people, and certain other cars to be occupied by colored people, so as to avoid complaint and friction; but if the railroads charge the same fare to each race, it must furnish, substantially, like and equal accommodations. The money of one has the same value as that of the other, and should purchase equal accommodations. There is no equality of right, when the money of the white man purchases luxurious accommodations amid elegant company, and the same amount of money purchases for the black man inferior quarters in a smoking car. The law does not tolerate such discrimination on the part of a railroad company. The carrier may furnish second or third class accommodations when he charges fare accordingly. Then the passenger may choose whether he will purchase a first, second, or third class ticket, and cannot complain when he receives that which he purchased. But if the carrier sells none but first-class tickets, he must give none but first-class accommodations, unless there arise emergencies when it is impossible or unreasonable for him to do so.

A train with but two cars in which passengers could go, as in this case, and in which the ladies and their friends had one exclusively, the other car being used for smoking and for gentlemen without lady friends, does not give like accommodations to all. The passenger from the rear car may go into the forward car and smoke, but the passenger in the forward car cannot go into the rear car for any purpose. He cannot go into it to smoke or to escape the smoke, however offensive to him. Nor can a colored man and woman of genteel appearance, good repute, and good behavior, who have paid for first-class passage, be sent to the smoking car simply because they are black. As well might all red-headed men be excluded from the ladies' car because their heads are red. A railroad company may make all needful rules and regulations in the conduct of its affairs, but such rules must be reasonable and impartial,—fair to all. If it separate passengers upon the color line, it must treat each alike from the intrusion of the other. If it give white people one end of a car and colored people the other end, and exclude colored people from the white end, it must also exclude white people from the colored end. A passenger has no right to select the car upon which he will travel without direction or interference on the part of the carrier. When he proposes to take the train the train-men may designate the car which he may enter, and he has no right to complain if such car is as comfortable and convenient in its equipment as the others of like character. But if the train-men leave the cars in an accessible shape, and the passenger enters without opposition or objection and selects an unoccupied seat, and places himself in it after having purchased the ticket or paid the fare required for a seat in such car, that seat, or so much of it as is necessary for him to occupy, becomes his for the trip, unless he be promptly notified to the contrary, especially as against another passenger who afterwards comes upon the train.

The defendant, who was a passenger, and as such entered the car and forcibly removed the plaintiff from his seat and ejected him from the car, had no right to do so, and is liable for the injury. Moreover, it is the duty of the railroad company to protect its passengers from insult and injury as far as it can. If a mob, or some other power or force the agents of the road cannot overcome or oppose or resist with success, or any reasonable prospect of it, injures the passenger, the road is not liable; but if he be injured by something which the exercise of diligence, activity, and courage would have prevented, and the officers of the train fail to make an effort to prevent the mischief, the road is liable. If the conductor and brakeman conspired with the passengers to remove the plaintiff, the railroad company is liable; or, if these agents of the road saw what these passengers were doing to their fellow-passenger, and made no effort to prevent the mischief, gave it no discountenance, or made no attempt to repair the mischief by restoring the plaintiff to the seat from which he was removed, the railroad company is liable. The conductor and one of

the brakemen are sued along with one of the passengers who removed plaintiff, and with the railroad company. If these two persons conspired and confederated with said passengers to eject the plaintiff from his seat and from the car, or gave them aid and encouragement in so doing, or were present to aid and encourage, they would be personally liable. But if they did not so conspire or aid, nor were present to aid, but merely failed to prevent the act, they are not personally liable, as there was no legal personal obligation resting upon them to interfere; but if they failed to do their duty as agents of the railroad company, by reason of which plaintiff was injured, the company would be liable.

If you find against the defendants, or any of them, you may give such an amount as damages as, in your judgment, will compensate the plaintiff for his physical and mental suffering, and for his loss of time and necessary expenses, as a compensation for his injury; and then, if you think the circumstances justify it, you may allow such an additional sum as you think proper as exemplary damages. It is proper for me to say, however, that while a railroad is held to a rigid accountability as to its duties towards its passenger, there rest upon the passenger certain duties. It is required of him not to be offensive, vulgar, obscene, or coarsely disagreeable to his fellow-passengers. It is expected of him that he demean himself in such way as not to outrage the feelings of his fellow-passengers, or expose them to suffering or danger. If he fail in these, and other respects I need not mention, the train-men may remove him from it, and use as much, and no more, force as is necessary to his removal. Now, should you conclude that the plaintiff is entitled to damages against any of the defendants, and you should believe from the proof that the plaintiff placed himself in the car and pursued the course he did so that he might be removed from the car and train, for the purpose of bringing a suit,—if he sought and desired what followed,—he is not entitled to exemplary damages; nor would a jury be justified in allowing him liberal or exaggerated compensation for his mental and physical sufferings. If he sought and desired that which befell him, that fact goes in mitigation of his damages. If there is no evidence which convinces you that such was his purpose, you should give him full and liberal compensation for his sufferings and other injuries, and may allow such sum as punitive damages as you may think right in preventing the recurrence of a like mischief.

The jury rendered a verdict against the passenger defendant and the railroad company for \$217, and in favor of the conductor and the brakeman.

See *Logwood v. Memphis & C. R. Co.*, ante, 318, and *The Sue*, 22 FED. REP. 843.—[Ed.

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LEHMAN v. ROSENGARTEN and another.

(Circuit Court, E. D. Michigan. January 26, 1885.)

1. REPLEVIN—PLEA OF POSSESSION UNDER ASSIGNMENT UNDER STATE LAW.

It is not a good plea to an action of replevin in the federal court that the defendant holds possession of the property as assignee under a state law regulating general assignments for the benefit of creditors, and proceedings thereunder, and providing that under certain circumstances the courts of the state may enforce the trust, appoint a receiver, etc., and giving to such courts supervisory powers of all matters and disputes arising under such assignments, etc.

2. SAME—POSSESSION OF ASSIGNEE NOT POSSESSION OF COURT.

The possession of such assignee is not the possession of the court.

On demurrer to a plea in abatement.

The action was replevin. Defendant Rosengarten pleaded that his co-defendant, Schlesinger, had made to him a general assignment for the benefit of creditors, under the provisions of the state act for the regulation of such assignments; that both he and Schlesinger had complied with all the provisions of the act with respect to the acknowledgment and filing of the assignment, the filing of the bond and inventory, etc.; and that from the delivery of said assignment "continuously to the time of the service of the writ of replevin in this cause, and at the time of said service, the said defendant was in possession of the property mentioned in said writ of replevin and declaration by virtue of the trust created by said assignment, and by virtue of the provision of said acts;" and he therefore averred that at the time of the service of said writ the property mentioned therein was in the custody and under the control of the circuit court for the county of Wayne, etc. Plaintiff demurred to this plea, and defendant joined in demurrer.

C. E. Warner, for plaintiff.

John D. Conely, for defendants.

Brown, J. The issue tendered by the pleadings in this case raises the question whether a general assignee for the benefit of creditors, under the assignment law of this state, holds possession of the assigned property as an officer of the circuit court of the proper county, or simply as a trustee for the benefit of those interested in the property; in other words, whether the property while in his possession is in the custody of the law, within the purview of the cases which hold that property in the possession of an officer of one court cannot be replevied or seized by the officer of another court. *Covell v. Heyman*, 111 U. S. 176; S. C. 4 Sup. Ct. Rep. 355; *Freeman v. Howe*, 24 How. 450; *Krippendorf v. Hyde*, 110 U. S. 276; S. C. 4 Sup. Ct. Rep. 27. Doubtless the principle of these cases also extends to an assignee in bankruptcy who takes his title directly from the court, and whose possession has always been treated as the custody of the law. *In re Vogel*, 7 Blatchf. 18; *In re Barrow*, 1 N. B. R. 481.

To my mind it is equally clear that a state legislature may enact an insolvent law of the same general nature as the federal bankrupt laws, which would vest in the trustee a possession of the insolvent's property unassailable by the process of any other court, and thus accomplish all which is claimed by the defendant in this case. *Keys Manuf'g Co. v. Kimpel*, 22 FED. REP. 466. Whether the general assignment law of this state is so far an insolvent law as to effectuate this exemption depends upon the extent to which the assignee acts under the direct authority of the court. A careful examination of its provisions, it seems to me, relieves the question of all reasonable doubt. Section 1 declares that all common-law assignments for the benefit of creditors shall be void, unless the same shall be without preferences, of all the property of the assignor, and unless the assignment, or a duplicate thereof, an inventory of the property, a list of the creditors, and a bond by the assignee shall be filed in the office of the clerk of the circuit court of the county where the assignor resides. The second section requires the assignment to be acknowledged, and gives specific directions respecting the inventory, the list of the creditors, and the bond. The third declares that every such assignment shall confer upon such assignee the right to recover all property, etc., which might be reached or recovered by any of the creditors. Section 4 provides for notices to creditors, and for filing proofs of claims "in said clerk's office." Section 5 requires the assignee to file a report "in said clerk's office" within three months after receiving such trust, etc. Section 6 enacts that in case of fraud in the assignment, or in the execution of the trust, or of the failure or neglect of the assignee in his duties, any person interested therein may file his bill in the circuit court in chancery of the proper county, for the enforcement of said trust, which court may appoint a receiver, with power to examine parties or witnesses. Additional sections were added in 1881, providing for the contest of claims in the proper circuit court, and also prescribing (section 10) that no allowance shall be made to any assignee for his compensation, etc., except upon notice to creditors that he intends to make application for such allowance. The final section (11) confers upon the circuit court in chancery of the proper county supervisory powers of all matters and disputes arising under the assignment, and authority to make all proper orders for the management and disposition of the assigned property, the distribution of the assets and avails, and the recovery of all property claimed by third persons, etc.

It is insisted by the defendant here that his possession under this act is analogous to that of an assignee in bankruptcy, and that he is therefore entitled to the same protection. A moment's consideration, however, will show that an assignee under this law, and an assignee in bankruptcy, stand in very different relations to their respective courts. Before an assignee in bankruptcy could take possession of the assigned property, there must have been a petition filed in the

district court, an adjudication of bankruptcy, a reference to the register, who held in fact an auxiliary court, proof of claims before him, a meeting of creditors called by and presided over by him, a choice by a majority of their votes, and an assignment by the register to such assignee. His only title to the assigned property was thus taken from the court itself by operation of law, and not by act of the parties. From this moment until his final discharge he was under the constant supervision of the court. He was obliged to keep regular accounts of all moneys received and expended, and to report to the court at least once in three months. He was bound to deposit his moneys in a bank designated by the court, and the moneys so deposited could only be drawn upon his checks, countersigned by the judge or register. He could not submit controversies to arbitration, or settle such controversies by agreement, except under the direction of the court. No sale of property could be made except at public auction, and no dividend paid except by instruction of the court, which was also vested with the ordinary powers of a court of chancery in respect to the supervision of the proceedings and removal of the assignee.

Upon the other hand, an assignee, under the law of this state, may collect the assets and distribute the proceeds of the entire estate, without once applying to the court, except, perhaps, to fix his compensation in case of dispute as to the amount which should be allowed him. It is true that he is bound to file a copy of the assignment, his inventory, a list of creditors, and his bond in the office of the clerk of the circuit court; but that was designed merely as a convenient place of deposit in case any person interested in the estate should wish to examine them. Proofs of claims were also required to be filed in the same office. It is also true that jurisdiction was vested in the circuit court in chancery in certain contingencies to enforce the trust, to authorize the recovery of all property claimed by third persons, and to require new bonds or sureties, but there can be no doubt that most, if not all, of these powers existed without the statute, and that, if useful for any purpose, this section was inserted out of abundant caution, or was intended to designate the precise bounds of the jurisdiction of such court in this connection.

In 2 Story, Eq. § 1037, it is said that "the trusts arising under general assignments for the benefit of creditors, are, in a peculiar sense, the objects of equity jurisdiction. For, although at law there may, under some circumstances, be a remedy for the creditors to enforce the trusts, that remedy must be very inadequate as a measure of full relief. On the other hand, courts of equity, by their power of enforcing a discovery and account from the trustees, and of making all the creditors, as well as the debtor, parties to the suit, can administer entire justice, and distribute the whole funds in their proper order among all the claimants, upon the application of any of them, either on his own behalf or on behalf of himself and all the other creditors." See, also, *Ledyard's Appeal*, 51 Mich. 623; S. C. 17 N. W. Rep. 208.

Certainly this section, conferring these powers upon the state court, would not oust the jurisdiction of this court to entertain a proper bill for the same purpose, although it will be conceded that if a receiver were appointed by either court, his possession of the assigned property would be exclusive. *Chewett v. Moran*, 17 FED. REP. 820, and cases cited. But it would be a strange doctrine to hold that an assignee chosen by an insolvent debtor could be thrust upon and made an officer of a court of justice without its authority or recognition. The position here taken is fully sustained by the following cases: *Shelby v. Bacon*, 10 How. 56; *Griswold v. Central Vermont R. Co.* 9 FED. REP. 797; *Adler v. Ecker*, 2 FED. REP. 126; *Lapp v. Van Norman*, 19 FED. REP. 406; *Mississippi Mills Co. v. Ranlett*, 19 FED. REP. 191.

The demurrer to the plea in abatement is therefore sustained.

GOLDSMITH v. GILLILAND and others.

(Circuit Court, D. Oregon. May 20, 1885.)

1. BOND OF A GUARDIAN.

Under section 10 of the act of December 16, 1853, (Laws, Or. 739,) the security required of a guardian, licensed to sell the real property of his ward, is a writing obligatory or "bond" in a definite sum, and upon the conditions therein specified, and not a mere "undertaking;" and such bond must be given in such sum as the county judge may direct, and with such sureties as he may approve.

2. SAME—WHO MAY QUESTION SALE ON ACCOUNT OF.

No one can question the validity of a guardian's sale for want of sufficient security given by him, except the ward or some one claiming under him.

Suit to Determine Adverse Claim to Real Property.

George H. Williams, for plaintiff.

James F. Watson, for defendants.

DEADY, J. This suit is brought by the plaintiff, a citizen of New York, to have his title to an undivided five-eighths of the Danforth Balch donation quieted, as against the claim of the defendants, citizens of Oregon, of an estate or interest therein adverse to him.

In his amended bill the plaintiff derails his title to the premises from the donee of the United States, Mary Jane Balch, the wife of Danforth Balch, and in so doing shows that on May 4, 1868, the eight minor children of said Danforth and Mary Jane Balch were the owners of the premises, as tenants in common, subject to a life estate therein, for the life of their mother, when one C. S. Silver was appointed by the county court of Multnomah county, their guardian; that on July 12, 1870, said Silver obtained an order from said court to sell the interests of four of said children in the premises, which he did on September 24, 1870, and conveyed the same to the purchaser under whom the plaintiff claims.

The defendants demur to the amended bill, for that the "complainant hath not by his own showing made out a case which establishes his right, title, or interest;" and on the argument thereof made the point that the guardian's sale was invalid, and no title or interest passed to the purchaser thereat, because it does not appear that the guardian, before making such sale, gave a bond as required by statute.

By section 10 of the act of December 16, 1853, (Laws Or. 739,) it is provided that a guardian, before selling the real property of his ward, shall "give bond to the county judge * * * with sufficient surety or sureties, with condition to sell the same in the manner prescribed for sales of real estate by executors or administrators, and to account for and dispose of the proceeds of the sale in the manner provided by law."

By section 20 of the same act, (Laws Or. 740,) it is provided that in any action relating to property sold by guardian under said act, in which "the ward or any person claiming under him shall contest the validity of the sale, the same shall not be avoided on account of any irregularity in the proceedings: provided it shall appear," among other things, that the guardian "gave a bond that was approved by the county judge."

In *Gager v. Henry*, 5 Sawy. 245, this court held that a sale by a guardian, when authorized by a court of competent jurisdiction, could not be questioned collaterally, except as allowed by this section of this act. See, also, *Hobart v. Upton*, 2 Sawy. 302. Upon this point the amended bill states that the county court licensed the guardian to sell the property "upon his giving bond in the sum of \$6,000 as prescribed by law, which bond was accordingly given and approved by said court."

The argument in support of the demurrer assumes that the word "bond" in this act is used as a synonym with the word "undertaking," and that the court had no power to limit the amount of such undertaking to \$6,000 or otherwise, but that the same should have been given generally as a security that the property would be duly sold and the proceeds, be they more or less, duly accounted for; and because this was not done counsel insists that the act was not complied with in this particular, and therefore the sale was invalid and the purchaser took nothing under it. In the primary sense of the word, an "undertaking" is simply a promise. But in modern times, it is most frequently used to signify a written promise, not under seal, made by a party in the course of legal proceedings as a prerequisite to obtaining some special process, order, or allowance in his cause. In proceedings according to the Code of Civil Procedure, it has taken the place of the "bond," and is given without limit as to the liability of the undertakers, unless otherwise specially provided by statute. *State v. Mahoney*, 8 Or. 207. But a "bond" is a writing under seal, by which the maker or obligor acknowledges himself indebted to another, called the obligee, in a specified sum, which he thereby "binds" him-

self to pay. If taken as a security for the performance or forbearance of any act, a clause is added, called a condition, in which the circumstances leading to its execution are recited, and by which it is in effect provided that if the obligor shall perform or forbear accordingly that the obligation shall be void.

When the act of 1853 was passed the word "undertaking," in the sense of a substitute for a bond, was unknown to the legislation of Oregon. But at the same session sundry acts were passed regulating the practice in the courts, which were taken from the New York Code of Civil Procedure. In these the term was first used. But there is not the slightest ground for supposing that the legislature used the term "bond" in the sense of "undertaking," or otherwise than in its well-known and universally understood legal sense. Now, one of the essentials of a bond is that the obligor shall acknowledge himself indebted to the obligee in a definite sum. Without this a bond cannot be given. Therefore, when the act required the guardian to give a "bond to the county judge," conditioned as therein provided, it in effect required him to give security for the faithful performance of his trust, in such sum and with such sureties as such judge might direct and approve.

The county judge before whom the proceeding is had has the means of knowing the probable value of the property, and the statute trusts him, as it must some one, to fix the amount of the bond at a sum sufficient to make it ample security to all concerned. And this view is fully confirmed by subdivision 1 of section 20, which in effect declares the sale legal in this respect, whenever it appears that the guardian "gave a bond that was approved by the county judge." This the bill shows was done in this case, and it is sufficient. But I do not perceive that the defendants are in a condition to raise this question. They have not yet answered and disclosed the nature of their claim, and therefore it does not appear whether they claim under the wards in this sale or adversely to their title. Taken together, sections 20 and 22 of the act provide that if the party contesting the validity of a guardian's sale claims under the ward, it must appear, among other things, that the guardian gave a bond to the approval of the county judge; but if the person questioning such sale claims adversely to the title of the ward, then it is only necessary that it should appear that the guardian was authorized to make the sale, and "that he did accordingly execute and acknowledge, in legal form, a deed for the conveyance of the premises."

Whatever may be commonly known or understood about the nature of the defendants' claim to this property, the court cannot assume or take notice that they claim under the wards of the guardian who made this sale, and until that fact appears they cannot be heard to question the validity of such sale on the ground of the insufficiency of the surety given by the guardian. The demurrer must be overruled, and it is so ordered.

BLAKEMORE and others v. HEYMAN.

(Circuit Court, D. Kentucky. April 5, 1881.)

COTTON EXCHANGE—SALE—MARGINS—CUSTOM.

In the absence of a special agreement or proof of knowledge of a custom of the cotton exchange of New York, a broker in that city who sells cotton before maturity of the contract, because of a failure on the part of his principal to advance margins, cannot recover from such principal the amount of loss sustained by reason of such sale.

At Law.

Henry Burnett, for plaintiffs.

J. C. Gilbert, for defendant.

BARR, J. This is a suit to recover a balance of \$687.19, which plaintiffs alleged they paid for defendant at his instance and request. Plaintiffs are commission merchants, doing business in New York, and are members of the Cotton Exchange of that city. They deal in produce on commission. The defendant is a dry goods merchant, doing business in Henderson, Kentucky. Plaintiffs bought on the Cotton Exchange, New York, for defendant, 100 bales of cotton, to be delivered February, 1879. This contract matured, and they say they closed it out according to the rules and regulations of the Cotton Exchange, and there was a loss of \$44.75. They, at the request of defendant, sold, March 24, 1879, for his account, 100 bales of cotton, June delivery. They sold March 26, 1879, upon like request and account, 100 bales of cotton, July delivery. These sales were made on the Cotton Exchange, and at the prevailing rates. Plaintiffs then had on hand as margin \$550, less the \$44.75 loss on the purchase of 100 bales of cotton for February delivery. The market advanced, and plaintiffs demanded of defendant additional margin, and he sent them April 1, 1879, \$75, and promised April 3, 1879, to send them \$300 more, but failed to do so. The plaintiffs, on the fifteenth April, 1879, covered these outstanding contracts by the purchase from two members of the Cotton Exchange the same amount of cotton and same delivery, June and July. The cotton thus purchased cost more than the price for which the cotton was sold in March. The difference was settled as of the fifteenth of April, and the contracts which were entered into April 15th substituted for the March contracts, and thus the transaction was closed, and plaintiffs released from any further liability. The loss on the contract for the June delivery was \$679.25, and on the contract for the July delivery was \$578.25. These sums, together with the plaintiffs' commission, after deducting the margins in their hands, made the balance of \$687.19 sued for.

The defendant admits the employment of plaintiffs and the sending of the margins to them, but puts in issue every other material allegation of the petition. He denies that there was a sale in March of the cotton as alleged, or that there was a purchase in April. He de-

nies all knowledge of the rules and regulations, or customs, of the New York Cotton Exchange. He also alleges that any contract or contracts which plaintiffs entered into were with the express understanding that only the difference should be paid, and that they were really only wagers upon the rise and fall of the market, and void.

I have carefully read the evidence, and need only consider whether or not plaintiffs had the right to close out the June and July deliveries on the fifteenth of April, because defendant failed to put into their hands the margin required by them of him. There is no evidence proving or tending to prove that there was a special agreement between the parties which authorized the plaintiffs to close out these contracts in advance of their maturity, because of the failure of defendant to put up margins to cover the fluctuation of the cotton market in New York. This right is sought to be derived from the rules and regulations of the New York Cotton Exchange, and the custom prevailing in the New York cotton market. All knowledge or notice of the rules and regulations of the New York Cotton Exchange is denied by defendant, and he reiterates these denials in his testimony. The plaintiffs have failed to prove defendant's knowledge of these rules and regulations, or that he agreed to be bound by them in his dealings with plaintiffs, or that the contract between plaintiffs and defendant was to be controlled or governed by them. Indeed, there is no affirmative evidence upon this subject, other than the fact the dealings were upon margins, and that defendant seemed to have recognized plaintiffs' right to call for additional margin. But, as far as I can see from the evidence, never at any time has defendant waived his legal rights, in the event he failed to put up margin as required by plaintiffs. In the absence of an agreement, plaintiffs had no legal right to close out contracts on the fifteenth of April, which did not mature until June and July.

The laws, rules, and regulations which govern the members of the New York Cotton Exchange, can have no effect upon defendant's legal rights, as he did not know of or acquiesce in them. If, however, it be conceded that defendant is bound to repay to plaintiffs all losses which they incurred in accordance with the laws and rules governing the New York Cotton Exchange, I should be disinclined to give judgment in favor of plaintiffs, because it is not shown they were compelled to do as they did. The parties to whom they allege they sold the cotton were Waldo & Dayton, plaintiffs' brokers, and they nowhere prove that Waldo & Dayton required of them more margin than defendants had already furnished them, nor indeed that any demand for margin had been made of them or would be made. Plaintiffs' call for an additional margin was, as far as this record shows, made for plaintiff's own protection, and not because margins had been demanded of them.

In regard to a custom in New York outside of the Cotton Exchange, which Mr. Watts, president of the Cotton Exchange, attempts to prove,

it is sufficient to say that no such custom is pleaded, nor is there any evidence tending to prove defendant's knowledge of it, or that it is a well-known usage or custom. In order to have "commercial usage take the place of general law, it must be so uniformly acquiesced in, and for such a length of time, that the jury will feel themselves constrained to find that it entered into the minds of the parties and formed a part of the contract." *Lyon v. Culbertson*, 83 Ill. 37.

The plaintiffs have failed to sustain their action, and judgment will be for defendant, and his costs expended therein.

YSTALIFERA IRON CO. v. REDFIELD and others, Ex'rs.

(Circuit Court, S. D. New York. April 30, 1883.)

CUSTOMS DUTIES—BOXES OF TIN PLATES—REAPPRAISEMENT—EXAMINATION OF BOXES—ACT OF AUGUST 30, 1842.

Plaintiff imported in 1853, from Liverpool, 1,300 boxes of tin plates of four different kinds, and of different value, and one box of each kind, being four boxes in all, were designated by the collector for examination and appraisal, and on appraisal increased duties and a penalty were imposed. Plaintiff paid the penalty and increased duties under protest, and brought suit to recover the amount. *Held*, that the act of August 30, 1842, §§ 16, 17, 21, under which the appraisal was made, required one in every ten boxes to be examined and appraised, and that no waiver of the statute being shown, the increased duties and penalty imposed were illegal, and that plaintiff was entitled to recover.

At Law.

A. W. Griswold, for plaintiff.

H. R. Wilson, Asst. Dist. Atty., for defendants.

SHIPMAN, J. The case shows that in 1853 the Ystalifera Iron Company, of Swansea, Wales, consigned, for its account and upon its risk, to Naylor & Co., of the city of New York, 1,300 boxes of tin andterne plates manufactured and owned by said iron company. Said goods were sent by way of Liverpool, and arrived by the ship Sidons about August 29, 1853. The invoice and entry contained four different kinds or brands, of different values, viz., 600 boxes terne plates, marked I C; 333 boxes, I C, tin plates; 137 boxes, I X, tin plates; and 230 boxes, W I C, tin plates. The invoice was presented for entry at the custom-house on August 29, 1853. The dutiable value was estimated upon the invoice valuation, being the value at the time and place of the manufacture of the goods, at \$8,133.14, and the duties thereon were properly estimated to amount to \$1,219.95, which were paid by Naylor & Co., without protest, on September 3, 1853. One box only of each mark or brand of the importation, being four boxes in all, were designated by the collector for examination and appraisal, and were removed to the public stores. A penal redelivery bond was given to the collector, as provided in section 4

of the act of May 28, 1830, (4 St. at Large, 410,) a permit for 1,296 boxes was given to Naylor & Co., and they received these boxes between September 10, 1853, and October 1, 1853. The invoice valuation was raised more than 10 per cent. by the government appraiser on September 12, 1853. Upon appeal by the consignees there was a reappraisement, on September 14, 1853, by a merchant appraiser and the general appraiser. The former took the oath required by law, and examined only two or three of the sample boxes which were in the public stores. The general appraiser examined no more than the four sample boxes. The two differed in their appraisal, the merchant appraiser increasing the invoice value somewhat, but less than 10 per cent., and the general appraiser adhering to the previous appraisal. The collector decided in favor of the appraisal of the general appraiser. The reappraisers appraised at Liverpool, without reference to Swansea, prices, and founded their opinion upon Liverpool prices current. The merchant appraiser deducted from the quotations in the circulars, because the value of the Ystalifera goods at Liverpool was less than that which was given as the ordinary market price. The increased duties in consequence of this appraisal were an additional duty of \$140.70, and a penalty of \$575, which were paid by the consignees on December 8, 1854, under and after written protest distinctly and specifically setting forth the grounds of objection to the payment of the duties, and under compulsion, partly in order to get the four boxes of plates upon which the duties were imposed, which were still in the public stores, and especially to prevent a permanent refusal by the custom-house officials to receive the bonds of their firm. There was no evidence of the waiver of the statutory requirement that one package in every ten packages in an invoice should be examined and appraised.

The decision by the reappraisers of the question what markets of the country from which the goods have been imported are the principal ones for the goods in controversy, and their appraisal, made in accordance with the examination which is required by statute, are final. But the statute (act Aug. 30, 1842, 5 St. at Large, 563-565, §§ 16, 17, 21) required that one package in every ten packages of the merchandise to be appraised must be designated by the collector and must be examined, and there must be, in substance and effect, a faithful personal examination by the reappraisers of the number of packages which are required to be examined and appraised, or such an examination of the samples drawn from such packages as is equivalent to an examination of the packages themselves. If such examination is not had, the reappraisal is invalid, and the excess of duty or the penalty that is imposed by reason of any increased valuations above those stated in the invoice is illegally imposed. *Greely v. Thompson*, 10 How. 225; *Greely's Adm'r v. Burgess*, 18 How. 413; *Burgess v. Converse*, 2 Curt. C. C. 216; *Stairs v. Peaslee*, 18 How. 521; *Belcher v. Linn*, 24 How. 508. If a faithful examination was

not had of the number of packages which the statute required to be examined, or of the samples drawn from such number of packages, there was no power in the reappraisers to make an appraisal. In this case but four packages, being one only of each of the four different brands of plates, and the aggregate number of packages being 1,300, were sent to the public stores for examination, and were examined. Any examination of such packages only must be inadequate, unless further examination is waived. The illegality is sufficiently pointed out in the twenty-seventh ground of protest, taken in connection with the sixteenth ground. No objection was taken by the defendants to any defect in the protest.

Let judgment be entered upon the verdict for \$715.70, with interest from December 8, 1854.

WINDMULLER and others v. ROBERTSON.

(Circuit Court, S.D. New York. May 8, 1885.)

1. CUSTOMS DUTIES—BEANS—ACT OF MARCH 3, 1883.

All ordinary beans are subject to a duty of 10 per cent. 22 St. at Large, 488, 517, 520.

2. SAME—VERDICT—MISTAKE AS TO AMOUNT.

In an action to recover excessive duties, where the jury, by mistake in calculating the amount of duties illegally exacted, render a verdict for too large an amount, such verdict may be sustained on remitting the excess, and a new trial refused.

At Law.

Henry E. Tremaine, for plaintiffs.

Sam'l B. Clarke, for defendant.

WHEELER, J. This is a suit to recover back duties exacted under the act of March 3, 1883, (22 St. at Large, 488,) upon importations of beans. Under this act, drugs, barks, beans, etc., not edible and in a crude state, (517,) and plants, trees, shrubs, and vines of all kinds not otherwise provided for, and seeds of all kinds, except medicinal seeds, not specially enumerated or provided for, (520,) are free; and vegetables, in their natural state, or in salt or brine, not specially enumerated or provided for, are, in Schedule G, under the head of provisions, made subject to a duty of 10 per centum, (504;) and garden seeds, except seed of the sugar beet, are made subject to a duty of 20 per centum. A duty of 20 per centum as for garden seeds was exacted. The importers protested that the beans were free as seeds, or subject to a duty of 10 per centum only. The jury, under instructions, found that the beans were neither garden seeds, nor seeds in the sense of the statute, and returned a verdict for the excess above 10 per centum. The principal question now is as to the correctness of this finding.

Beans are vegetables, and are mentioned as examples of such in Webster's Dictionary. They are raised for food, and properly fall under the head of provisions. They are not specially enumerated or provided for anywhere in the act, unless they are under the general name of "seeds" or "garden seeds." A few only of all that are raised are used for seed. They are not commonly spoken of as seeds, but are known as an article of food by their name of beans. Those not edible are free by the other provision of the act. If that division had not been intended for the purpose of leaving those edible dutiable with other provisions, it would be useless. The fair meaning of all these provisions of this act seems to be to make all ordinary beans dutiable at 10 per cent. The verdict, being in accordance with this view, appears to be right as to this question.

The payment of 20 per cent., for which the verdict was rendered, was not made until after this suit was brought, but this fact was not made known, and no question which it would affect was raised at the trial; but, by an apparent mistake in computation, the verdict was for \$715.29, when the excess actually paid, with interest, amounted to only \$571.50. The defendant insists that the verdict should be set aside unless the plaintiffs remit the excess; and that then it should be, unless the recovery would be a bar to any future recovery for the same payments. Of course the excess should be remitted or the verdict set aside. The plaintiffs do not claim to the contrary of this. And it is the former recovery, not the recovery upon any particular form of pleading, or order or regularity of procedure, that satisfies the right of recovery and constitutes the bar. No error was committed at the trial in this respect, and this irregularity, if one, furnishes no ground for a new trial.

On the filing of a remitter of \$143.79 within 10 days, let judgment be entered on the verdict for the balance; and on failure to file such remitter within that time, let an order be entered setting aside the verdict.

HARRISON and others *v.* MERRITT.

(Circuit Court, S. D. New York. May 8, 1885.)

CUSTOMS DUTIES—BONE-BLACK—REV. ST. § 2504.

Bone-black is not included in the clause, "bones crude, and not manufactured, burned, calcined, ground, or steamed," in the free-list of section 2504 of the Revised Statutes.

At Law.

Henry E. Davies, for plaintiffs.

Elihu Root, U. S. Atty., and Sam'l B. Clark, Asst. U. S. Atty., for defendant.

WHEELER, J. The question in this case is whether bone-black is included in the clause, "bones crude, and not manufactured, burned, calcined, ground, or steamed," in the free-list of section 2504 of the Revised Statutes. The evidence showed that it is made by subjecting bones, after being steamed and cleaned, to destructive distillation by heat in close vessels, until all is expelled but the carbon, and then crushing that, and assorting the pieces into proper sizes for clarifying sugar. The jury has found thereupon that bones so treated, are not manufactured more than by being burned, calcined, ground, or steamed. The defendant has moved for a new trial, principally upon the ground that this finding is not supported by, and is contrary to, the evidence. Bones are understood to be calcined when they are subjected to heat in open vessels so as to produce bone-ash, by being made friable; and to be burned when subjected to the direct action of fire. This distillation appears to be different from either. And the crushing and assorting is an important part of the process. By the whole a new article is made from bones. They are not treated thus for the purpose of securing them, or making them portable, as grass is made into hay, without becoming manufactured, as was held in *Frazee v. Moffitt*, 20 Blatchf. 267; S. C. 18 FED. REP. 584; or as apples are cut and dried, as in that case mentioned. The bones are manufactured into bone-black by processes of several steps. *Schrieffer v. Wood*, 5 Blatchf. 215; *Peters v. Robertson*, 20 FED. REP. 818. These steps amount to more than either of those allowed by the statute without making the result dutiable. The verdict for these reasons appears to be contrary to the weight of the evidence, and ought, therefore, to be set aside.

Verdict set aside, and new trial granted.

LEECH, Assignee, v. DAWSON and others.

(District Court, D. Kentucky. July 28, 1884.)

BANKRUPTCY—STATUTE OF LIMITATIONS—ACTION BY ASSIGNEE AGAINST BANKRUPT CLAIMING LAND AS HOMESTEAD.

The limitation prescribed by Rev. St. § 5057, applies to a suit by an assignee in bankruptcy against the bankrupt, to recover land fraudulently claimed and retained by the bankrupt as his homestead.

In Bankruptcy.

Gilbert, Reed & Darby, for defendants.

Henry Burnett, for complainant.

BARR, J. B. N. Dawson was adjudged a bankrupt in May, 1876, and James H. Leech, now deceased, was appointed his assignee, and the register made deed in June, 1876. The assignee, in October, 1876,

filed his report describing the land which had been set apart to the bankrupt as a homestead thus, viz.:

"Two hundred and fifty acres of land in Hopkins county, Kentucky, near the town of Dawson, upon which said B. N. Dawson and his family now reside as a homestead."

The land in controversy is within the town of Dawson, if Dawson embraces the whole of a plat of ground which the bankrupt had made some years before his bankruptcy, and under which he had sold lots. The plat had never been recorded, nor had the town of Dawson been incorporated as a town; but, as there was to be a depot on the place, the bankrupt concluded to establish a town, and had for that purpose a plat made, in which some 25 or 30 acres was laid out by streets, and lots fronting thereon. He sold small lots in 1872 or 1873, but the town did not grow, and at the time of Dawson's bankruptcy the actual town consisted of a few houses immediately around the depot. The land in controversy is not, therefore, within the town of Dawson, but "near" it, if the town of Dawson meant the actual town.

This description of the homestead must be read by the light of surrounding circumstances, and much evidence has been taken by the parties in this controversy. There is quite a conflict in this evidence on some material points. The plea of the statute of limitations is made, and that question should be disposed of first. The 5057th section, Rev. St., provides that "no suit, either at law or in equity, shall be maintainable in any court between an assignee in bankruptcy and a person claiming an adverse interest, touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against said assignee." This is taken from section 2 of the act of 1867, and is substantially the same upon this subject as the eighth section of the bankrupt act of 1841. The complainant alleges that the bankrupt fraudulently concealed this land from the assignee, Mr. Leech, and omitted it from his schedule, with the fraudulent intent to prevent it from being sold by him; but this is not sustained by the evidence. In the schedule made by the bankrupt, and in his claim to have the land allotted, he described his land thus:

"A tract of land of about 250 acres, with ordinary dwelling-house and usual out-houses on it, situated in Hopkins county, Ky., near the town of Dawson, which the petitioner now lives upon, occupies as a home and farm for the support of himself and family, and which the petitioner claims under the statute of Kentucky as a homestead."

We think, without going into the detail of the evidence, that the bankrupt did claim the land in controversy, and that, after the allotment of his homestead, he supposed, as did the assignee, Mr. Leech, that it embraced all of the land which he owned, except those lots which he (bankrupt) had sold and gotten back. These lots are not now in controversy. The whole of the land, including that in con-

troversy, was not worth more than \$1,000, and its subsequent advance in value, caused by the discovery of mineral water in Dawson, is, of course, not to be considered. Dawson died in 1877, and after his death, his wife and family continued to live on the homestead until it was sold. The land in controversy was not sold, but was claimed in a general way by the guardian of the children of the bankrupt, and in 1882 he obtained a decree of the Hopkins circuit court to sell this land, and did sell in November, 1882. This suit was brought April 7, 1883, so that the limitation bars if it applies to this case.

In *Phelps v. McDonald*, 99 U. S. 306, the assignee of a bankrupt brought a suit to recover a large sum which had been awarded to the bankrupt by the British government, but to be paid by the United States. The bankrupt claimed to be a British subject, and got this award for cotton burned during our civil war. The award was made in 1873, and the suit brought in September, 1874. The bankrupt claimed under a purchase of his assets, but the court held that purchase was fraudulent and void, and that the claim was still the property of the assignee. In the course of the opinion the court say:

"The bankrupt law required that all suits by or against the assignee should be brought within two years from the time the cause of action accrued. Rev. St. p. 782, § 5057. But this provision relates to suits by or against the assignee with respect to parties other than the bankrupt. In a case like this it has no application. If this were otherwise, the cause of action here did not accrue until the award was made, and McDonald (bankrupt) set up a claim to the fund awarded. *Clark v. Clark*, 17 How. 315."

The case of *Clark v. Clark*, 17 How. 315, was a case almost identical with the *Phelps v. McDonald* case, and arose under the eighth section of the bankrupt act of 1841, which in terms, as to limitation, was the same as the act of 1867. In that case the language is almost identical with that used in *Phelps v. McDonald*. The court say:

"The interest adversely claimed, and which the statute protects if not sued for within two years, is an interest in a claimant other than the bankrupt; but supposing Ferdinand Clark had been placed in that condition, as to the fund in the treasury, by his pretended purchase of his own assets, yet as no cause of action accrued to the assignee in bankruptcy against Clark until he got possession of the money, and as he never held the fund adversely, it follows that the act does not apply; but if it did, the fund had no existence until the award was made, which was only thirty days before the suit was brought."

It will be seen that while both of the opinions state in broad terms that the act does not apply to a suit by or between the assignee and bankrupt, the question is not discussed, and in both cases the court say no cause of action accrued until the award, which was within less than the two years. Again, the court say, in the *Clark Case*, that no cause of action accrued until the bankrupt obtained the money; and as he never obtained the money, but it was still in the treasury, there was no adverse holding by the bankrupt.

In the case at bar the homestead of the bankrupt did not pass to the assignee by the register's deed. This, by the express terms of

section 5045, did not pass to the assignee. It is true that the determination of the matter of homestead and exemption is left with the assignee, subject to revision by the court; but I presume that a claim in the schedule of a specified homestead is in the nature of an adverse claim, and that, after the bankrupt's assignee has determined the question of homestead, and the bankrupt claims and has possession of land as part of his homestead, that is an actual adverse holding against the assignee. While the homestead does not pass to the assignee, still he has a right to determine whether the claim of the bankrupt is just and proper, and all else, except the exemptions and homestead, does pass to the assignee. Whatever is shown by the bankrupt not to have passed, but to be his homestead, is held adversely to the assignee after his determination is made and reported by him. If the land claimed under such circumstances is really the bankrupt's homestead, it has never passed to the assignee. If, however, there is a doubt, because of the description or other cause, the possession and claim of the bankrupt, that it is part of his homestead, is and must be an adverse claim. It will be observed that there is nothing in this section confining the limitation to suits between the assignee and persons other than the bankrupt. The language is, "between an assignee in bankruptcy and a person claiming an adverse interest."

The bankrupt is very rarely in condition to claim an adverse interest to his own assignee; but if, in fact, he does have possession, as in the case at bar, claiming it as part of his homestead which never passed to his assignee, I can see no good reason why this statute of limitation should not apply. It is not under the assignee, but adverse to him. Whatever my own opinion upon this subject might be, it would be controlled by the case of *Phelps v. McDonald*, 99 U. S. 298, if I construed it as a decision upon this point. The court say that "the cause of action did not accrue until the award was made, and McDonald set up a claim to the fund awarded." If this was true, of course the two-years limitation did not apply, as the award was made only one year before the suit. So, in the *Clark Case*, 17 How. 315, the award was only three months before the bringing of the suit. While it is true that in both of these cases the supreme court say that the limitation does not apply to suits between the bankrupt and his assignee, in both the court say that if he had applied, it would not bar, because the cause of action accrued within the two years. The reason for this provision of the law was to force prompt settlements of bankrupts' estates, (*Bailey v. Glover*, 21 Wall. 342,) and this reason applies with equal force to the prompt adjustment and final settlement of the question of homestead exemption, as any other connected with the settlement of the bankrupt's estate. The supreme court has determined recently that this limitation applies to the receiver of debts due the bankrupt's estate by third parties, thus giving a broad construction to the words "claiming an adverse interest," in this section, (*Jenkins v. International Bank*, 106 U. S. 574; S. C. 2 Sup. Ct. v.23F, no.13—42

Rep. 1,) and that court has indicated a purpose to give a liberal construction to this limitation, and apply it rigidly to all suits covered by its terms.

I have looked with diligence for a direct authority on the question under consideration, but have found none. I must therefore decide this question as I understand the language of this section, which, I think, applies to all persons claiming an adverse interest to the assignee; the bankrupt as well. There is not sufficient evidence of a fraudulent intent or a fraudulent concealment of the property in contest. Indeed, I think the proof makes it clear that the present controversy has arisen from a loose description in the schedule, and consequently in the report of the assignee of the homestead assign; but there was no intentional fraud.

The question of whether or not the land in controversy was, in fact, a part of the homestead, as recognized by the assignee, need not be decided, as I think the suit is barred by the two-years limitation.

The bill and cross-bill should be dismissed, with costs; and it is so ordered.

UNITED STATES v. ROGERS.

(District Court, W. D. Arkansas. April 27, 1885.)

1. CRIMINAL LAW AND PROCEDURE—MOTION FOR WARRANT OF REMOVAL.

In acting on a motion for a warrant of removal, the judge is performing a judicial function, and in the performance of such function he may look into the proceedings of the commissioner, or the court in which the indictment was found, for the purpose of enabling him to properly determine questions pertaining to the removal and grant or refuse the order accordingly.

2. SAME—QUESTION FOR DECISION OF JUDGE.

The question the judge is called to pass on in a proceeding for removal is, where the case is to be tried, where a trial can be had. In passing on the question, the judge can go behind the indictment. He must inquire where a trial can be had. He must send the party to the court which has jurisdiction to try. The judge is to determine for himself whether the party charged should be held or removed or discharged.

3. SAME—JURISDICTION.

Jurisdiction can be raised at any stage of a criminal proceeding. It is never presumed, but must always be proved, and is never waived by a defendant. Jurisdiction to try, embraces jurisdiction of the person, of the place, and of the subject-matter. There must be a concurrence of all of these to give the right to try.

4. SAME—OBJECTION, HOW RAISED.

The person accused and who is asked to be removed, can raise the question of jurisdiction without invoking the aid of the writ of *habeas corpus*, or he may do so by the aid of such writ.

5. SAME—REV. ST. § 1014.

Under section 1014 of the statute of the United States, the judge of the district is invested with plenary power to grant or refuse the warrant of removal, and he is but exercising sound judicial discretion when he looks into the question of jurisdiction, and in looking into such question he may go behind the indictment.

6. SAME—HABEAS CORPUS.

By *habeas corpus* the jurisdiction of a court to try can be inquired into under

the law of the United States, by any judge or court which has a right to issue the writ.

7. **CHEROKEE NATION—TITLE TO LANDS.**

The Cherokee Nation of Indians hold what is called the "Cherokee Outlet" by substantially the same kind of title it holds its other lands. The title to all their lands was obtained by grant from the United States. This title is a base, qualified, or determinable fee, without the right of reversion, but only the possibility of reversion in the United States. This, in effect, puts all the estate in the Cherokee Nation.

8. **SAME—ACT OF JANUARY 6, 1883.**

Prior to the act of congress of January 6, 1883, the Cherokee Outlet was in the jurisdiction of the United States district court for the Western district of Arkansas. That act did not put it in the jurisdiction of the United States court of Kansas, as then and now it is Indian country, set apart and occupied by the Cherokees.

9. **SAME—"OCCUPIED."**

The word "occupied" or "occupation," may be used in law in connection with other expressions, or under the peculiar facts of the case, as to signify actual residence. Under the peculiar facts here, actual residence of the Cherokee Nation would be an impossibility.

10. **SAME—POSSESSION.**

When congress, in the act of January 6, 1883, used the word "occupied" it could have meant no more than the possession of the country. To have possession does not require actual residence.

11. **SAME—LEGAL POSSESSION.**

The word "occupy," as used in the act of congress above referred to means subject to the will and control, *possessio pedis*, and it is synonymous with "subjection" to the will and "control." Wherever there is a subjection of land to the will and control of another, with title in him, it is occupied by that other—it is in the actual legal possession of that other.

12. **SAME—OCCUPATION BY NATION.**

The usual legal sense of the word "occupy," as applied to land, is where a person exercises physical control over such land. Hence, when a nation or body of people have the title to land, and the same is subject to its will and control, it is occupied by it,—legally, it is in its possession.

On Application for Warrant of Removal and Habeas Corpus.

The petitioner for *habeas corpus* in this case was, on the eleventh of September, 1884, at a term of the United States district court of Kansas, begun and held at Wichita, indicted for the crime of arson, in the Indian Territory. Said indictment, in effect, alleges that the crime was committed in that part of the Indian Territory lying north of the Canadian river and east of Texas and the 100th meridian, not set apart and occupied by the Cherokees, Creeks, and Seminole Indian tribes; and that the same was committed within the exclusive jurisdiction of the United States district court for the district of Kansas. A certified copy of the indictment was sent to the marshal of the Western district of Arkansas, with the request that he obtain a warrant of removal, and bring petitioner before the district court of the United States for the district of Kansas, sitting at Wichita. The marshal of this district on the fifteenth day of December, 1884, applied to the judge of this court for a warrant for the arrest of the petitioner. The same was issued. The petitioner was, on the thirtieth of December, 1884, arrested on said warrant, and by the marshal of this district brought before the judge of this court, when the district at-

torney of this district applied to the judge for a warrant of removal; and simultaneous with such application the petitioner filed his petition for a writ of *habeas corpus*, in which he prayed that he might be discharged from arrest, for the reason that the alleged crime for which he is indicted, was not committed in that section of the Indian country over which the district court of Kansas has jurisdiction, but that the same, if any offense against the laws of the United States, was committed in that part of the Indian country lying north of the Canadian river, and west of Texas and the 100th meridian, set apart and occupied by the Cherokees, for which they hold a patent, which evidences their title, obtained from the United States. Said patent is dated December 31, 1838. In other words, that the court in which the indictment was found, had no jurisdiction over the place where the crime was committed, and consequently the indictment could not be lawfully found by the grand jury, and that the court would not have the right to try the same; that no trial can be lawfully had of the alleged crime in the district court of Kansas, and that, therefore, the petitioner cannot be lawfully removed to said district for trial; that consequently the warrant for his arrest should not have been issued by the judge of this court; and that now he is restrained of his liberty in violation of the constitution and laws of the United States. Other reasons are set up by the petitioner in his response to the return of the marshal to the writ of *habeas corpus*, but they not being necessary to a decision of the case, it is not deemed important to set them out.

Barnes & Mellette for petitioner.

W. H. H. Clayton, U. S. Dist. Atty., for the United States.

PARKER, J. This case is before me on the application of District Attorney Clayton for a warrant for the removal of petitioner to the district of Kansas, as well as upon the writ of *habeas corpus*, issued upon application of petitioner. Section 1014 of the Revised Statutes of the United States, among other things, provides that "for any crime or offense against the United States the offender may, by any justice or judge of the United States, * * * be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense.

* * * And when any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had." If it be true that the district court of Kansas has no jurisdiction to try the offense alleged to have been committed by petitioner, this court had no right to issue the warrant for his arrest; and although said warrant is regular on its face, yet it would be without authority of law, as such warrant was issued solely with a view to his removal to the district court of Kansas sitting at Wichita. If that is not a court where a trial can be had for the alleged offense of arson, and

not the court which has cognizance of the offense, the petitioner cannot be held under this warrant.

The question presents itself under the statute of removal, how far the judge of the district can or may go in his inquiry into the case, before he takes action in the shape of ordering the removal of a person charged with crime in a district other than the one where he may be arrested. In *U. S. v. Brawner*, 7 FED. REP. 86, *In re James*, 18 FED. REP. 854, and *In re Buell*, 3 Dill. 116, it was, in effect, held that in acting on a motion for a "warrant of removal" the judge is performing a judicial function, and in the performance of such function, he may look into the proceedings of the commissioner, or the court in which the indictment was found, for the purpose of enabling him to properly determine questions pertaining to the removal, and grant or refuse the order accordingly. If the party has been indicted, can the judge go behind that indictment to inquire into the jurisdiction? The very question that he is called on to investigate and pass on in a proceeding for removal is where the offense is to be tried. What court has jurisdiction of it? Where the trial is to be had. Now, is he precluded from doing this by an indictment? The statute is very broad. He must inquire where the trial is to be had. He must send the party to the district where the offense is to be tried; to the court which has jurisdiction, where the trial is to be had. The judge of the district must judicially determine whether the prisoner shall be taken to another district for trial, and that he may refuse his warrant when it appears that the removal should not be made, or when he should admit the party to bail. The judge is to determine for himself whether the party charged should be held or removed. *U. S. v. Brawner*, 7 FED. REP. 86; Conkl. Treat. (4th Ed.) 582; *Murray*, U. S. Courts, 29; *Re Buell*, 3 Dill. 116, at p. 120; *U. S. v. Jacobi*, 14 Int. Rev. Rec. 45; *U. S. v. Pape*, 24 Int. Rev. Rec. 29; *U. S. v. Volz*, 14 Blatchf. 15; *U. S. v. Haskins*, 3 Sawy. 262; *Re Alexander*, 1 Low. 530; *U. S. v. Shepard*, 1 Abb. 431; *Re Doig*, 4 FED. REP. 193; and cases cited in these opinions.

In some of these cases there was a writ of *habeas corpus*, and in some, the original examination was before the district judge, and in one the question arose in the district to which the removal was made on motion to quash the indictment.

Judge HAMMOND, in *U. S. v. Brawner*, says:

"In none of these cases does it seem to have been treated as a matter of much importance by what form of procedure the action of the judge is invoked, and in none is it denied that he may determine for himself whether the removal is proper."

In the discretion of the judge he may take the indictment as *prima facie* evidence of jurisdiction; but suppose the party, when an application for removal is made, objects to the removal on the ground that the court to which he is sought to be removed, has no jurisdiction to try him, he certainly has the right to, in this way, raise the question

of jurisdiction. Jurisdiction can be raised at any stage of a criminal proceeding. It is never presumed, but must always be proved; and it is never waived by a defendant. If this principle be correct, it follows that the party who is charged with a crime, and arrested in one district to be removed for trial to another, can raise the question, as an objection to his removal, that he cannot be tried in that other, or that the trial cannot be had there for want of jurisdiction in the court either over the person, the subject-matter, or the place where the crime was committed. There is no question in my mind of the right of a person accused to raise the question of jurisdiction on the hearing of an application for removal, without invoking the aid of the writ of *habeas corpus*. In *re James*, 18 FED. REP. 853; *U. S. v. Brawner*, 7 FED. REP. 86. And when said question is raised it becomes the duty of the judge of the district to investigate the case so far at least as to ascertain if the court to which the accused is asked to be removed, is the one where the trial can be had. Under the statute the judge of the district is invested with plenary power to grant or refuse the warrant of removal, and he is but exercising sound judicial discretion when he looks into the question of jurisdiction. It must be remembered that this case is before me both on an application for removal of petitioner and on *habeas corpus*, and if there could be any question about the right of the judge to look to the question of jurisdiction on an application for a warrant of removal, there can be none as to his right to do so when the case is brought before him by *habeas corpus*. In *re Buell*, 3 Dill. 116; *U. S. v. Brawner*, 7 FED. REP. 86.

But it is objected by counsel that the case cannot be heard on *habeas corpus*, as the warrant for the arrest of Rogers was legal; that the officer held him legally by virtue of such writ, and he being in legal custody, he cannot be discharged by this writ at this stage of the case. If he had been arrested on a warrant of a commissioner, and committed to await a warrant of removal, the action of the commissioner could be inquired into by *habeas corpus*, or without it on the application for removal. *U. S. v. Brawner*, 7 FED. REP. 86; *In re Buell*, 3 Dill. 116. The petitioner is in the same condition when held by the marshal under the warrant issued by the judge of this district as though he had been committed by a commissioner to await a warrant of removal. The effect of the warrant was to commit him to the marshal to await the action of the judge in ordering his removal, as would be the effect of the action of a commissioner when he was committed by him to await a warrant of removal. In the one case, the judge, by *habeas corpus*, reviews the action of the commissioner. In the other he reviews his own action. By *habeas corpus* the jurisdiction of a court can be inquired into under the laws of the United States by any judge or court which has the right to issue the writ. In *re Buell*, 3 Dill. 16; *In re James*, 18 FED. REP. 853; *U. S. v. Brawner*, 7 FED. REP. 86.

In re Buell there was an indictment against Buell in the District of Columbia for libel, and he was arrested upon a warrant of a commissioner in the Eastern district of Missouri, where he sued out a writ of *habeas corpus* before Judge TREAT. He took up the question of jurisdiction, and discharged Buell on the ground that the indictment failed to show jurisdiction. This ruling was affirmed by Judge DILLON. If there is no jurisdiction to try, the party is held in custody contrary to the constitution and laws of the United States, and in that case this great writ of right, known as the writ of *habeas corpus*, can be invoked from any officer who has a right, under the laws of the United States, to issue it.

There can, I think, be no doubt that the petitioner can raise the question of jurisdiction on an application for removal either when the motion for a writ of removal is pending, and on such motion, or by *habeas corpus*, and that the judge can, if the question of the jurisdiction of the court to which the prisoner is asked to be sent for trial is raised, go behind the indictment to ascertain *where the trial is to be had*. Then the material question in this case is, did the district court of Kansas have jurisdiction of this alleged offense? The proof submitted in this case shows that a number of persons had banded together under the lead of one D. L. Payne, for the purpose of making a raid into the Indian country; that they had entered that country and made a settlement at a point four miles south of Hunniwell, Kansas, and the thirty-seventh parallel of north latitude, and between the ninety-seventh and ninety-eighth degrees of west longitude, a little north-west of the Nez Perce reservation on the Shaskaskie river; that these persons were intruders in the Indian country. They were there against and in violation of the laws of the United States. The president of the United States had issued his proclamation for their expulsion and arrest. The petitioner in this case had gone there as "acting Indian agent" of the five civilized tribes to point out to the military the intruders who were to be expelled and arrested. That the petitioner set fire to and caused to be burned a small board shanty, which the intruders could not, or would not, remove after being requested by petitioner to remove same. If this is an offense against the laws of the United States, it was committed in that part of the Cherokee country known as the "Cherokee Outlet." This country, together with the other part of its lands, was granted to the Cherokee Nation, as a nation, by the treaties between the Nation and the United States, made May 6, 1828. Indian Treaties 56 and 57, the fourteenth of February, 1833, Id. 63, and December 29, 1835, Id. 61. By these treaties the Cherokee Nation was granted a perpetual outlet west, and a free and unmolested use of all the country lying west of the western boundary line of the 7,000,000 acres of land granted in and by the same treaties.

On the thirty-first of December, 1838, a patent was issued by the government of the United States, in accordance with treaty stipula-

tions for all its lands, including the outlet west. The language of the descriptive part of that patent touching the outlet is "that the United States further guaranty to the Cherokee Nation a perpetual outlet west, and a free and unmolested use of all the country west of the western boundary of said 7,000,000 of acres as far west as the sovereignty of the United States and their right of soil extend." The "granting clause" is that the United States have "given, granted, and by these presents do give and grant, unto the Cherokee Nation the two tracts of land surveyed," which two tracts included the outlet. The *habendum* clause is "to have and to hold the same, together with all the rights, privileges, and appurtenances thereunto belonging, to the said Cherokee Nation," forever subject, however, "to the right of the United States to permit other tribes of red men to get salt on the Salt plain on the western prairie referred to in the second article of the the treaties of the twenty-ninth of December, 1836, which Salt plain has been ascertained to be within the limits prescribed for the outlet, and subject further to the condition provided by the act of congress, of the twenty-eighth of May, 1830," and which condition is that "the lands hereby granted, shall revert to the United States, if the Cherokee Nation become extinct or abandon the same." By looking at the title of the Cherokees to their lands, we find that they hold them all by substantially the same kind of title, the only difference being that the outlet is incumbered with the stipulation that the United States is to permit other tribes to get salt on the Salt plains. With this exception, the title of the Cherokee Nation to the outlet is just as fixed, certain, extensive, and perpetual as the title to any of their lands. This court held in the case of *U. S. v. Reese*, 5 Dill. 405, that "the Cherokees hold their land by title different from the Indian title, by occupation; they derived it by grant from the United States. It is a base, qualified, or determinable fee without the right of reversion, but only a possibility of reversion, in the United States. This in effect puts all the estate in the Cherokee Nation."

Prior to the act of congress of January 6, 1883, all of the country lying west of Missouri and Arkansas, known as the "Indian Territory," was attached by a law of the United States to the judicial district of Arkansas. And the district court of such district had jurisdiction over all the country described above as Indian country for the trial of offenses, when committed by a certain class of persons, or upon a certain class of persons. Up to the time of the act above referred to there was no question as to the Cherokee outlet being in the jurisdiction of the district court for the Western district of Arkansas. It was Indian country and Indian country, lying west of Missouri and Arkansas, and a part of what was known as *the Indian country*. On the date above named, congress passed an act entitled "An act to provide for holding a term of the district court of the United States, at Wichita, Kansas, and for other purposes, which provides, by section 2, "that all that part of the Indian Territory lying north of the Can-

adian river and east of Texas and the 100th meridian, *not set apart and occupied* by the Cherokee, Creek, and Seminole Indian tribes, shall, from and after the passage of this act, be annexed to and constitute a part of the United States judicial district of Kansas, and the United States courts at Wichita and Fort Scott, in the district of Kansas, shall have exclusive original jurisdiction of all offenses committed within the limits of the territory hereby annexed to said district of Kansas against any of the laws of the United States now or that may hereafter be operative therein." 22 St. 400.

By the treaties and patent above referred to the Cherokee outlet was, beyond question, *set apart* to the Cherokees and to that extent was in a condition the converse of that which is necessary to attach it to the district of Kansas. It matters not what may have been the extent of their title. If they had a title of any degree whatever, it was set apart to them. Now, at the time of the commission of this alleged offense, was it occupied by the Cherokee tribe of Indians? If it was set apart and occupied by this tribe, it is not in the jurisdiction of the district court of Kansas.

The evidence in this case shows that the Cherokee Nation has constantly, and all the time since it obtained the outlet, claimed it, and exercised acts of ownership and control over it. The nation has collected at different times a grazier's tax from white men who were grazing their stock on it. Individual Indians have gone on it and fenced up large tracts of land on the outlet. Different individual Indians have gone out and lived on it, and now live on it. That since the passage of this law of January 6, 1883, the Cherokee Nation has leased to citizens of the United States for grazing purposes 6,000,000 acres of this outlet. That under the provisions of the sixteenth article of the treaty of 1866 with the United States, it has sold tracts of land on this outlet for reservations to the Pawnees, Poncas, Nez Percés, Otoes, and Missouras. The very country where this alleged offense was committed, was, at the time of its commission, leased to the cattle men as a part of the 6,000,000-acre lease. That the Cherokee Nation never has abandoned any part of the outlet except what it has sold. It claims the title and possession of the outlet and of that part of it where this alleged offense is shown to have been committed. The United States, the grantor, has admitted its title to it. Then, does the Cherokee Nation occupy the country where the offense was committed? It becomes necessary in this connection to ascertain what is meant by the word "occupy." It is well to remember that the country was set apart to the Cherokee Nation,—not to individual Cherokees, but to the Cherokee Nation as such. When congress used the phrase "not set apart and occupied," did it mean to imply that to constitute an occupation the Cherokee Nation must actually reside on the land, as a tenant resides in the house of his landlord? How could the nation do that? This would be impossible. Did it mean to say that all the country upon which individual Indians, members

of the tribe, did not actually reside, was after the passage of the act to be in the jurisdiction of the district court of Kansas? If so, the jurisdiction of that court would be of the most rambling, meandering, and uncertain character; as it is a notorious fact that there are millions of acres scattered all over the Cherokee Nation, which are not occupied either by the nation or its citizens in the sense of actual residence upon the land. We find that the word "occupied" or "occupation," may be so used in law, in connection with other expressions, or under the peculiar facts of the case, as to signify actual residence. Under the peculiar facts here, actual residence of the Cherokee Nation would be an impossibility and an absurdity. When congress used the word "occupied," it could have meant no more than possession of the country. To have possession does not require actual residence. Words are to be taken according to their customary legal meaning. We find that, ordinarily, in the law, the words "occupation," or "occupy," or "occupied," mean, as used, subject to the will and control *possessio pedis*; that the words "occupation," or "occupy," or "occupied," are synonymous with subjection to the will and control. Wherever there is a subjection of land to the will and control of another with title in him, it is occupied by that other. It is in the actual legal possession of that other. *Lawrence v. Fulton*, 19 Cal. 690; *Plume v. Seward*, 4 Cal. 94; *Bailey v. Irby*, 2 Nott & McC. (S. C.) 343; *Jackson v. Woodruff*, 1 Cow. 285; *Jackson v. Halstead*, 5 Cow. 219. Messrs. Rapalje & Lawrence, in their *Law Dict.* vol. 2, p. 893, in defining the word "occupation," say, "In its usual sense, it is where a person exercises physical control over land." Hence, when a nation or body of people have the title to land, and the same is subject to their will and control, it is occupied by them, —legally, it is in their possession.

The government of the United States occupies all of its public lands. The Cherokee Nation occupies, and is in the actual legal possession of, all its lands to which it has title, and to which it has not relinquished such title. This, in my judgment, is the only reasonable interpretation which can be given to this word "occupied," as used in the act of congress of January 6, 1833. If this be so, there is left no room for any other construction of this act of congress than that it does not put in the jurisdiction of the district court of Kansas any of the Cherokee country to which the nation has title, and which is subject to its will and control. But it is claimed in this case that the Cherokees no longer have any title to the country where the alleged offense is said to have occurred, as they sold it to the Cheyennes and Arapahoes in 1866.

We find by the treaty of May 22, 1866, between the United States and the Cheyennes and Arapahoes, a reservation was set apart for them, which included, as a part thereof, the very country where this alleged crime was committed. By the terms of the second article of the treaty they were not required to settle on said reservation until

such time as the United States shall have extinguished all claims of title thereto on the part of other Indians to said reservation. They did not settle on this reservation, and claimed that they did not understand the location of it as defined by the treaty with them of August 16, 1868, and therefore refused to go upon it. The president of the United States, by executive order of August 10, 1869, located them on their present reservation on the North Fork of the Canadian river. By the sixteenth article of the treaty of July 27, 1866, between the United States and the Cherokees, it was agreed "that the United States may settle friendly Indians in any part of the Cherokee country west of 96 deg., to be taken in compact form, in quantity not exceeding 160 acres for each member of each of said tribes thus to be settled; the boundaries of each of said districts to be distinctly marked, and the land conveyed in fee-simple to each of said tribes, to be held in common, or by their members in severalty, as the United States may decide; said lands thus disposed of to be paid for to the Cherokee Nation at such price as may be agreed on between the said parties in interest, subject to the approval of the president, and if they should not agree, then the price to be fixed by the president; the Cherokee Nation to retain the right of possession of and jurisdiction over all of said country west of 96 deg. of longitude, until thus sold and occupied, after which their jurisdiction and right of possession to terminate forever as to each of said districts thus sold and occupied. The plain meaning of this provision of the treaty is that when the United States should desire any of the outlet for the settlement of friendly Indians on the same, that the Cherokees would sell the same to such Indians, and make title in fee-simple to them for the same,—the purchase price to be paid by them, or the government of the United States for them, to the Cherokees. But until the country, or any part of it, is *so sold and occupied*, the right of possession and jurisdiction over all of said country west of 96 deg. of longitude to be retained by the Cherokees. Here is a plain recognition of the title of the Cherokees by the government of the United States, with their right of possession and jurisdiction. Inasmuch as there never was any sale by the Cherokees to the Cheyennes and Arapahoes of the country where this offense was committed, that the same was never sold by them and occupied by the Cheyennes and Arapahoes, the country is still in the condition of being set apart and occupied by the Cherokees, and does not come under the designation of *Indian country not set apart and occupied by the Cherokees*. Therefore, it is not in the jurisdiction of the United States district court for the district of Kansas, and that court is not one in which a trial of the case of Rogers can be had, and the "petitioner" cannot be removed to said district, and the "warrant of removal" will be refused, and the petitioner in the proceeding by *habeas corpus* will be discharged.

UNITED STATES *v.* GUNNING and another.*(Circuit Court, S. D. New York. May 8, 1885.)*

PATENTS FOR INVENTIONS—PATENT OBTAINED BY FRAUD—MOTION TO REOPEN CASE.

Motion to reopen case for further proof denied, and former opinion (22 FED. REP. 653) adhered to.

In Equity.

Andrew J. Todd, for defendant Ingersoll.

G. E. P. Howard, for plaintiff.

WHEELER, J. This cause has now been heard upon the motion of the defendant Ingersoll, made since the hearing in chief, (22 FED. REP. 653,) to reopen the case for further proof. The testimony sought to be had is that of the defendant Gunning, as to making the invention, and that of one Barnes, in corroboration. The patent is No. 265,051, dated September 26, 1882, and is for letters and figures of enamel, baked on copper or other metal, for signs on windows, and in other places. The testimony proposed is in substance that, seeing enameled articles, he conceived the idea of making letters and figures of the same material in the same way before any one else; and suggested it to others, who acted upon the suggestion, and made such letters, but not that he ever made any such letters or figures. The principal testimony is his own, and there is none shown to be had that he did not know of, nor that the defendant Ingersoll is shown not to have been aware of before the hearing. The principal ground for the motion is that she was not able to take his testimony after the plaintiff's testimony was closed. He and Barnes were both witnesses for the plaintiff, but not to the making of the invention. It does not appear that he was so far distant that she could not easily take his testimony if she had known where he was; nor that she made any arrangement with him, or undertook to, when she was in communication with him, for taking his testimony, or for keeping informed of his whereabouts. Affidavits are made that she diligently endeavored to find him, when she got ready to take testimony, but what efforts she made are not set out. On the whole, it appears that she lost this testimony rather from her own lack of diligence than from any other cause. She shows no right to have the case opened according to the usual practice in such cases; and her motion can be granted only by the exercise of large discretion in her favor.

As this is a bill to repeal the patent for fault in its procurement, the existence of the fraud, and not the validity of the patent otherwise, is the main thing in controversy. But upon the question whether discretion should be exercised to give unusual relief, it is proper to look into the nature of the patented invention far enough to ascertain

whether any useful result is likely to follow from its exercise. Gunning does not pretend that he invented enameling on metal, and of course not that he invented signs, or letters for signs. The materials and mode of manufacture were all old. The most that he did, according to his own story, as now told, was to conceive the idea of making letters out of old materials in an old way. There was nothing new but the purpose. This would not appear to be any patentable invention. *Pennsylvania R. Co. v. Locomotive Safety Truck Co.* 110 U. S. 490; S. C. 4 Sup. Ct. Rep. 220.

It does not appear that the patent could be saved from this suit for any good purpose, even if the proposed testimony would save it. Gunning might prefer that the patent should fail from other grounds than his fraud, but he is not asking for anything in this behalf. No costs were allowed against the defendant Ingersoll, and none would be taxable in her favor against the government if she should prevail in this case, and no fraud is proved against her; therefore it can make no difference to her whether the patent fails here or not, unless she wishes to hold it for some improper purpose, which is not to be presumed. Besides this, there is the fact which appears in the case, and which the proposed testimony does not meet, that the patented letters, made by others, were sold by Gunning more than two years prior to his application, which would invalidate the patent, although his affidavit that the invention had not been in public use or on sale for two years prior to the application, which accompanied the application, may not have been made with such fraudulent intent as to warrant a decree setting aside the patent.

Motion denied.

THE ANCHORIA.

(District Court, S. D. New York. March 29, 1885.)

ADMIRALTY PRACTICE—EXCEPTIONS—FINAL HEARING—COSTS.

The hearing of exceptions to a pleading in admiralty, where the exceptions are in the nature of a special demurrer, or a motion to make more definite and certain, is not such a "final hearing in equity or admiralty," under section 824 of the Revised Statutes, as to entitle a party to a docket fee or costs.

In Admiralty.

Scudder & Carter and Geo. A. Black, for libelants.

Hill, Wing & Shoudy, for the Anchoria.

Brown, J. The libelants having excepted to the answer for want of sufficiency, fullness, and distinctness, the exceptions were sustained, and the defendant was directed, as provided by rule 28 in admiralty, to answer more fully. On the settlement of the order the libelants claimed costs of the hearing upon the exceptions. Rule 28; promul-

gated in 1844, authorized the court to require the defendant "to pay such costs as the court shall adjudge reasonable." The subsequent fee bill of 1853, as modified by section 823 of the Revised Statutes, provides, however, that "the following and no other compensation shall be taxed to attorneys," etc., "except in cases otherwise expressly provided by law." Among the fees made taxable by the following sections there are no costs provided for the hearing of a motion merely. The only language applicable is the provision for a docket fee "on a final hearing in equity or admiralty," under section 824. In the case of *Wooster v. Handy*, 23 FED. REP. 49, Mr. Justice BLATCHFORD has recently carefully considered what constitutes a final hearing sufficient to entitle the party to tax a docket fee. In conclusion, it is said that "there must be a hearing of the cause on its merits; that is, a submission of it to the court in such shape as the parties choose to give it, with a view to a determination whether the plaintiff or libelant has made out the case stated by him in his bill or libel as the ground for the permanent relief, which his pleading seeks, on such proofs as the parties place before the court,—be the case one of *pro confesso*, or bill, or libel and answer, or pleadings alone, or pleadings and proofs."

From this it is clear that unless the hearing be one upon which it is competent for the court to make either a final or an interlocutory decree binding the parties upon the merits, it is not such a "final hearing" as authorizes an allowance of costs; but where the hearing is of that character, such a fee may be awarded. This is in accordance with what, since 1853, has been the practice of this court upon the hearing of exceptions to a libel or an answer. Where the exceptions go to the whole cause of action, or to the sufficiency of the libel or answer, and are such as in common law pleading would be equivalent to a general demurrer, the practice has been to allow a docket fee to the successful party. Such a hearing is in effect a final hearing upon the cause presented by the pleadings and exceptions. In such cases it is discretionary with the court whether it will permit any amendment or not; and if none is permitted, a final decree would follow. The fact that the court may permit further pleading on the payment of the costs, does not make the previous hearing any less a final one as respects the cause of action already heard before the court. This rule was applied by Judge BETTS upon exceptions to a libel involving the merits in the case of *Whitlock v. The Thales*, February term, 1859, in which the exceptions were overruled and a docket fee was allowed to the libelant, and the defendant was permitted to answer. It was applied by BENEDICT, J., in the case of *Aumach v. S. S. Creole*, November 24, 1865, upon exceptions to the libel for insufficiency, where the exceptions were sustained, and a decree ordered for the claimant, with liberty to the libelant to file an amended libel on payment of costs.

The exceptions in this case are not to the merits, or to the general

sufficiency of the libel; but are in the nature of a special demurrer, or of a motion to make the pleadings more definite and certain. Upon exceptions of this limited character, rule 28, before referred to, directs what order the court shall make; namely, to require the defendant "forthwith to answer the same." As this rule is a specific direction to the court, I think the court would not be fairly authorized or warranted, under the more general provisions of rules 30 and 32, to proceed *pro confesso* against the defendant in the first instance for default of "due answer." But should a default be afterwards entered for the defendant's contumacy in not obeying an order entered under rule 28, there is no doubt a docket fee could then be taxed. *Wooster v. Handy*, *supra*; *Hayford v. Griffith*, 3 Blatchf. 79; *The Bay City*, 3 FED. REP. 48; *In re Trundy*, 18 FED. REP. 607.

A hearing on exceptions like the present is, therefore, in no sense a final hearing; and the practice which has previously obtained, in not awarding costs on such hearings, must be adhered to.

THE NELLIE FLAGG.

(District Court, N. D. New York. May 12, 1885.)

TOWAGE—NEGLIGENCE—INJURY TO CANAL-BOAT IN LOCK.

On examination of the evidence in this case, *held*, that negligence on the part of the steam-tug Nellie Flagg, causing the injury to the canal-boat William A. Rundell, was not shown, and that the libel should be dismissed.

In Admiralty.

J. F. Mosher, for libellant.

E. W. Douglas and E. L. Fursman, for claimant.

COXE, J. The libellant, Charles P. Moore, as master of the canal-boat William A. Rundell, contends that on the eighteenth day of November, 1882, at West Troy, New York, while his boat was being towed by the steam-tug Nellie Flagg, she was injured by the careless and unskillful navigation of the tug, in running her against the center pier, which divides the locks between the Hudson river and the State Basin at that point. Through one of these locks it was necessary for the canal-boat to pass in order to reach her destination. The claimant insists, *inter alia*, that the injury was caused, after the tug had cast the canal-boat loose, by the negligence of the libellant in permitting her to strike, stem on, against the bucking-beam of the lock. The evidence sufficiently establishes the following propositions:

First. While the canal-boat was in charge of the tug, her lowest guard, at the corner of the port-bow, came in contact with the north-west corner of the pier. *Second.* After the tug had left her she struck the bucking-beam of the lock, stem on. This the libellant admits. *Third.* The leak was not discovered until she was in the lock. *Fourth.* After being put on the dry-dock, it was

found that there was an opening on the port-bow from 18 inches to 2 feet below the lowest guard, at the upper edge of the corner-streak, on the turn coming up to the side from the bottom of the boat. The seam, for a distance of from four to five feet, had opened sufficiently to permit the oakum to be drawn out and cause the leak.

Even if it be assumed that the blows were equally severe, how can the court determine, upon this proof, which of the two opened the seam? Upon what theory can it be said that this was done prior to the entry into the lock? And yet, remembering that the burden is upon the libelant, it is incumbent upon him to satisfy the court, by evidence having greater weight than that offered by the claimant, that the blow at the pier occasioned the damage of which he complains.

It is thought that there is no way of ascertaining, with any degree of certainty, that the tug caused the injury. To say that she did do so would be to substitute inference for proof. The strongest statement permissible from the evidence is that she might have done so. But speculation and conjecture have no place in an investigation of this character. If, then, the proof were equally balanced between the two theories, it is quite clear that the libelant could not recover.

The claimant has, however, established, by a preponderance of evidence, that the injury was inflicted in the lock. The only expert witness called—the boat-builder who repaired the canal-boat—was clearly of the opinion that the opening of the seam was caused by a blow on the stem, and that it was improbable, if not impossible, that it could be caused by a blow of the character described by the libelant.

The evidence is conflicting as to the manner in which the tug landed the boat at the pier. That there was nothing unusual about it is maintained by a majority of the witnesses. Even if she struck the pier with more than ordinary force, there can be little doubt that the blow was a glancing one, and that the first seam above the corner-streak, where the leak occurred, was nearly two feet below the point of contact, and could not possibly have come in direct collision with the pier. Add to this the fact that, on the testimony, the collision at the bucking-beam was the severer of the two, and that after it occurred the leak was first discovered, although the blow at the pier was given some 20 minutes before, and the presumptions point with great clearness to the claimant's contention that the negligence which caused the injury must be imputed to the libelant.

It follows that the libel must be dismissed, with costs.

CENTRAL TRUST CO. v. TEXAS & ST. L. RY. CO., CAMDEN LUMBER CO.,
and others, Interveners.¹

(Circuit Court, E. D. Missouri. April 29, 1885.)

1. LIENS FOR RAILWAY SUPPLIES—OPEN ACCOUNT.

Under the Missouri statutes a material-man is entitled to a lien for the whole amount due him for materials furnished a railroad under an open and current account, if the last item of the account accrued subsequently to the time within which a lien could be filed.

2. SAME—EQUITABLE LIENS—MORTGAGES.

Where a material-man is entitled to a statutory lien against a railroad in the hands of a receiver, this court will treat his claim as if all necessary steps had been taken under the statute, and will allow him an equitable lien prior in right to that of mortgage creditors.

Exceptions to Master's Report.

The intervenors' claim in this case is for lumber furnished from time to time, between August 20, 1883, and December 3, 1883. Default in the payment of interest took place September 1, 1883, and a receiver was appointed January 12, 1884.

L. P. Nolan, for intervenors.

Butler, Hubbard & Stillman, Phillip & Stewart, and Eleneious Smith, for complainant.

Wells H. Blodgett and Eleneious Smith, for receiver.

BREWER, J., (orally.) In the intervening petitions in the Texas & St. Louis Railway Company, which have been held by us for some time because of the decision of the supreme court of this state as to the construction of the lien law, the conclusion to which we have come is that the master has rightly interpreted that lien law, and that his exposition of the order heretofore made by this court, in reference to subsisting contracts, is also correct. Were it not for the fact that the materials furnished went into the permanent structure of the road, and for which a lien could be obtained, we think that the claims would have to be disallowed as far as the items of account furnished prior to the first of September are concerned. But there was an "open, running account," as the supreme court construe that term. Indeed, in reference to one of these cases, the parties agreed that there was an open, running account; and while the essential facts, as narrated by the master, do not seem to me to fully bring it within the description of an "open, running account," yet there is an express stipulation of the parties. The other case presents substantially the same facts; and if there was an open, running account, the last items of which accrued subsequently to the time within which a lien could be filed, the whole account should be sustained as a prior claim; for, as was stated very early in the proceedings in this case and formulated in an order, where parties are entitled to a lien, and can secure

¹Reported by Benj. F. Rex, Esq., of the St. Louis bar

it by certain proceedings under the statutes of the state, they are not required to go to the expense of such proceedings, but this court will treat it as though all needful steps had been taken to establish the lien. In both these cases—one by express stipulation, and the other by a fair construction of the entire testimony—there were open, running accounts for material which passed into the permanent structure of the road. We think the parties were entitled to a lien, and therefore their entire claims should be allowed, and the exceptions to the report of the master will be overruled.

In reference to the particular order discussed by counsel, my brother TREAT has prepared an exposition which may help to a right understanding in future proceedings in this and other cases, which I will read:

"The various rulings of the court with respect to betterments and wages, not within the respective times stated,—to-wit, six months or otherwise,—have rested upon this distinct proposition: That supplies furnished or services performed under a *subsisting* contract, to which and to the continuance of which the parties were respectively bound, and the termination of said contract did not happen except within the time limited; or when such a continuing contract was still in force at the appointment of a receiver, the items of such continuing and subsisting contracts would fall within the prescribed rules. No other demands, independent in their nature, incurred before the prescribed time, are to be treated other than as credits at large. If this ruling is enforced there need be no difficulty with respect to what are called 'open and current' accounts. Such accounts must be under subsisting contracts, not to be terminated until within the period of time named; otherwise all items previous to that time must be rejected. This ruling may be subject to an exception where the local statute gives a lien under a different limitation. In the latter cases difficulties may arise if local decisions are followed, each one of which must depend on its special facts.'

That is, in order that there shall be a subsisting contract, it must be one binding on the vendor as well as upon the railroad. A mere open, running account does not necessarily come within the purview of that. In dealing with a grocery merchant, for instance, you order separately from day to day, and while, by implied understanding or express agreement, there may be an open, running account, yet it is an account terminable at the option of either party at any time. The purchaser may say he will make no further purchases. The merchant may decline to make further sales. It is not, therefore, a subsisting contract. There must be a contract by which the vendor is under obligation to furnish for a definite time; as for instance, if the vendor had contracted to furnish for a period of six months, so much lumber each month at a certain rate, there is a contract which during the six months is binding upon him as well as binding upon the road. It is a subsisting contract enforceable as against both parties. But where there is simply an open, running account, terminable at the instance of either party, at any time, it is not within the scope of the order. We think the master fairly interpreted it, and we sustain his construction.

CENTRAL TRUST CO. and another v. WABASH, ST. L. & P. RY. CO.
and others.¹

(Circuit Court, E. D. Missouri. May 1, 1885.)

RECEIVERSHIPS—ATTORNEY'S FEES.

Where, during the pendency of a receivership, counsel for the complainant present claims for professional services for allowance, they will not be allowed the full value of their services, but only a part thereof; and the balance will be allowed to stand until the litigation is disposed of, and the court can see whether or not the property in the receiver's hands will suffice to pay all expenses, and the court will then decide what final allowance should be made.

In the Matter of the Application of Messrs. Green, Burnett & Humphreys, for an allowance for professional services as attorneys for the petitioner in *Wabash & St. L. & P. Ry. Co. v. Central Trust Co. and others.*

Green, Burnett & Humphreys, pro se.

Wells H. Blodgett, H. S. Priest, and Geo. S. Grover, for receiver.

BREWER, J., (*orally.*) It is not because we think the counsel have not earned the amount reported by the master in their favor that we do not sustain this report in full; but we do not believe in the policy or propriety, pending a receivership, of making a large allowance to parties who are employed as officers of the court, or in looking after the interests of clients in that connection. They should wait until the matter comes to a close, and then their bills, as a whole, should be presented. The court can then look at them, and pass upon the question as to whether they are correct or not. It makes a great difference, practically, in the administration of affairs, whether parties present bills for two or three thousand dollars every three or four months, or at the end of the litigation for eight or ten thousand dollars. We do not mean that counsel shall go without compensation as the case progresses, because they cannot afford to; but still these intermediate allowances will always be small, and will not be in the way of a determination of what the services up to that time are really worth, or what they should be at the final disposition of the case. They will be simply in view of the necessities, so to speak, of counsel pending litigation; and while the master in this case recommends an allowance of \$6,000, the order will be that these gentlemen be paid \$2,000 on account. The matter will stand over until we come to the final disposition of the *Wabash Case*, and then all fees and claims will be presented, and it will be seen whether there are funds enough in the Wabash road to pay the expenses.

¹Reported by Benj. F. Rex, Esq., of the St. Louis bar.

WOOLDRIDGE and others v. IRVING and others.

VALLEY NAT. BANK OF ST. LOUIS v. KLEIN and others.

(Circuit Court, S. D. Mississippi. November Term, 1884.)

1. ASSIGNMENT FOR BENEFIT OF CREDITORS—RESERVATION OF EXEMPT PROPERTY—PARTNERSHIP ASSIGNMENT.

Where an assignment by a firm in Mississippi excepts from the property conveyed such portion of it as is exempt by law from sale under execution, as provided by the laws of that state, without designating what property is claimed, and whether it is partnership property or individual property, the presumption will be that the exemption was intended to be out of the individual property of each partner, and the assignment will not be void.

2. SAME—ATTORNEY'S FEES.

A provision in an assignment that the assignee may, as part of the expenses of executing the trust, pay necessary attorney's fees, will not invalidate the assignment, unless such fees are to be paid for defeating an attachment.

3. SAME—PAYMENT OF FIRM DEBTS—PAYMENT OF PARTNER'S DEBTS.

That the assignment appropriates all of the assets belonging to the firm and to each individual member to the payment of the partnership debts, and, if any shall remain, then the remainder, whether arising from the partnership assets or that belonging to the individual members, to the payment of the individual debts of the assignors, will not render it void.

4. SAME—INTENT TO DEFRAUD CREDITORS.

On examination of the circumstances, as disclosed by the evidence in this case, *held*, that the assignment was intended to defraud creditors, and was fraudulent in fact.

5. SAME—POWER OF ASSIGNOR TO EXECUTE ASSIGNMENT.

It further appearing that the member of the banking firm who executed the assignment in this case had no authority to do so, *held*, that it was void *in toto*.

In Equity.

A. B. Pittman, for S. L. Wooldridge and others.

Catchings & Dabney, Buck & Clark, and H. C. McCabe, for Valley Nat. Bank.

Martin Marshall and Miller, Smith & Hirsh, for attaching creditors.

Shelton & Crutcher, Birchut & Gillaud, and Nugent & McWillie, for assignee and assignors.

HILL, J. These two causes are submitted together, upon bills, answers, exhibits, and proofs; the purpose of both suits being to have declared null and void, and canceled, an assignment and trust deed executed by said G. M. Klein, in his own name, and in the name of his father, said J. A. Klein, on the twenty-first day of November, 1883, upon the alleged grounds that said trust deed is—*First*, upon its face, fraudulent and void; and, *secondly*, that it was executed with the fraudulent purpose of hindering and delaying the creditors of said J. A. and G. M. Klein, as bankers and copartners, and as individuals. The answers deny the fraud charged, to which complainants have filed replications, and upon which a large volume of testimony has been taken and read upon the hearing, and will be referred to in considering the questions presented for decision.

The first question presented is as to whether or not the assignment, upon its face, contains any stipulations, which will, in law, render it fraudulent and void. This assignment is very lengthy, and was drawn by a lawyer, with unusual care, and in substance purposes to convey every species of property, rights, credits, and assets of every description, owned or possessed in any way by said J. A. and G. M. Klein, as bankers, doing business under the name and style of the "Mississippi Valley Bank," or otherwise, as partners, and of each of their individual property and assets of every description, wherever situated, to the defendant G. S. Irving, as trustee, who is by the assignment vested with the usual powers to sell the property and collect the assets of every kind; in a word, to reduce the entire property and assets into money, and, after the payment of the expenses of the trust, to first pay a very numerous class of preferred creditors, and then to pay those not preferred, if sufficient, and if not sufficient in either case, then to pay them ratably. The assignment provides that all the assets of the copartnership, and of its individual members, shall first be appropriated to the payment of the firm debts, and, if anything shall remain, then to apply the same to the payment of the individual claims against the said J. A. and G. M. Klein, whether arising from the firm assets, or those belonging to the individual members.

The clauses in the assignment which it is insisted render it void, are—*First*, that it excepts from the property conveyed such portion of it as is exempt by law from sale under execution, as provided by the laws of this state, without designating what property is claimed, and whether it is partnership or individual property. I have heretofore held that such a provision in an assignment of an insolvent debtor's property will render it void; and such has been the holding of the supreme court of Tennessee, and, since the decision made by me, of two or more courts of high authority; but as the supreme court of this state has held differently, I yield my own opinion to the better judgment of that court. Had the assignment excepted the exemptions out of the partnership property, I would hold it void; but it does not, and the presumption is that it was intended to be out of the individual property of each; therefore this objection is not well taken. The next objection is that it allows the assignee to pay, as part of the expenses of executing the trust, necessary attorney's fees. There is no objection to this, but I have held and still hold that in such assignments, if there is a provision to pay attorney's fees for defeating the attachment, it is an appropriation of the assets to pay the obligation of the assignor,—that being his suit alone,—and that such a provision will render the assignment void. But this assignment does not contain this provision, therefore this objection is not well taken. The third and last objection is that the assignment appropriates all of the assets belonging to the firm, and to each individual member, to the payment of the partnership debts, and, if any shall remain, then the remainder, whether arising from the partnership assets, or that be-

longing to the individual members, is to be applied to the payment of the individual debts of the assignors.

The assignment sets out with the declaration of the insolvency of the banking firm, but does not declare the insolvency of the members of the firm as individuals, apart from their individual liability for the debts arising by the firm. Had it provided that the firm assets should be applied to the payment of the individuals debts, without first satisfying the debts owing by the firm, I would hold the assignment fraudulent and void; but that is not the provision of this assignment. The provision is that after the partnership debts are satisfied, the residue, whether arising from partnership debts, or those belonging to the individual members, shall be applied to the payment of the debts against the individual members. If it is intended that the individual property of one member, or his share in the partnership assets, shall be, before the payment of his own debts, applied to the payment of the other, it would render the assignment fraudulent and void. This the assignee might do without violating the directions of the assignment, and is certainly a strong circumstance, taken in connection with other circumstances, tending to establish the fraudulent intent upon the part of G. M. Klein in making this conveyance; but I am not prepared to hold that it is sufficient to hold it void upon its face, therefore I cannot conclude that the conveyance contains, upon its face, sufficient provisions to render it fraudulent and void.

The next question is, was the assignment executed with the fraudulent purpose of hindering and delaying the creditors of the banking firm, or of either of its members? The proof shows that J. A. Klein, the senior partner of the firm, and father of G. M. Klein, had been in declining health for a number of years, and had for a year before the execution of the assignment become so imbecile of mind as not to be able to comprehend any business matters, and has since died without even knowing that his business had failed, or anything connected with it; and that the entire business of the firm and his individual business had been conducted by his son, said G. M. Klein,—so that if any fraud was committed it was done by G. M. Klein, who had a power of attorney, executed by his father before his mind became impaired, authorizing and empowering him to transact any business in his name, pertaining either to the business of the firm or of his private affairs; but no provision is made in it for making an assignment of the character of the one under consideration.

The proof also shows that G. M. Klein was engaged in quite a number of other business enterprises, of which he seems to have been a leading manager; that he had almost unlimited credit, and little or nothing was known of the embarrassed condition of the banking firm, or of any of the various enterprises in which G. M. Klein was engaged, until the day of his failure; that on the day before the assignment the bank received deposits amounting to over \$90,000; that on that day he had a deed conveying to his mother two valuable store-houses,

valued at \$24,000, (which from its date, and the date of the acknowledgment, was executed about a year previously, but never put upon the public record,) then placed upon record; that the rents had been collected and credited upon the books of the bank in the name of the firm, or of J. A. and G. M. Klein, and that nothing was known by others than the parties to it, and the officer who took the acknowledgment; that such a conveyance had been executed, and it is not known that the officer knew the contents of the deed. On the same day J. A. Klein's account was charged with \$20,000 for school warrants and other scrip; and also on the same day a credit for some \$2,000, standing on the books of the bank to the credit of M. C. Klein, of North Carolina, a brother of G. M. Klein, was by him transferred to the credit of his mother; and on the same day he sold a tract of land to his mother; and on the next morning before the assignment was made he delivered to his mother \$8,000 in warrants, etc. About 5 o'clock on the evening of the twentieth of November, he sent for his attorney, closed the doors of the bank, and all the employes in it went to work arranging for the assignment, which was completed, signed, and acknowledged before banking hours next morning. The defendant G. S. Irving was selected assignee. Mr. Irving was a customer of the bank, and was then indebted to it, and was a personal friend of the Messrs. Klein and family; the sureties upon his bond as assignee being the mother of Mr. Klein and other members of his family. When Klein applied to Irving to become his assignee, he remarked to him that he found that he could not meet paper then drawn upon him, and that he would make an assignment in which he would prefer his home creditors, and that he expected to arrange with the others, and rich creditors, on a basis of time. At the time of the assignment there was in the bank about \$6,000 in warrants, which had been obtained from one Wolf, and for which a due bill had been given and was held by Wolf. After the assignment Klein gave the warrants back to Wolf, and took up or canceled the due bill. Also, after the assignment, he delivered to the attorney of Mr. Peyton, of Raymond, a note for about \$5,000, belonging to his father; Peyton being a large creditor of the bank for deposits made, at interest, from time to time.

The mercantile firm of Ragan & Martin were large creditors of the bank; the last deposit by them having been made on the evening of the twentieth of November for a considerable sum. Ragan hearing of the failure of the bank became very much distressed, and importuned Klein to do something for him, in which he was aided by Mr. Andrews, a warm friend of Klein. Shortly afterwards Ragan & Martin were paid in money and warrants several thousand dollars, which Klein in his testimony stated that he obtained from his mother. He also testifies that since the failure he has paid to the destitute and needy home creditors some \$15,000, which he also obtained from his mother. After the assignment was made, Klein made an assignment of an interest he had in certain railroad enterprises, upon which he placed a

high estimate, to Thomas Rigby, who held a large indebtedness against the bank. This assignment was antedated so as to show that it was made before the assignment to Irving, and was witnessed by his confidential friend.

The proof shows various other transactions made by G. M. Klein before and soon after the assignment to Irving, which need not be referred to in detail, which require explanation to establish their good faith. As soon as the failure was known to the citizens of Vicksburg, a very large number of all classes of whom were creditors of the bank, and of the Klein's individually, quite an excitement among them was created, and a committee was appointed to interview Klein, and to try to get him to do something for their relief. Of this committee Mr. A. Kuhn was chairman, or an active member, and he made an earnest application to Klein to do something for them. At the time of this interview Gen. Butts had been appointed receiver, and had possession of the assets. Klein was pressed to give a statement of the cause of the failure, and to give a statement of the assets of the bank and partners, which he promised to do, provided Butts, whom he considered as his enemy, was removed from the receivership, but that unless that was done he would make no disclosure of the assets and business; that in speaking of the matter he pointed to the sides of the house, and remarked that there were securities all around this house that no one knew anything about but himself, and would not, unless Butts was removed as receiver. Butts soon after resigned as receiver, but the statement has not been furnished his successor. Klein in his deposition explains that he meant that the securities were in the hands of banks and others, as collateral security for liabilities to them; but there is no proof that he has ever made a statement of them to the receiver, or discovered them in any way. Klein in his deposition endeavors to explain a number of the transactions stated, but the circumstances were certainly such as to cast a strong suspicion upon their fairness, and ought to be explained by all the proof within the control of the defendants sustaining the explanations attempted to be given by Klein, which has not been done; and the presumption is that the proof could not be had.

The proof further is that the liabilities, as shown by the books of the bank, are in all \$1,147,908.32, and the nominal assets of all kinds, belonging either to the firm or the individual members, amount to about \$400,000, out of which may be realized \$200,000. For a considerable portion of the difference between the liabilities and the assets there is no satisfactory explanation; there may be a satisfactory reason, but it ought to be given.

The sole question is, do these circumstances, considered separately, or all taken together, establish a fraudulent purpose in G. M. Klein, in making this deed of assignment; or, if not, are its provisions such that the assignee cannot execute the trust imposed? These conveyances, like all others, are presumed to be executed with an honest

purpose, and this presumption stands until overcome by the proof. It is said that courts should be astute in finding reasons to sustain them; I suppose the meaning is that courts should be astute in ascertaining the truth. Mr. Klein, in his testimony, says he did not know of his embarrassed condition until the twentieth day of November,—the day before the assignment was made,—and that he did not then contemplate making the assignment until about 5 o'clock in the evening. It was his duty to have known his pecuniary condition long before that time, and it is passing strange that he did not do so. Whether he contemplated making the assignment before the time stated by him or not, the arrangements made on that day to secure his family, by placing the deed to the town lots and improvements thereon on record, and the other provisions for his family, go far to establish the fact that some steps were to be taken without delay, or they would suffer loss. There is no reason given why these steps were not taken before that time.

The secrecy which was observed in preparing and executing the assignment is another circumstance going to show the purpose of the transfer. That G. M. Klein had no power to execute the assignment in the name of his father, and that, so far as that part of the assignment is concerned, it was not binding on him in his life-time, or those claiming after him, and is not binding on his individual creditors, is apparent—*First*, for want of power in the power of attorney; and, *secondly*, because the power of attorney was revoked by the insanity of J. A. Klein, the maker, and which insanity was well known to G. M. Klein when he executed the assignment, and which had been carefully concealed by him from the business public. The effect of this want of power to execute the assignment, if there was nothing more, in my opinion, renders the conveyance void, as it will be impossible for the assignee to execute the trust imposed in all such instruments, the conveyance itself being the only guide for the assignee. The establishment of this want of power is necessarily done by proof outside of the face of the assignment, and could not be considered when determining its validity or invalidity upon its face. And if the conveyance were not invalid for this reason, I am satisfied that, considering the occurrences upon the day before the assignment was executed, on that day, and on the subsequent days, as shown by the evidence, it cannot be maintained that the conveyance was made with the sole purpose of having all the property and assets, purported to be conveyed honestly and fairly, applied to the payment of the debts due by the firm and its members. This position is greatly strengthened by the fact that no statement has ever been made of the collaterals claimed to be held by distant creditors, the refusal to disclose which only upon condition of Butts' removal was not consistent with good faith to his creditors; and, had it been so, the failure to disclose them to his successor is unexplained. Therefore, for the reasons stated, I am brought to the conclusion—*First*, that the assignment is fraudulent.

lent in fact; and, *secondly*, that it is void as to J. A. Klein, and is incapable of execution, and therefore void *in toto*.

A decree will be entered in each cause declaring the assignment null and void, and for its cancellation.

HOW EXECUTED. Under the New York law a general assignment should be executed and acknowledged by all the members of the firm the same as a deed of real estate, otherwise it is void and inoperative.¹ Where an assignment is made in another state, if valid there, is valid here.² A partner who has withdrawn from the firm need not join in the assignment by the firm.³

DISSOLUTION OF PARTNERSHIP. If partners dissolve the partnership in good faith, and divide the partnership assets among themselves,⁴ or transfer them all to one partner,⁵ after such transfer a partner may use the assets to pay his individual debts, without being a violation of the rights of partnership creditors.⁶ A dissolution and division of assets among partners is not in itself fraudulent, although the object is to prevent individual creditors of one partner from levying on partnership property;⁷ but if the effect is to delay, hinder, or defraud individual creditors of one partner, it is void.⁸ If a dissolution is not made in good faith, but to divert partnership assets from partnership creditors to individual creditors, it is fraudulent, and partnership creditors are entitled to priority out of the assets,⁹ even though the transfer was to pay individual debts.¹⁰ In such case the insolvency of the partnership may be considered, in determining whether the dissolution was in good faith or not.¹¹ On dissolution of the partnership, the firm creditors have the right to have partnership property applied to the payment of the partnership debts in preference to those of the individual partner;¹² and this right cannot be impaired by any consideration with reference to the amount of capital contributed by each individual partner;¹³ and debts contracted in the name of one partner may be shown to be in reality partnership debts;¹⁴ but where such debt was incurred by consent or privity of the other partner, proof of joint creditors against the separate estate, in competition with the separate credit-

¹ *In re Lawrence*, 5 Fed. Rep. 349; *Smith v. Tim*, 14 Abb. N. C. 447.

² *In re Paige & S. L. Co.* 31 Minn. 136; *S. C.* 16 N. W. Rep. 700.

³ *First Nat. Bank v. Hinman*, 21 N. W. Rep. 280; *Same v. Rock River Paper Co.* Id. 280.

⁴ *Case v. Beauregard*, 99 U. S. 119; *Allen v. Center Valley Co.* 21 Conn. 130; *Kimball v. Thompson*, 54 Mass. 283.

⁵ *Ladd v. Griswold*, 9 Ill. 25; *Howe v. Lawrence*, 63 Mass. 553; *Robb v. Mudge*, 80 Mass. 534; *Shirner v. Huber*, 19 N. B. R. 414; *McNutt v. Strayhorn*, 39 Pa. St. 269; *Smith v. Edwards*, 7 Humph. 106.

⁶ *Case v. Beauregard*, 99 U. S. 119; *Hapgood v. Cornwell*, 48 Ill. 68; *Goemmel v. Arnett*, 100 Ill. 34; *Armstrong v. Fahnestock*, 19 Md. 58; *Pfromm v. Koch*, 1 N. Y. 460; *Sage v. Chollar*, 21 Barb. 596; *Dimon v. Hazard*, 32 N. Y. 65; *Wilcox v. Kellogg*, 11 Ohio, 394; *Baker's Appeal*, 21 Pa. St. 76; *Bullitt v. Chartered Fund*, 26 Pa. St. 108.

⁷ *Atkins v. Saxton*, 77 N. Y. 185.

⁸ *Burrill v. Lawry*, 18 N. B. R. 367; *Weaver v. Ashcroft*, 50 Tex. 427.

⁹ *In re Cook*, 3 Biss. 122; *Collins v. Hood*, 4 McLean, 186; *In re Byrne*, 1 N. B. R. 464; *In re Tomes*, 19 N. B. R. 36.

¹⁰ *Tracy v. Walker*, 1 Flippin, 41; *Collins v. Hood*, 4 McLean, 186; *Sanderson v. Stockdale*, 11 Md. 563; *Flack v. Charron*, 29 Md. 311; *Phelps v. McNeely*, 66 Mo. 554; *Ferson v. Monroe*, 21 N. H. 462.

¹¹ *Frank v. Peters*, 9 Ind. 844; *Shemer v. Huber*, 19 N. B. R. 414.

¹² *Case v. Beauregard*, 99 U. S. 119; *Evans v. Winston*, 74 Ala. 349; *Warren v. Taylor*, 60 Ala. 218.

¹³ *Wilson v. Robertson*, 21 N. Y. 587.

¹⁴ *Cox v. Platt*, 32 Barb. 126; *Read v. Baylies*, 35 Mass. 497; *Marks v. Hill*, 15 Grat. 400; *Barcroft v. Snodgrass*, 1 Cold. 430; *Siegel v. Chidsey*, 28 Pa. St. 279; *Gwin v. Sedley*, 5 Ohio St. 96; *Haben v. Henshaw*, 49 Wis. 379; *Schaeffer v. Fithian*, 17 Ind. 463; *Walt v. Bull's Head Bank*, 19 N. B. R. 500.

ors, will not be admitted.¹ An assignment by one partner of a firm operates as a dissolution of the partnership.²

VALIDITY OF PARTNERSHIP ASSIGNMENT. Where a voluntary assignment of partnership property was made in trust for the payment of all partnership debts that should be proved "as provided by statute," and afterwards for the payment of individual debts, it contains no unlawful preference.³ If property is purchased in the firm name with assets of a prior firm, a transfer of part or all of it, to secure a creditor of the prior firm, is valid.⁴ A debtor may prefer creditors if he make no reservation for his own benefit to the injury of creditors unprovided for.⁵ At common law an insolvent may make an assignment in trust for the benefit of his creditors, and may give a preference to *bona fide* creditors.⁶ If the sole purpose of the maker be to discharge an honest debt, the deed is not fraudulent.⁷ A deed which gives a preference to his sureties to prevent one creditor from obtaining full satisfaction to the injury of other creditors is not fraudulent.⁸ An insolvent debtor, making an assignment of all his property, may devote his individual property primarily to the payment of his individual debts.⁹ A sale by one partner of an insolvent partnership of his individual property, to secure an antecedent personal debt, is not fraudulent;¹⁰ and an assignment made after execution of an assignment of the firm property is not void because there is no provision for payment of debts fully provided for in the firm assignment;¹¹ but a preference of individual debts of a partner in an assignment by the firm is void.¹² A transfer of separate property, in consideration of a debt due by the firm, is founded on a good consideration.¹³ A deed may be valid as to *bona fide* debts and void as to fraudulent and fictitious debts.¹⁴ The validity of an assignment is to be determined by the intent of the assignor, and his contemporaneous fraudulent acts are evidence of such intent.¹⁵ A debtor may pay or secure a creditor or number of creditors where no statute forbids it.¹⁶ An assignment, which does not purport to pass the title owned by the partnership making it as well as the individual property not exempt from forced sale, and owned by the individuals of the firm, cannot be sustained.¹⁷

ASSIGNMENT BY ONE PARTNER. If the partnership is dissolved in good faith, and one partner takes the property and assumes the firm debts, he may subsequently assign the same for payment of his individual debts,¹⁸ or the debts due creditors of any new firm of which he may become a member.¹⁹ The surviving partner of an insolvent firm may make an equitable and just assignment of partnership effects for the equal benefit of all the firm creditors; but as trustee he is not permitted to assign and give a preference to certain creditors.²⁰ One of two partners, with consent of the other, may make an as-

¹ In re Lloyd, 22 Fed. Rep. 91; In re McEwen, 12 N. B. R. 11; In re McLean, 15 N. B. R. 333; In re May, 19 N. B. R. 101.

² Conrad v. Buck, 21 West Va. 396.

³ Bradley v. Kroft, 19 Fed. Rep. 295.

⁴ Day v. Wetherby, 29 Wis. 363.

⁵ Guggenheimer v. Brookfield, 90 N. C. 232.

⁶ Means v. Montgomery, 23 Fed. Rep. 421.

⁷ Moore v. Hinnant, 89 N. C. 455; Hafner v. Irwin, 1 Ired. Law, 490.

⁸ Means v. Montgomery, 23 Fed. Rep. 421; Reed v. McIntyre, 98 U. S. 511.

⁹ Evans v. Winston, 74 Ala. 349; Bank of Mobile v. Dunn, 67 Ala. 381.

¹⁰ Schoverling v. Kovar, 15 Neb. 806.

¹¹ Bogert v. Haight, 9 Paige, 297.

¹² Schiele v. Healy, 10 Daly, 92; Vernon

v. Upson, 60 Wis. 418; Willis v. Bremner, 60 Wis. 622.

¹³ Stewart v. Slater, 6 Duer, 83.

¹⁴ Market Nat. Bank v. Hofheimer, 23 Fed. Rep. 13.

¹⁵ Adler v. Ecker, 2 Fed. Rep. 126.

¹⁶ Carter v. Rewey, 22 N. W. Rep. 129; Anstedt v. Bentley, 21 N. W. Rep. 807; Lucas v. Claflin, 76 Va. 269.

¹⁷ Coffin v. Douglass, 61 Tex. 406; Donoho v. Fish, 58 Tex. 164.

¹⁸ Robb v. Stevens, Clarke, 192; Marsh v. Bennett, 5 McLean, 117; Price v. De Ford, 18 Md. 489; Yearsley's Estate, 1 Amer. L. Reg. 636. See Heye v. Bolles, 2 Daly, 231.

¹⁹ Smith v. Howard, 20 How. Pr. 121.

²⁰ Salisbury v. Ellison, 7 Colo. 167.

signment; and, the partner absconding, consent will be implied.¹ A partner who has not joined in an assignment of the firm assets may thereafter ratify the same, and a creditor may not question its validity because of his non-joinder;² but where one partner takes the firm assets and agrees to pay the firm debts, the partnership creditors may prove against his estate, and share *pari passu* with the separate creditors.³ As a separate creditor cannot be injured by a transfer of one partner's interest in the partnership property to his copartner, in consideration of the grantee assuming the liability of the firm.⁴

WHEN FRAUDULENT. An assignment which does not declare the uses, but reserves to the assignor to subsequently do so, is fraudulent and void;⁵ it is a fraud on the creditors, as it must necessarily hinder and delay.⁶ Where a deed conveyed integral amounts to a series of integer creditors, and its provisions were several, and does not provide for the contingency of some of the debts being fictitious, which they in fact proved to be, the amounts intended for them, not disposed of by the deed, remained in the grantor as to assailing creditors, and subject to their lien.⁷ It is absolutely necessary that the equitable interests in the assigned property shall be fixed and determined by the assignment itself;⁸ so the reservation of his right to determine the preferences at some future time renders it void.⁹ An attempt to assign partnership property for the purpose of paying the private debts of one of the partners, when the firm is insolvent, is conclusive of an actual fraudulent design;¹⁰ but it has been held that the assignment is valid though the appropriation is void.¹¹ When a power of revocation is reserved, the necessary inference is that it is made with intent to hinder, delay, or defraud creditors; for its only effect is to mask the property,¹² even though only to be exercised in case any creditor refuses to assent to the assignment.¹³ A power to make loans on the security of the estate is equivalent to a power of revocation.¹⁴ A reservation in a chattel mortgage of the right to dispose of the goods, is void with respect to creditors;¹⁵ and possession thereunder gives mortgagee no rights as against the mortgagor's creditors.¹⁶ A firm, in law, is distinct from the members who compose it, and a transfer of firm property to pay the separate debts of one partner is a voluntary conveyance; and where

¹ Sullivan v. Smith, 15 Neb. 476; S. C. 19 N. W. Rep. 620.

² Ade v. Cornell, 93 N. Y. 572.

³ In re Lloyd, 22 Fed. Rep. 90. See Smith v. Spencer, 73 Ala. 299.

⁴ Griffin v. Cranston, 10 Bosw. 1; S. C. 1 Bosw. 281.

⁵ Harvey v. Mix, 24 Conn. 406; Burbank v. Hammond, 3 Sum. 429; Grover v. Wake-man, 11 Wend. 203. See Sheldon v. Dodge, 4 Denio, 217; Strong v. Skinner, 4 Barb. 546; Moody v. Paschal, 60 Tex. 483.

⁶ Boardman v. Halliday, 10 Paige, 223; Barnum v. Hempstead, 7 Paige, 568; Gaz-zam v. Poyntz, 4 Ala. 374.

⁷ Market Nat. Bank v. Hofheimer, 23 Fed. Rep. 13.

⁸ Averill v. Loucks, 6 Barb. 470; Mitchell v. Stiles, 13 Pa. St. 306.

⁹ Averill v. Loucks, 6 Barb. 470.

¹⁰ Keith v. Fink, 47 Ill. 272; French v. Lovejoy, 12 N. H. 458; Hurlbert v. Dean, 2 Abb. App. 428; Kirby v. Shoonmaker, 3 Barb. Ch. 46; Cox v. Platt, 23 Barb. 126; Knauth v. Bassett, 34 Barb. 31; Ruhl v. Phillips, 2 Daly, 45; Lester v. Abbott, 28 How. Pr. 488; Heye v. Bolles, 33 How. Pr.

266; Wilson v. Robertson, 21 N. Y. 587; Henderson v. Haddon, 12 Rich. Eq. 393.

¹¹ Read v. Baylies, 35 Mass. 497; Nye v. Van Husan, 6 Mich. 329; Kemp v. Carn-ley, 3 Duer, 1; Nicholson v. Leavitt, 4 Sandf. 252; 6 N. Y. 510; 10 N. Y. 591; Las-sell v. Tucker, 5 Sneed, 1; McCullough v. Sommerville, 8 Leigh, 415; Gordon v. Canon-n, 13 Grat. 387.

¹² Cannon v. Peebles, 4 Ired. Law, 204; Murray v. Riggs, 15 Johns. 571; S. C. 2 Johns. Ch. 565.

¹³ Hyslop v. Clarke, 14 Johns. 458.

¹⁴ Sheppards v. Turpin, 3 Gratt. 373.

¹⁵ Wells v. Langbein, 20 Fed. Rep. 183; Crooks v. Stuart, 7 Fed. Rep. 801; Robin-son v. Elliott, 22 Wall. 513; Meyer v. Gage, 22 N. W. Rep. 892; Leaser v. Glaser, 4 Pac. Rep. 1026; Speigelberg v. Hersch, 4 Pac. Rep. 706.

¹⁶ Wells v. Langbein, 20 Fed. Rep. 183; Chenery v. Palmer, 6 Cal. 123; Delaware v. Ensign, 21 Barb. 85; Stein v. Munch, 24 Minn. 390; Dutcher v. Swartwood, 15 Hun, 31; Parshall v. Eggert, 54 N. Y. 13; Blakeslee v. Rossman, 43 Wis. 116.

the firm is insolvent, it is void¹ as to creditors, and a previous division of the property will not alter the rule.²

FRAUD MUST BE PROVED. The question whether a conveyance is made to defraud creditors in the first instance, is a question of fact,³ to be determined from all the facts and circumstances,⁴ and must be proved when the deed is alleged to be fraudulent.⁵ Fraudulent intent is generally a question of fact for the jury, and not for the court.⁶ It is never presumed when fairly reconcilable with honesty.⁷ The burden of proof is upon the party attacking the deed, to establish a fraudulent intent;⁸ it is on him who seeks to set aside the legal title.⁹

RESERVATION, WHEN FRAUDULENT. A debtor in failing circumstances cannot convey his property in trust and reserve to himself any benefit;¹⁰ such a reservation renders the assignment null, void, and of no effect,¹¹ if made to the exclusion of his creditors;¹² but the reservation of a secret benefit does not necessarily render such conveyance fraudulent as to creditors.¹³ There is a distinction between an express trust for the debtor and a benefit which is merely incidental to a trust created for another object.¹⁴ To render a deed of trust fraudulent, as matter of law, there must appear upon its face some express provision for the personal benefit of the grantor, or a stipulation wholly irreconcilable with an honest and legal purpose of paying his debts within a reasonable time.¹⁵ The debtor must part with his property free from any control over or interference with it, and from any contingency on which he may resume it at pleasure.¹⁶ An assignment differs from a mere security in passing both the legal and equitable title to the assignee absolutely, leaving no equity of redemption.¹⁷ Where the consideration expressed is far below the value of the property, as known to both parties, it is a strong circumstance to show fraud.¹⁸ He cannot, under pretense of paying his debt, assign more property than reasonably sufficient for the purpose.¹⁹ Where the assignment covers a great deal of property as security for a small amount of debts, so that the resulting interest of the debtor is really the valuable consideration, and the purpose professed is so obviously a mere pretense as not to conceal

¹ *Geortner v. Canajoharie*, 2 Barb. 625; *Burtus v. Tisdall*, 4 Barb. 571; *Dart v. Farmers' Bank*, 27 Barb. 337; *Walsh v. Kelly*, 42 Barb. 98; *S. C.* 27 How. Pr. 359. *Elliot v. Stevens*, 38 N. H. 311; *Ferson v. Monroe*, 21 N. H. 462; *Wilson v. Robertson*, 21 N. Y. 587; *Hartley v. White*, 94 Pa. St. 31. But see *Schaeffer v. Fithian*, 17 Ind. 463; *McDonald v. Beach*, 2 Blackf. 55; *Schmidlapp v. Currie*, 55 Miss. 597; *National Bank v. Sprague*, 20 N. J. Eq. 13; *Sigler v. Knox Co. Bank*, 8 Ohio St. 511.

² *Burtus v. Tisdall*, 4 Barb. 571.

³ *Howe Mach. Co. v. Claybourn*, 6 Fed. Rep. 438; *Spaer v. Rood*, 51 Mich. 140.

⁴ *Morse v. Riblet*, 22 Fed. Rep. 501; *Livesay's Ex'r v. Beard*, 22 West Va. 585.

⁵ *Davis v. Kennedy*, 105 Ill. 300.

⁶ *Evans v. Rugee*, 23 N. W. Rep. 24; *Hyde v. Chapman*, 33 Wis. 392; *Barkow v. Sanger*, 47 Wis. 501; *Mehlhop v. Pettibone*, 64 Wis. 556; *Green v. Dixon*, 22 N. W. Rep. 943.

⁷ *Mey v. Gulliman*, 105 Ill. 272.

⁸ *Means v. Montgomery*, 23 Fed. Rep. 421; *Maish v. Bird*, 22 Fed. Rep. 576; *Tebbs v. Lee*, 76 Gratt. 744; *Clemens v. Brillhart*, 23 N. W. Rep. 779; *Long v. Wert*, 1 Pac.

Rep. 545; *First Nat. Bank v. Buck*, 23 N. W. Rep. 57.

⁹ *Adams v. Ryan*, 61 Iowa, 733.

¹⁰ *Kellog v. Richardson*, 19 Fed. Rep. 71.

¹¹ *Lawrence v. Norton*, 15 Fed. Rep. 853; *Baldwin v. Peet*, 22 Tex. 708; *Bailey v. Mills*, 27 Tex. 434; *Barney v. Griffin*, 2 N. Y. 365; *Leitch v. Hollister*, 4 N. Y. 211.

¹² *Muller v. Norton*, 19 Fed. Rep. 719; *Lawrence v. Norton*, 15 Fed. Rep. 853.

¹³ *Howe Mach. Co. v. Claybourn*, 6 Fed. Rep. 438.

¹⁴ *Curtis v. Leavitt*, 15 N. Y. 9; *Van Buskirk v. Warren*, 34 Barb. 457.

¹⁵ *Means v. Montgomery*, 23 Fed. Rep. 421; *McCormick v. Atkinson*, 78 Va. 8.

¹⁶ *Whallon v. Scott*, 10 Watts, 237. See *Planters' & M. Bank v. Clarke*, 7 Ala. 765; *Dana v. Bank of U. S. 5 Watts & S. 223*; *Hafner v. Irwin*, 1 Ired. Law, 490; *Janney v. Barnes*, 11 Leigh, 1007; *Sheppards v. Turpin*, 3 Gratt. 373.

¹⁷ *Martin v. Hausman*, 14 Fed. Rep. 160; *State v. Benoist*, 37 Mo. 500; *Gale v. Mensing*, 20 Mo. 461; *Livesay's Ex'r v. Beard*, 22 West Va. 585.

¹⁸ *Bartles v. Gibson*, 17 Fed. Rep. 293.

¹⁹ *McNichols v. Rubelman*, 13 Me. App. 515.

the true purpose, the debtor is obviously providing for himself and not for his creditors.¹ Where he conveys property on consideration of his maintenance and support, the conveyance is fraudulent and void as to creditors if any part of the consideration is to be paid in the future support of the grantor;² such conveyance will not be protected although full consideration was paid.³

PROVISIONS UNAUTHORIZED BY LAW. Any stipulation in an assignment intended to hinder or delay non-assenting creditors, if not warranted by law, is null and void.⁴ Provisions beyond the limits of the power which the law allows to be vested in the assignee, render the assignment void.⁵ An assignment which authorizes the assignee to dispose of the property in a way not authorized by law is void.⁶ So a deed is void which requires the assignee to sell choses in action before the lapse of time sufficient to enable him to collect by legal procedure.⁷ Unless authorized by law, a provision which authorizes the assignees in their discretion to dispose of the property on credit, vitiates the assignment,⁸ and is a badge of fraud;⁹ so an attempt to hinder and delay all creditors, even if there is no attempt to prefer any, is unauthorized by law.¹⁰ An assignment which attempts to confer on the assignee power to declare future preferences in his discretion is void;¹¹ but a conveyance to the assignee and his successors, which merely refers to such person as may lawfully succeed him in case of resignation, removal, or death, is not void.¹²

CONDITIONS IN. A deed stipulating that no creditor shall participate in the proceeds of the property unless he accepts the same in full satisfaction of his debt is valid; but to be valid, all the debtor's property must be conveyed.¹³ Where a participation in the assets depends upon the release of a balance due, and there is no provision for distribution of the surplus, it is *per se* fraudulent and void;¹⁴ and non-assenting creditors, not present when the deed was executed, are not bound by such an agreement of release.¹⁵

WHEN NOT FRAUDULENT. The mere fact that an assignment was voluntary and without consideration, will not support a finding that it was fraudulent;¹⁶ the *onus* is on the grantee to prove a valuable consideration,—recitals are not evidence in his favor.¹⁷ Where the deed was made on a fair consideration it is not necessarily void;¹⁸ but the motive or purpose is not material.¹⁹ A conveyance is not necessarily fraudulent because its effect is to hinder and delay, unless there was a contrivance for that purpose, and the grantee par-

¹ Moore v. Collins, 3 Dev. 126; Beck v. Burdett, 1 Paige, 305; Hastings v. Baldwin, 17 Mass. 552.

² Lawson v. Funk, 108 Ill. 502. A provision for future support made in good faith will not render the conveyance fraudulent. Barnett v. Knight, 3 Pac. Rep. 747; but the grantee may be held for the excess of the land over the consideration actually paid. Farlin v. Sook, 1 Pac. Rep. 123.

³ Buck v. Vorels, 89 Ind. 116.

⁴ Muller v. Norton, 19 Fed. Rep. 719; Jaffray v. McGehee, 2 Sup. Ct. Rep. 367; Keevil v. Donaldson, 20 Kans. 168; Bryan v. Sundberg, 5 Tex. 423; Donoho v. Fish, 58 Tex. 167.

⁵ Rapalee v. Stewart, 27 N. Y. 310; Bagley v. Bowe, 50 N. Y. Super. Ct. 100.

⁶ Schoolfield v. Johnson, 11 Fed. Rep. 297; Bartlett v. Teah, 1 Fed. Rep. 768; Sumner v. Hicks, 2 Black, 532; McCleery v. Allen, 7 Neb. 21; Rapalee v. Stewart, 27 N. Y. 310; Woodburn v. Mosher, 9 Barb. 255; Keep v. Sanderson, 12 Wis. 391.

⁷ Richardson v. Stapleton, 60 Miss. 97; distinguished in Wickham v. Green, 61 Miss. 463.

⁸ Muller v. Norton, 19 Fed. Rep. 720; Lawrence v. Norton, 15 Fed. Rep. 853; Moir v. Brown, 14 Barb. 39; Schufeldt v. Abernethy, 2 Duer, 533; Rapalee v. Stewart, 27 N. Y. 311; Hutchinson v. Lord, 1 Wis. 286; Keep v. Sanderson, 2 Wis. 42.

⁹ Carlton v. Baldwin, 22 Tex. 731; Live-
say's Ex'r v. Beard, 22 West Va. 585.

¹⁰ Malvin v. Wert, 19 Fed. Rep. 721.

¹¹ Moody v. Paschal, 60 Tex. 483.

¹² Langdon v. Thompson, 25 Minn. 509.

¹³ Dodd v. Martin, 15 Fed. Rep. 338; Clayton v. Johnson, 36 Ark. 406.

¹⁴ Seale v. Vaiden, 10 Fed. Rep. 831.

¹⁵ Id.

¹⁶ Genesee River Nat. Bank v. Mead, 92 N. Y. 637; George v. Kimball, 41 Mass. 234; Spear v. Rood, 51 Mich. 140.

¹⁷ Zelnicker v. Brigham, 74 Ala. 598.

¹⁸ McCanless v. Flinchum, 89 N. C. 373.

¹⁹ Goodman v. Wineland, 61 Md. 449.

ticipated in the design.¹ To render a deed founded on a valuable consideration void for fraud, both parties must concur in a fraudulent intent, or the grantee must have notice of such intent, or be in some way privy thereto.² The grantee with knowledge of the fraudulent intent makes himself a party to the fraud;³ so a mortgage which purposely exaggerates the mortgagee's demand, if known to him, is void as to creditors,⁴ even if given for full value.⁵ So, if grantee has knowledge of facts sufficient to excite the suspicion of a prudent man and put him on inquiry, he is a party to the fraud;⁶ but an assignee is not affected by the fraud of the assignor unless he co-operated or took with knowledge of the fraud.⁷ If the provisions of the deed manifest a real purpose to satisfy *bona fide* creditors in a reasonable time, with no unlawful intent towards other creditors, and without any substantial benefit to the grantor, no presumption of fraud arises from a provision for the retention of the possession, with power of disposition of the property by the grantor.⁸ If not fraudulent at its inception, it is not invalidated by subsequent delinquencies of the assignee;⁹ and subsequent acts of the debtor, or continuance of the business, is not proof of fraudulent intent.¹⁰

RESERVATIONS VALID. An exception in the conveyance, whereby the property is retained by the debtor and not conveyed to the assignee, is not a reservation of a benefit to the debtor, and does not vitiate the assignment.¹¹ A declaration that notes are accommodation notes, and providing for their return to the maker, will not justify an inference of fraud.¹² Unless the assignment is merely colorable, and made for the sake of the resulting trust, it is not void.¹³ Where one partner, with the consent of his copartner, assigns his individual estate and partnership assets to pay his private debts, there may be a reservation in favor of such copartner of a sum equal to his interest.¹⁴ A reservation to the debtor of what is left after payment of *all* his debts is proper,¹⁵ as what remains belongs to him by operation of law.¹⁶ The rule that there must be no provision for the benefit of the debtor does not apply to sales. A stipulation to take notes for part of the purchase money simply relates to the manner the property should be paid for by the purchaser.¹⁷

EXEMPT PROPERTY. Whatever is exempt from execution may be reserved to the debtor;¹⁸ and an express reservation of such property does not render

¹ Daniel v. Vaccaro, 41 Ark. 316.

² Means v. Montgomery, 23 Fed. Rep. 422.

³ Bartles v. Gibson, 17 Fed. Rep. 293.

⁴ Stinson v. Hawkins, 16 Fed. Rep. 850.

⁵ Stinson v. Hawkins, 13 Fed. Rep. 833.

⁶ Bartles v. Gibson, 17 Fed. Rep. 297; Atwood v. Impson, 20 N. J. Eq. 156; Baker v. Bliss, 39 N. Y. 70; Parker v. Conner, 93 N. Y. 118; Avery v. Johann, 27 Wis. 251; David v. Birchard, 58 Wis. 492; S. C. 10 N. W. Rep. 557. See Kaine v. Weigley, 22 Pa. St. 179.

⁷ Cannon v. Young, 89 N. C. 264.

⁸ Means v. Montgomery, 23 Fed. Rep. 421.

⁹ Olney v. Tanner, 10 Fed. Rep. 101; Hardmann v. Bowen, 39 N. Y. 200.

¹⁰ Olney v. Tanner, 10 Fed. Rep. 101.

¹¹ Moss v. Humphrey, 4 Greene, (Iowa,) 443; Dodd v. Hills, 21 Kan. 707; Bank v. Cox, 6 Me. 395; Ingraham v. Grigg, 21 Miss. 22; In re Walker, 18 N. B. R. 56; Carpenter v. Underwood, 19 N. Y. 520; Knight v. Waterman, 86 Pa. St. 258; Spencer v. Jackson, 2 R. I. 35; Baldwin v. Peet, 22

Tex. 708; Bates v. Ableman, 13 Wis. 644. See Foster v. Libby, 24 Me. 448.

¹² Price v. De Ford, 18 Md. 489.

¹³ Wilkes v. Ferris, 5 Johns. 335.

¹⁴ Mandel v. Peay, 20 Ark. 325.

¹⁵ Sangston v. Gaither, 3 Md. 40; Beatty v. Davis, 9 Gill, 211; Wintringham v. Lafoy, 7 Cow. 735; Lindsay v. Guy, 57 Wis. 200.

¹⁶ Cross v. Bryant, 3 Ill. 38; Finlay v. Dickerson, 29 Ill. 9; Hollister v. Loud, 2 Mich. 309; Robins v. Embry, 1 Smedes & M. Ch. 207; Van Rossum v. Walker, 11 Barb. 237; Ely v. Cook, 18 Barb. 612; Gibson v. Walker, 11 Ired. Law, 327; Hoffman v. Mackall, 5 Ohio St. 124; In re Potter, 54 Pa. St. 485; Van Hook v. Walton, 28 Tex. 59; Farquharson v. McDonald, 2 Heisk. 404; Hall v. Denison, 17 Vt. 810.

¹⁷ Beach v. Bestor, 47 Ill. 521.

¹⁸ Garnor v. Frederick, 18 Ind. 507; Hollister v. Loud, 2 Mich. 309; Brooks v. Nichols, 17 Mich. 38; Smith v. Mitchell, 12 Mich. 180; Richardson v. Marqueeze, 59 Miss. 80; Dow v. Platner, 16 N. Y. 562; Mulford v. Shirk, 26 Pa. St. 473; Heck-

the assignment void, as creditors are not hindered or delayed thereby.¹ He cannot except from his general assignment property exempt from execution, when at the time of the assignment there were judgments against him in which he has waived the benefit of the exemption laws.² So the right to claim the benefit of the exemption law may be waived by laches.³ The claim must be made with such promptness as to occasion no delay to the one about to sell it.⁴ It is too late to claim the exemption after all the property is sold, the proceeds paid out in satisfaction of debts, and the assignee about to file his account.⁵ An assignment is not void which excepts property exempt by law.⁶ So the reservation of exempt property in an assignment by a firm will not invalidate the assignment.⁷ There is no obligation on the part of an assignor to make any selection of a homestead claimed by him as exempt;⁸ and the mere failure to claim the exemption until the morning preceding the sale will not waive the right.⁹ A merchant tailor, the head of a family and resident of the state, may exempt portions of his stock, as he may select, up to the statute limitation as to value;¹⁰ but if the reservation of what may be exempt by law gives the debtor the right to select the article, the assignment is void, as the assignee has no certain claim until selection is made.¹¹

RESERVATION OF SURPLUS. An express reservation to the debtor of the surplus remaining after payment of the debts or execution of the trust is not, as matter of law, fraudulent and void, as to creditors not provided for,¹² it raises no presumption of fraud;¹³ it is merely what the law would provide without the declaration, and does not interfere with, or vitiate the transfer.¹⁴ The doctrine that the reserve of the surplus renders the deed void, is placed on the ground that the effect is to lock up the property until the creditors provided for in the assignment are paid;¹⁵ and other creditors could not sue the interest of the debtor, subject to the assignment, as they could if it were a mortgage;¹⁶ but the opposite doctrine is held in other cases.¹⁷ The assignor's inter-

man v. Messinger, 49 Pa. St. 465; Sugg v. Tillman, 2 Swan, 208; McCord v. Moore, 5 Heisk. 734; Farquharson v. McDonald, 2 Heisk. 404; Overton v. Holinshade, 5 Heisk. 683.

¹ Hildebrand v. Bowman, 100 Pa. St. 580.

² Shaeffer's Appeal, 101 Pa. St. 45.

³ Chilcoat's Appeal, 101 Pa. St. 23.

⁴ Shaeffer's Appeal, 101 Pa. St. 45; Bowyer's Appeal, 21 Pa. St. 210; Davis' Appeal, 34 Pa. St. 236; Morris v. Shafer, 93 Pa. St. 489.

⁵ Chilcoat's Appeal, 101 Pa. St. 22.

⁶ Bates v. Simmons, 22 N. W. Rep. 335. First Nat. Bank v. Hinman, 21 N. W. Rep. 280.

⁷ McNair v. Rewey, 22 N. W. Rep. 339; following First Nat. Bank v. Hinman, 21 N. W. Rep. 280, and Goll v. Hubbell, 20 N. W. Rep. 674, and 21 N. W. Rep. 288.

⁸ Batten v. Smith, 22 N. W. Rep. 342.

⁹ Rice v. Nolan, 5 Pac. Rep. 437.

¹⁰ Id.

¹¹ Clark v. Robbins, 8 Kan. 574.

¹² Knapp v. McGowan, 90 N. Y. 75; Cooper v. Whitney, 3 Hill, 95; Curtis v. Leavitt, 15 N. Y. 9.

¹³ Means v. Montgomery, 23 Fed. Rep. 421.

¹⁴ Means v. Montgomery, 23 Fed. Rep. 421; Hempstead v. Johnston, 18 Ark. 125; Brown v. Lyon, 17 Ala. 659; Graham v.

Lockhart, 8 Ala. 9; Hindman v. Dill, 11 Ala. 639; Miller v. Stetson, 32 Ala. 166; Rowland v. Coleman, 45 Ga. 204; Conkling v. Carson, 11 Ill. 503; New Albany R. Co. v. Huff, 19 Ind. 444; McFarland v. Birdsall, 14 Ind. 126; Ely v. Hair, 16 B. Mon. 230; Johnson v. McAllister, 30 Mo. 327; Andrews v. Ludlow, 22 Mass. 28; Richards v. Levin, 16 Mo. 596; Moore v. Collins, 3 Dev. Law, 126; Vaughan v. Evans, 1 Hill, Ch. 414; Beck v. Burdett, 1 Paige, 305; Dickson v. Rawson, 5 Ohio St. 219; Floyd v. Smith, 9 Ohio St. 546; Dana v. Bank of U. S. 5 Watts & S. 223; Dance v. Seaman, 11 Grat. 778. Contra, Truitt v. Caldwell, 3 Minn. 364; Banning v. Sibley, 3 Minn. 389; Green v. Trieber, 3 Md. 11; Pierson v. Manning, 2 Mich. 445; Maberry v. Shisler, 1 Harr. (Del.) 349; Berry v. Riley, 2 Barb. 307; Barney v. Griffin, 2 N. Y. 365; Goodrich v. Downs, 6 Hill, 438; Lansing v. Woodworth, 1 Sandf. Ch. 43; Strong v. Skinner, 4 Barb. 546; Collobomb v. Caldwell, 16 N. Y. 484; Dana v. Lull, 17 Vt. 390; Therason v. Hickok, 37 Vt. 454.

¹⁵ Dana v. Lull, 17 Vt. 390.

¹⁶ Leitch v. Hollister, 4 N. Y. 211; Dunham v. Whitehead, 21 N. Y. 131; McClelland v. Remsen, 23 How. Pr. 175.

¹⁷ Graham v. Lockhart, 8 Ala. 9; Ely v. Hair, 16 B. Mon. 230; Murray v. Riggs, 15 Johns. 571; Austin v. Bell, 20 Johns. 442;

est in a possible surplus is not an interest in the property assigned, which can be asserted in an action to determine adverse claims.¹ The assignor may make what disposition he pleases of the reserved property.² There may be a provision in the assignment that the surplus shall be paid to the debtor or creditors in the discretion of the assignee.³ Partners in making assignment of firm property to discharge firm debts, may direct the residue to be returned to them, to be divided according to equitable interests of each, leaving each to pay his private debts out of his own individual property;⁴ and such assignment is not fraudulent,⁵ as the law itself creates a resulting trust in their favor as to such surplus.⁶ Where the assignee includes both individual and partnership property, the surplus cannot be reserved without providing for individual debts;⁷ but proof must be given that there are separate debts,⁸ and it is void if the surplus is reserved without providing for the separate debts;⁹ but where no surplus is expected, the omission to so provide does not affect the transfer;¹⁰ and evidence is admissible to show that there is no surplus after payment of the partnership debts;¹¹ so where it is shown that the omission was the result of haste or inadvertence.¹² An appropriation without discrimination renders the deed fraudulent; so if it authorizes the property of a solvent debtor to be applied in part to pay the debts of another, for which neither he nor his property is in any way bound, before his own just debts are satisfied.¹³ Where it appears that sufficient property was retained by the debtor to pay his other creditors, the conveyance is valid.¹⁴ The state statutes have reference only to assignments for the benefit of all creditors;¹⁵ and a conveyance of all property to trustees to pay a portion of the creditors, the surplus to be returned to the debtor, leaving his other creditors unprovided for, is fraudulent and void as to them;¹⁶ but evidence may be given of no individual debts, and the burden of proof is on the parties claiming under the instrument.¹⁷

APPLICATION OF PROPERTY. Partnership property may be applied to the payment of debts not partnership debts, but for which all the partners are bound.¹⁸ So money loaned to a stockholder may be shown to have been used for the benefit of the corporation, and is a good consideration for a transfer made by the latter to the creditor.¹⁹ An appropriation of the firm property to pay individual debts is not, it seems, a ground for setting aside the assignment at the instance of an individual creditor, as he cannot in any manner be affected by it.²⁰ Where separate property assigned by each partner exceeds the amount of his separate debts, a direction that the separate debts shall be paid out of the partnership property will not vitiate the assignment.²¹ Debts

Skipwith v. Cunningham, 8 Leigh, 271; Janney v. Barnes, 11 Leigh, 100. Marks v. Hill, 15 Grat. 400.

¹ Donohue v. Ladd, 31 Minn. 244.

² Hildebrand v. Bowman, 100 Pa. St. 580.

³ Kneeland v. Cowles, 4 Chand. 46.

⁴ Bogert v. Haight, 9 Paige, 297; Butt v. Peck, 1 Daly, 83; Hubler v. Waterman, 33 Pa. St. 414. See Goddard v. Hapgood, 25 Vt. 351; Eyre v. Beebe, 28 How. Pr. 333.

⁵ Collomb v. Caldwell, 16 N. Y. 484; Collumb v. Read, 24 N. Y. 505.

⁶ Bogert v. Haight, 9 Paige, 297.

⁷ Collomb v. Caldwell, 16 N. Y. 484.

⁸ Bogert v. Haight, 9 Paige, 297.

⁹ Goddard v. Hapgood, 25 Vt. 351.

¹⁰ Doremus v. Lewis, 8 Barb. 124; Bishop v. Halsey, 3 Abb. Pr. 400; Spies v. Joel, 1 Duer, 669.

¹¹ Turner v. Jaycox, 40 N. Y. 470. Contra, Smith v. Howard, 20 How. Pr. 121.

¹² Hooper v. Tuckerman, 3 Sandf. 311.

¹³ Smith v. Howard, 20 How. Pr. 121; O'Neil v. Salmon, 25 How. Pr. 246; Kitchen v. Reinsky, 42 Mo. 427.

¹⁴ Knapp v. McGowan, 96 N. Y. 75.

¹⁵ Knapp v. McGowan, 96 N. Y. 75; Tie-meyer v. Turnquist, 85 N. Y. 522.

¹⁶ Knapp v. McGowan, 96 N. Y. 75.

¹⁷ Hurlbert v. Dean, 2 Keyes, (N. Y.), 97. Contra, Lester v. Abbott, 23 How. Pr. 488.

¹⁸ Smith v. Howard, 20 How. Pr. 121.

¹⁹ Calkins v. Lockwood, 16 Conn. 276; Gardner v. Webber, 34 Mass. 407; Goddard v. Sawyer, 91 Mass. 78; U. S. v. Hoee, 3 Cranch, 73.

²⁰ Morrison v. Atwell, 9 Bosw. 503.

²¹ Hollister v. Loud, 2 Mich. 309; Van Nest v. Yoe, 1 Sandf. Ch. 4; Knauth v. Bassett, 34 Barb. 31.

provided for in an assignment of the individual property must be those for which the debtor is liable jointly with others, or severally and alone. If he is liable, the appropriation cannot be fraudulent.¹ A direction that property shall be distributed among creditors according to their respective equities is good.² After a partnership creditor has exhausted the firm assets he is entitled to come in equally with separate creditors under an assignment by one partner.³ A provision cannot be made for debts which the separate partner may have against the firm, before the firm creditors are paid;⁴ but a note given to a former partner upon his withdrawal, may be provided for.⁵ The general rule now is that when all the partners are in bankruptcy the separate estate of one partner shall not claim against the joint estate of the partnership in competition with the joint creditors, nor the joint estate against the separate estate in competition with the separate creditors;⁶ but if there is no joint estate, firm creditors have the right to share in the separate estate.⁷

ATTORNEY'S FEES. It is no objection to a conveyance in trust for the benefit of creditors that a provision is made for the payment of a reasonable attorney's fee for examination of facts, advice, or drawing up the assignment; but the debtor cannot contract with attorneys for future services.⁸ The reasonable and proper charges incurred by the assignee in the employment of attorneys may be properly embraced in the items of expenses;⁹ but the assignment cannot designate the attorney to be employed by the assignee. The payment of attorney's fees is not such a preference as will bar a dividend charge.¹¹—[ED.]

¹ Fox v. Heath, 18 Abb. Pr. 163; O'Neil v. Salmon, 25 How. Pr. 246; Eyre v. Beebe, 28 How. Pr. 333; Kirby v. Schoonmaker, 3 Barb. Ch. 46; Van Rossum v. Walker, 11 Barb. 237; Newman v. Bagley, 33 Mass. 570; French v. Lovejoy, 12 N. H. 458; Gadsden v. Carson, 9 Rich. Eq. 252. See Jackson v. Cornell, 1 Sandf. Ch. 348.

² Heckman v. Messinger, 49 Pa. St. 465; Maennel v. Murdock, 13 Md. 264.

³ Gadsden v. Carson, 9 Rich. Eq. 252. See Black's Appeal, 44 Pa. St. 503; Fellows v. Greenleaf, 43 N. H. 421; Pennington v. Bell, 4 Sneed, 200.

⁴ Goddard v. Hapgood, 25 Vt. 351.

⁵ Mattison v. Demarest, 4 Robt. 161; Blow v. Gage, 44 Ill. 208; Smith v. Howard, 20 How. Pr. 121.

⁶ In re Lloyd, 22 Fed. Rep. 90; In re Lane, 10 N. B. R. 135.

⁷ In re Lloyd, 22 Fed. Rep. 90.

⁸ Hill v. Agnew, 12 Fed. Rep. 230.

⁹ Jacobs v. Remsen, 36 N. Y. 668; Bu v. Peck, 1 Daly, 83; Iselin v. Dalrymple, 27 How. Pr. 137; 8 C. 2 Robt. 142.

¹⁰ Hill v. Agnew, 12 Fed. Rep. 230. Contra, Baldwin v. Peet, 22 Tex. 708.

¹¹ In re Boynton, 10 Fed. Rep. 277.

ST. LOUIS, K. C. & C. RY. CO. v. DEWEES and others.¹

(Circuit Court, E. D. Missouri. March 24, 1885.)

INJUNCTIONS—SCRAMBLE FOR POSSESSION—RAILROADS.

Where there is a dispute as to the possession and right of possession of a railroad track, which is not in the actual possession of either party to the controversy, this court will not interfere by injunction.

In Equity.

Noble & Orrick, for complainant.

Davis & Davis, Farrish & Jones, Harris & Dewees, and *Nathan Frank*, for defendants.

BREWER, J., (*orally*.) In this case, as I intimated to counsel, I have read all the affidavits through carefully, and these facts suggest themselves to me as material: It appears that some years ago there was a corporation called the "Forest Park Railroad Company," which gave a trust deed to secure certain bonds to the amount of \$50,000. A year or two after, it gave a second trust deed to secure several hundred thousands, as I remember, of bonds, and the allegation of the bill is that \$50,000 of these bonds were used to cancel the \$50,000 covered by the first trust deed, and that only \$200,000 of the bonds secured by the second trust deed were issued. Thereafter this company, which had already completed a small fragment of a road, entered into a contract with certain parties for further work; in pursuance of which, the contractors, Knapp & Co., by themselves and subcontractors, did a certain amount of work. Receiving no pay and having filed liens, the subcontractors proceeded in this court to bring two actions, obtained judgments, decrees, and orders for the sale of the property. In these actions the company alone was made defendant; that is, the trustees in the first or second mortgages were not made parties. Upon the decrees a sale was made, and the property sold to Messrs. Dyer and Garland. The sale was confirmed and a deed made by the marshal, and the purchasers last fall sold the property to the plaintiff. At the time of this sale Mr. Shultz, represented by the bill to have been the vice-president and actual manager of the railroad company, was present in the office of Col. Dyer, where the papers were executed, and said, "I assent to the transfer of possession." As a matter of fact, all there was of the property of the company was a road-bed about three miles in length, upon which no cars were running; it was unoccupied, dead property. After the sale, Mr. Shultz accepted employment from the plaintiff, and received pay for his services in looking after the property, etc. Last February the directors of the original company made a lease to a Mr. Parker, and thereupon Mr. Parker attempted to resuscitate this dead track and to put it in a condition for operation. In so

¹ Reported by Benj. F. Rex, Esq., of the St. Louis bar.

doing he encountered the representatives of the plaintiff, who claim possession, and said to him, "You have no right to possession. That is the way the testimony, as I read it, shapes itself before my mind; and the question, which is very suggestive, is whether this does not come within what parties sometimes and very appropriately term "a scramble for possession," as to which the courts seldom interfere in an equitable proceeding.

Now, as I read the affidavits, here is an unoccupied, abandoned dead track, and during the winter, at least, in the actual possession of nobody; the defendant claiming the right of possession under lease from the original company, the plaintiff claiming the right of possession under certain decrees and sale, but no settled, absolute grasp of possession. Under these circumstances, should a court interfere by injunction to say in favor of one party or the other, "Your possession shall be protected, and the other party restrained?" My brother TREAT has not read all the affidavits, and perhaps if he read them he may come to a different conclusion.

Mr. Orrick. There are a great many affidavits, and perhaps your honor may have overlooked some of them.

The Court, (BREWER, J.) I addressed myself to the question of possession first.

Mr. Orrick. Yes, if there is a scramble for possession.

The Court, (BREWER, J.) You cannot get an injunction against mere trespassers. The court might appoint a receiver and put both of you in possession; but where there is a scramble for possession, I do not think the court ought to move by way of injunction.

Mr. Orrick. We understand that, and our position is, as far as the question of possession is concerned, there should be no question about it, upon the facts as we understand them to be, and as is shown by all these papers here.

The Court. Where you foreclose a lien of that kind, or of another kind, and the marshal sells the property, unless there is a specific order from the court to the marshal to take possession and transfer it, whatever legal rights you may have to the possession, do you give up the possession? That is the trouble. You had a decree which said "Sell this property." The property was sold. The purchaser has the right to possession. Now, how did he get possession? Did Mr. Shultz, by reason of the fact that he was vice-president and general manager, as you allege, have the right to say, "I will turn this property over, and give possession?" Because, unquestionably, here was a road-bed running some three miles in length, nobody operating on it, doing anything with it, just a dead road-bed.

Mr. Orrick. Three miles of track, and several thousand dollars' worth of personal property.

The Court, (BREWER, J.) But there was nobody there.

Mr. Orrick. But we put somebody there once under our deed and according to our deed.

The Court, (BREWER, J.) That comes back to the question, what right had Mr. Shultz, the vice-president, to turn over possession? Did it not require the action of the directors of the corporation itself?

The Court, (TREAT, J., orally.) The way the question shapes itself to my mind is this. You had your special decree for your lien; how did you gain possession? If there was an action at law as in ejectment, and recovery had, the marshal would put you in possession under a writ of *habere fucias*; but being in equity, it is not necessary, of course, that you should go through all these formal proceedings. Now the question Brother BREWER suggested is, the adverse party did surrender possession. That is a simple matter of fact. As you say, Mr. Shultz, the vice-president and actual manager, told you to go and take it. That is all.

The Court, (BREWER, J.) As I said this morning, I read the papers over last night and I came to a conclusion as to what should be done in the matter, and I was anxious that my brother TREAT should read the papers also, as he has done during recess, and he is of the same, or very nearly the same, opinion that I have expressed; so it seems to us that further argument is unnecessary; that there is not that clear showing of an actual, undisturbed, absolute possession of this property which will justify the court in restraining outside parties from interfering. We this morning got into a discussion of some matters outside of the present question as to the ultimate rights of the parties; and, whatever opinions were hastily expressed on the spur of the discussion, of course neither of us feel under any obligations to hold to, when the ultimate rights of the parties come to be considered. The question is really whether, at the time this suit was instituted, there was that quiet, undisturbed, clear, and absolute possession which a court will protect against intruders. As a matter of fact, the property was an unoccupied roadway, just like a quarter section of land on which there was no improvements, and no occupation.

Mr. Orrick. Three miles of track completed, if the court please.

The Court, (BREWER, J.) Of course; but, upon the present showing, we agree that there is no such condition of things as would justify the court in granting the restraining order.

Mr. Orrick. In the view of the matter, would your honor be ready to entertain an application for a receiver? Here is a dispute liable to result in bloodshed to the contending parties, and we think the court ought to interpose.

The Court, (BREWER, J.) Before an application for receiver is entertained there should be notice given.

Mr. Orrick. I think we have a right to protect our rights in order to avoid trouble of that kind, and that the property may be preserved to whom it may belong. We ask your honor, therefore, to appoint a receiver to take charge of this property, and in the interests of peace, and we think the facts will justify such action.

The Court, (BREWER, J.) You ought to give notice of an application of that kind.

Mr. Orrick. The parties are in court.

The Court, (BREWER, J.) They might not wish to take it up without having a chance to prepare.

Mr. Orrick. I give notice now, that it may be heard to-morrow.

The Court, (TREAT, J.) The proposition involved is a very simple one. Your bill is a bill of peace, resting on possession by you, which the court asks you to show. Looking at your affidavits, you do not show that actual possession which the court requires in order to interfere, and when we look to the affidavits on the other side, the weight of the testimony is just the other way. There is somebody else in possession. On that state of facts the court has to pass, and that is all, on a motion of this kind. The rights of the parties, as ultimately they may be determined, is another question. The court cannot interfere in a scramble for possession, or give an injunction against trespassers; and on the other hand, of course, there is no trespass unless you have possession, and parties interfere when you were in possession. Hence, under all the rules concerning these matters, I do not see that an injunction can go. You must rest on the ultimate determination of these matters. Now, in regard to this other matter suggested, I only intimate (I have not consulted Brother BREWER in regard to it)—I do not see how, looking at the papers, if a man is building a road for you which belongs to you—

Mr. Noble. I wish to interrupt the court, simply to say that parties are present, and lest they might make a mistake about this matter, and think the court was deciding that they had possession, and base some action upon it, I think it well for the court, in view of the serious consequences that may occur on account of this, that it ought to be impressed upon them that there is no decision that they have possession.

The Court. As I say, it occurs to me that this is merely a scramble for possession.

Mr. Noble. And that scramble goes on, and each man decides for himself.

The Court. If you desire a receiver, notice should be given to the other side, that they may be ready, because that presents other questions.¹

¹ *Ante*, 519.

GLENN *v.* DORSHEIMER and others.¹

SAME *v.* HUNT.

SAME *v.* LIGGETT.

SAME *v.* FOY.

SAME *v.* PRIEST.

SAME *v.* DAUSMAN.

SAME *v.* VON PHUL.

SAME *v.* SCOTT and another.

SAME *v.* TAUSSIG and another.

SAME *v.* TRIPLETT.

SAME *v.* DIMMOCK and another.

SAME *v.* NOONAN and others.

SAME *v.* LUCAS and others.

SAME *v.* LOCKWOOD and others.

(Circuit Court, E. D. Missouri. April 9, 1885.)

1. **STATUTE OF LIMITATIONS — LIABILITY OF STOCKHOLDERS IN CORPORATION WHICH HAS CEASED TO DO BUSINESS.**

Where an insolvent corporation ceases to do business, and assigns all its property, including unpaid stock subscriptions, to trustees for the benefit of its creditors, the liability of its stockholders at once becomes absolute, and the statute of limitations begins to run in their favor, and against such creditors and trustees, immediately.

2. **SAME—CIRCUITOUS METHOD OF COLLECTION.**

Where the law furnishes a party with a simple method of proceeding against an ultimate debtor, he cannot prevent the statute of limitations from running against him by attempting to collect his debts by a circuitous legal proceeding.

Demurrers to Bills and Petitions.

The demurrers in all the above-entitled cases were passed upon in the following opinion. The period within which suits of this character must be brought, under the Missouri Statutes, (section 3230,) is five years. The other material facts are sufficiently stated in the opinion of the court.

T. K. Skinker, for plaintiff.

W. H. Clopton, for Dorsheimer, Foy, Priest, Lucas, and others.

C. M. Napton, for Hunt.

Smith & Harrison, for Liggett and Dausman.

Walker & Walker, for Von Phul.

¹ Reported by Benj. F. Rex, Esq., of the St. Louis bar.

Wilbur F. Boyle, for Scott and others.

Geo. W. Taussig, for Taussig and others.

Thos. C. Fletcher and *Geo. D. Reynolds*, for Triplett, Noonan, and others.

Dryden & Dryden, for Dimmock and others.

Noble & Orrick, for Lockwood and others.

BREWER, J., (*orally*.) There is a confused mass of law in the books bearing on the questions which are involved in these cases. In general way, the facts as stated in the petitions in the law cases, and the bills in the equity suits, are that the National Express Company was organized on the twelfth day of December, 1865; it continued in business until the twentieth day of September, 1866, less than one year. The defendants are charged as stockholders in that corporation. An assignment was made of all the properties of the company, all debts due to it, whether from stock subscriptions or otherwise. This assignment was made on the twentieth of September, 1866. Nothing, then, seems to have been done until November 28, 1871, more than five years thereafter, when one creditor brought his bill in the chancery court of Richmond, Virginia, in behalf of himself and other creditors, to establish his and their claims against the company, and compel an assessment upon the stockholders. These proceedings terminated in a decree in that court on the fourteenth day of December, 1880, more than nine years thereafter, by which debts were established against the company to the amount of half a million dollars, and over, an assessment of \$30 a share ordered, the assignees removed, and the present plaintiff appointed as trustee. Between three and four years after that, these suits were commenced in this court; so that 18 years after the established insolvency of the company, its cessation of business, its assignment of its property, for the first time these defendant stockholders are notified that they have to pay something to discharge the debts of the corporation.

Passing all other defenses, the single one that we shall notice is that of the statute of limitations. These subscriptions, as I say, were payable on the call of the corporation; and the first call was made in 1880. So it is argued by counsel for the trustee that the statute of limitations begins to run then, and then only; that the obligation of the stockholders is a conditional obligation, becoming absolute only when the call has been made. On the other hand, counsel for the defendant read to us some cases in Pennsylvania, which affirm that the obligation of stockholders in a corporation similar to the one before us, is like the obligation of one who has given a note payable upon demand, where the statute of limitations commences to run within a reasonable time, and it is assumed that the demand is, or must be, made at once. I cannot assent to that doctrine as broadly as stated by the supreme court of Pennsylvania, and I think the court in Mississippi has drawn a wise distinction. The obligation in the first instance is a conditional obligation. The stockholders are not

to pay until a call has been made. As was suggested in the argument, these debts due by the stockholders to the corporation are its assets, and furnish its means for transacting business, and so long as the corporation is a going concern, doing business, it may not need to have these obligations called in; and so, while it is a going concern, I think it is fair to say, as is said by the supreme court of Mississippi, that theirs is a conditional obligation, and that while the corporation continues to transact business, whether 5, 15, or 50 years, the stockholders' liability continues and becomes absolute only after a call is made. But that is not this case, and the court in Mississippi draws the distinction very nicely. In 1866 this corporation ceased to do business. It ceased to be a going concern. It turned over its property, including the debts due from its stockholders, to the assignees, to collect its debts, dispose of its property, and pay its creditors. Whenever such a cessation of business occurs, it seems to me fair to say that the liability of the stockholders becomes absolute, — a fixed, unconditional obligation. And, although no call be made by the company, or by the assignees, yet these debts from the stockholders could have been reached by the creditors. That seems to be settled by the decision in *Ogilvie v. Insurance Co.* 22 How. 380, where the supreme court held that creditors, who had reduced their claims to judgment against the corporation, might proceed directly by bill against one or more stockholders. The language is this:

"The objection made to the bill, for want of proper parties, is equally untenable. The creditors of the corporation are seeking satisfaction out of the assets of the company, to which the defendants are debtors. If the debts attached are sufficient to pay their demands, the creditors need look no further. They are not bound to settle up all the affairs of this corporation, and the equities between its various stockholders, partners, proprietors, or debtors. If A. is bound to pay his debt to the corporation in order to satisfy its creditors, he cannot defend himself by pleading that these complainants might have got their satisfaction out of B."

The court adds further:

"It is true, if it be necessary to a complete satisfaction to the complainants that the corporation be treated as an insolvent, the court may appoint a receiver, with authority to collect and receive all the debts due to the company and administer upon its assets, and in this way stockholders or debtors may be made to contribute."

While such is a proper proceeding, of course, yet the court affirms the right of a creditor to reduce his claim to judgment in a court of law and proceed against one or more stockholders; and that which is true of one creditor is true of all. In the aggregate, all the creditors can have no greater rights than as individual creditors. So these creditors could have reduced their claims against the corporation to a judgment, immediately after the assignment in 1866, through the simple processes of an ordinary action at law, and then brought their bill against the various stockholders to enforce payment here or elsewhere.

The same doctrine is recognized by Judge McCrory in the case of *Holmes v. Sherwood*, 3 McCrory, 405, S. C. 16 FED. REP. 725, and is the settled law of federal courts.

The case of *Scovill v. Thayer*, 105 U. S. 143, relied on by counsel for plaintiff, does not at all oppose this view, and does not overrule the case of *Ogilvie v. Insurance Co.*, for there the contract between the corporation and the stockholder was that the stock was to be treated as fully paid, although in fact it was only partially paid; and, as between the corporation and its stockholders, that was a valid contract, which the corporation as such could not repudiate, and it needed the interposition of a court of equity or a court of bankruptcy to establish the fact that, as between the creditors and the stockholders, that contract was no protection to the stockholders. Yet even there the court says, (and counsel rely rather on some *dicta* in the opinion than on the actual decision:)

"The rule is this. It is well settled that when stock is subscribed to be paid upon call of the company, and the company refuses or neglects to make the call, a court of equity may itself make the call, if the interests of the creditors require it, and the court will do what it is the duty of the company to do. But under such circumstances, [and to this our attention was especially called,] before there is any obligation upon the stockholder to pay, without an assessment and call by the company, there must be an order of a court of competent jurisdiction, or at the very least some authorized demand upon him, for payment; and it is clear the statute of limitations does not begin to run in his favor until such order or demand."

Counsel emphasized the words "some order of a court of competent jurisdiction," but there is added to it "some authorized demand." When a creditor, having his claim reduced to judgment, commences his suit in equity, that is an authorized demand.

A distinction should be noticed between this case, where the stockholders, not having paid their subscriptions in full, are simply debtors to the company for the unpaid portions, and those cases where a double liability is by statute cast upon the stockholders, in reference to which I find, in some of the opinions, language inappropriate to a case of this kind; and also those other cases, some of which went from Georgia to the supreme court, where a stockholder is held to be directly liable to certain creditors of the corporation; in one case, the stockholders being adjudged directly liable to the holders of bills issued by the bank in which they were stockholders. Of course, those are cases involving other considerations.

It was said in the argument, and our attention was called to the case of *Fogg v. Railroad Co.* 17 FED. REP. 871, decided in this court two or three years ago, that these creditors pursued an ordinary and proper way of enforcing their claims, and having pursued that ordinary and proper way, and as to each step in that way keeping themselves within the limits of the statute of limitations, they are not prejudiced by the delay. Thus, within six years after the assignment, they commenced proceedings to establish their claims against the

company, and they proceeded in the ordinary course of litigation in the chancery court and obtained an order for a call in that court, and then sued on that call within six years after it was made, and so, there being no statute of limitations interfering with each separate step in the course pursued, the courts must say that the statute of limitations does not cut off this action. That case of *Fogg v. Railroad Co.* does not justify any such conclusion as that. That was a case where one corporation having property turned it over to another, and the creditor, instead of pursuing directly the grantee company, established his claim in an action at law against the grantor company, and then by a bill in equity, filed at once, proceeded against the grantee company. The statute was held no bar. But here the creditor in the first instance had an open, ordinary, direct, and simple way of collecting his debts from the stockholder, and I do not think that he may follow any other way that he sees fit, and say that, although the statute of limitations would have cut off the simple and direct way, yet it did not happen to interfere with the various steps pursued in the way around to reach the stockholders; for certainly there should be some limit. If this theory were correct the stockholder might at the end of 18 years, as in this case, or of 25, 30, or 50 years, be confronted with a claim. Where the law furnishes to a party a simple method of proceeding against an ultimate debtor, and he fails to pursue that, I think such debtor can appeal to the statute of limitations as a protection.

There are many cases involving these questions. As I said in the outset, there is a confused mass of learning in the books as to the liabilities of stockholders to creditors of corporations. We have looked at the authorities carefully, and studied the questions as fully as we have had time, and our conclusions are that the demurrers must all be sustained.

TREAT, J., (*orally.*) I concur most fully in the judgment announced. I emphasize one proposition. Here was a corporation of short continuance; and I think, under the very terms of the act of corporation, only two dollars a share were primarily to be paid up. If any more was to be thereafter paid, it was to be paid when the directors of the corporation called therefor. The original amount was paid, and the parties rested there. It seems to have been a very unfortunate concern; for it had hardly begun operating before, practically, it was dissolved; and the amount of indebtedness shown by the proceedings in chancery at Richmond was incurred—to what end we know not, and it is immaterial. Three assignees were appointed, with full authority to collect all the assets and pay the obligations of the company; the stockholders being scattered, it seems, all over the country, at least as far as Missouri. There is nothing to indicate that they were to be called upon, or charged, except through calls, with the indebtedness to the original corporation. If assignees were

substituted to the rights of the original corporation, to call in these assessments, why did not these creditors move? They could have asked and demanded that the assignees should do—what? Proceed at once to make a call. But they did not do it. They filed a bill in 1871, more than five years afterwards, and, for reasons unknown to this court, that was prolonged until 1880, when that court thought there should be a call on the stockholders to meet these demands, and then the substituted assignees rested until 1884. Under the statutes of limitations, which are statutes of repose, and under the theory of laches in equity, a man cannot patch out, by proceedings of this nature, an indefinite extension of time. As stated by my brother judge, if he can do it for 18 years, or more, he may do it for 50 years. The right of the creditor existed against the corporation at the time the assignment was made. Why did not he pursue it? He had the right so to do. He never did it. He must take the consequences of the delay.

PILLA and another v. GERMAN SCHOOL Ass'n and another.¹

(Circuit Court, E. D. Missouri. April 24, 1885.)

1. DESCENT AND DISTRIBUTION—ALIENAGE.

The law existing at the time of descent cast, governs the right of aliens to inherit realty.

2. SAME.

Under the Missouri statutes existing in 1860, aliens could not inherit realty.

3. EQUITY PRACTICE IN REMOVED CASE.

Where a suit, embracing both an equitable and legal cause of action, is instituted in a state court and removed to this court, and the equitable cause of action stated is held bad on demurrer, the bill will be dismissed, and the complainant left to pursue his remedy at law.

In Equity. Demurrer to bill.

Louis Gottschalk, for complainants. *Henry Hitchcock* and *Hugo Muench*, for defendants.

TREAT, J., (*orally*.) This case, instituted in the circuit court of the city of St. Louis and removed here, involves some questions which have been presented in part only to the court.

The plaintiffs in the suit are a Mrs. Maria Pilla and Maria Parazolt, her husband joining, residents of France, daughters, as they claim, of one Gabriel Andre, who died in this country in November, 1860, leaving a will. In that will, so far as its provisions are stated, the decedent recited that he had a wife in France, from whom he had been separated; that a son was born a great many years antecedent to the will, who died at the age of 11 months. There were two supposed daughters, to one of whom he left the sum of one dollar, averring, as

¹ Reported by Benj. F. Rex, Esq., of the St. Louis bar.

the reason for so doing, that she was not his child, but illegitimate. The bill itself does not separate the two daughters who are plaintiffs therein as to which one had been cut off with a dollar, but avers that they are the legitimate daughters, both of them, of the decedent, and they sue jointly for their portions of the estate. It is obvious that if he chose to cut off one of the two, whether legitimate or illegitimate, and made a disposition of his property as to one only, the unnamed one would not lose her interest in the estate; but which was the one? He did not name her. There are two. One has been disposed of by the will; but which one? Without commenting any further in regard to that, it must suffice, for the purposes of this case, that, whether one or the other was the daughter unnamed and unprovided for, the court would not know which was the one until further investigation. That would present a controversy among themselves. How could the forms of that litigation arise? Concerning that I have nothing to say, because there is a question that disposes of the case, and which underlies the whole matter.

The case of *Sullivan v. Burnett*, tried in this court, and affirmed by the supreme court of the United States, (105 U. S. 334,) and the *Case of De Franca*, 21 FED. REP. 774, decided at the last term of this court by Justice MILLER, are conclusive, so far as the realty is concerned: namely, that at the time of descent cast, November, 1860, the rights of the parties were fixed according to the statutes then existing with regard to aliens. It is a matter of astonishment to me, however, that while I tried the case of *Sullivan v. Burnett*, and the act of February 18, 1855, was before me, and also before the supreme court when it passed upon that case and affirmed the judgment of this court, yet the act of November, 1855, was not referred to in that case, and not referred to in this case. If Wagner's Revision of 1870 is a correct revision, I find, without going back to the original statutes, that there was a strange omission on the part of this court, and consequently on the part of the supreme court of the United States, to notice that act. Had it been noticed, it would not, however, have affected the result. The act of February, 1855, so far changed the old law that an alien could not inherit realty; as to permit the alien to take and sell within three years after the death of the ancestor. Subsequently, a statute was passed, and that is the act to which I refer, and to which no allusion is made, either by this court or the supreme court, in the determination of that case, to-wit, the act of November, 1855, concerning the time within which they might dispose of the property, which, but for alienage, would descend in fee to them, limiting the power to sell it to three years after administration had. That was the condition at time of descent cast. Then, taking the most liberal view for these plaintiffs of the statutes then in force, what is the result? Gabriel Andre died November, 1860; at that time he had two married daughters in France; the administration was closed in 1868; these daughters did not move with respect thereto until March, 1884.

Under the most liberal construction that could be given to these statutes, the right of these parties to sue, so far as the realty was concerned, ended three years after administration, to-wit, in 1871; hence any rights that they might have had, under the statutes, pertaining to realty here, ceased in 1871.

But the structure of this so-called bill calls for a great many exceptions, which may be disposed of by a simple comment. Proceedings were instituted in the state court, where legal and equitable matters may both be pursued in the same case. These parties claimed their supposed interest in the realty, but after the remarks already made, it will be seen they had none. They also claim an interest in certain personalty in the hands of the residuary legatees, namely, \$4,000. Now, if they sued at law, the statute of limitations might be interposed; if they sued in equity, the doctrine of laches. But the bill being one of those mixed bills, it comes here without having been reformed. It should have been reformed to comply with the equity rules of this court. That, however, would be a mere matter of formal proceeding; because leave would be granted for the parties to make such changes pertaining to the form as would preserve their rights under the equity rules prescribed by the supreme court. But there can be no phase of the case which would bring them here on the equity side of the court, under what has already been said, namely, that they have no interest in the realty at all. Consequently, if they are not barred by the statute of limitations, their remedy is adequate at law for money had and received. The result is that this bill, as it stands before the court, is undoubtedly defective, not for form only, but for substance. Eliminating the realty from this controversy, there is nothing left but an ordinary money demand; and plaintiffs must sue at law for that.

The case that went to the supreme court, (of *Sullivan v. Burnett*, 105 U. S. 334,) and that of *De Franca*, decided at the last term, Justice MILLER giving the opinion, are conclusive so far as the realty is concerned. As to a demand for money had, it is to be pursued by an action at law. It is for the parties to say whether, with the statute of limitations before them, they choose to bring a proper action with regard to the money demand, or leave the matter as it is.

The demurrer is sustained, not for technical objections which have been presented, and which it would be very proper to consider had there been an original bill filed here, (but as this is a removed case, any such objections could have been cured by reforming the pleadings.) Under the facts stated,—and I suppose there is no dispute in regard to them,—the parties are entirely mistaken as to the realty, and if there is any demand for the personalty, that is to be pursued at law.

Demurrer sustained, and bill dismissed.

CENTRAL TRUST CO. v. TEXAS & ST. L. RY. CO.¹*In re WATERS PIERCE OIL Co., Intervenor.*¹

(Circuit Court, E. D. Missouri. April 8, 1885.)

1. RAILROAD LIENS—OILS—REV. ST. MO. § 3200, CONSTRUED.

Lubricating and illuminating oils are not "materials," within the meaning of section 3200 of the Revised Statutes of Missouri, and parties furnishing them are not entitled to any statutory lien.

2. MORTGAGES—MATERIAL—MEN—EQUITABLE LIENS.

Where materials necessary for use in the management of a railroad were furnished from time to time from October 17, 1882, to January 10, 1884, inclusive, and two notes were given for a part of the amount due therefor, dated, respectively, October 15, 1883, and December 12, 1883, both due four months after date, and the railroad defaulted in the payment of its bonded interest, September 1, 1883, and a receiver was appointed January 12, 1884, and the materialmen filed their claim for the whole amount due, and surrendered their notes for cancellation, *held*, that they were only entitled to an equitable lien superior to that of the mortgagees, for the amount due for materials furnished after the railroad company's default.

Exceptions to Master's Report.

The claim of the intervenor in this case is for a balance of \$2,861.91, due it for lubricating and illuminating oils furnished the Texas & St. Louis Railway Company, at various times from October 17, 1882, to January 10, 1884, inclusive. Two promissory notes executed by said railway company, on account of part of said indebtedness, one for \$1,376.76, and dated October 15, 1883, and the other for \$1,844.04, dated December 12, 1883, both payable four months after date,—were surrendered for cancellation. It was conceded that the oils were necessary for use in running the road. Default in the payment of interest took place September 1, 1883. A receiver was appointed January 12, 1884. The intervening petition was filed April 5, 1884. The intervenor claimed a lien under the Missouri Statutes, which provide (Rev. St. § 3200) that "all persons who shall do any work or labor in constructing or improving the road-bed, rolling stock, station-houses, depots, bridges, or culverts of any railroad company incorporated under the laws of this state, or owning or operating a railroad within this state, and all persons who shall furnish ties, fuel, bridges, or materials to such railroad company, shall have * * * a lien," etc. The master reported that the intervenor is not entitled to any lien under said statute, because oils are not materials, within its meaning; but is entitled to an equitable lien for all oils furnished since the railroad company defaulted in the payment of interest.

W. R. Woodward and J. D. Johnson, for intervenor.

Phillips & Stewart, for receiver.

Butler, Stillman & Hubbard and Elenious Smith, for complainant.

¹ Reported by Benj. F. Rex, Esq., of the St. Louis bar.

BREWER, J., (*orally*.) In the intervening petition of the Waters Pierce Oil Company, in the case of *Central Trust Co. v. Texas & St. L. Ry. Co.*, the question presented is whether the oils furnished by the intervenor come within the Missouri statute in reference to liens. The language of the statute contains the word "fuel," in addition to the words "labor and material;" and it is claimed that the use of the word "fuel" enlarges the meaning of the word "material," and makes it broad enough to cover all supplies furnished. But for that word "fuel" there would be no question. The idea which underlies these lien statutes is that because the labor and the material have gone into the building of the road or structure, and to that extent added to its value, therefore a lien for such labor and material should be given to him who does the one and furnishes the other.

Now, fuel does not go into the structure of a railroad; neither does coal oil. It is something used in the running of the road; a part of the supplies necessary for the operation of the road, but nothing which goes into the enduring structure. While we may be compelled to follow the language of the statute, and give for the fuel furnished a lien, yet I think in the construction of these statutes we should start from the underlying thought of giving security to him who adds to the value of the road, and that we should never carry the statute beyond that, unless imperatively demanded by the language used; particularly, as Brother TREAT suggests, when it would operate to override prior mortgages. So that, while that word "fuel" is in there, I take it it is not fair to give it the force of enlarging the meaning of the other words, "material," etc., but it should be considered as a new term, something added by the legislature, carrying its own weight, but giving no different meaning to the word "material" from that which it possessed in prior statutes, and, in fact, changing the statutes only in this respect: that it adds a certain specified matter for which a lien is given. The master was correct in his conclusions. The exceptions will be overruled, and the report confirmed.

BLAIR v. ST. LOUIS, H. & K. RY. CO. and others.

In re MERRIWETHER and others, Intervenor.¹

(Circuit Court, E. D. Missouri. April 29, 1885.)

RAILROAD MORTGAGES—LIEN OF MATERIAL-MEN—STATUTE OF FRAUDS.

Where supplies used for rebuilding bridges, building side tracks, and in making repairs, were furnished a railroad company from time to time under a continuous verbal contract made after default in the payment of the company's bonded interest, and which was not terminated until the appointment of a re-

¹ Reported by Benj. F. Rex, Esq., of the St. Louis bar.

ceiver, (more than two years after the first supplies were furnished,) *held* that, notwithstanding the statute of frauds, the material-men were, under the circumstances, entitled to judgment for the balance due them, and to a lien for the amount due on the earnings of the road, superior to that of the mortgage creditors.

Motion for Rehearing.

For a statement of facts and opinion on exceptions to master's report, see 22 FED. REP. 769.

In *Central Trust Co. v. Texas & St. L. Ry. Co.*, referred to in the opinion, the following order concerning intervening claims was made, *z.*:

"That all outstanding debts of the said railway company for labor, materials, and supplies used in the equipment or permanent improvement of the said railroad, and all outstanding debts for necessary operating and managing expenses thereof in the ordinary course of its business, incurred after the first day of September, 1883, shall be allowed by the master as equitable liens, prior in right to the lien of the mortgage sued on, irrespective of statutory liens therefor. And it is further ordered that all such claims accruing on open running accounts between said railroad and its creditors shall be considered as embracing within this order, if any part of the work was done, materials furnished or expenses incurred after the first day of September, 1883, on subsisting contracts necessary for the continued operation of the road by said receiver; otherwise the demand will be limited to what accrued subsequent to said September 1st."

September 1st was the day upon which default took place.

Walter C. Larned and *Theo. G. Case*, for complainants.

John O'Grady, for receiver.

Dyer, Lee & Ellis, for intervenors.

BREWER, J., (*orally*.) The same principle announced concerning the intervening petitions in *Central Trust Co. v. Texas & St. L. Ry. Co.* will determine the case of *Merriwether v. St. Louis, H. & K. Ry. Co.* Some criticism was made in the argument on what was said by Brother TREAT as to the mortgagor being agent of the mortgagee after default and the payment of interest. I do not think my brother TREAT meant to be understood as laying down as a general proposition that wherever there was default the mortgagor became the general agent for the mortgagee for the contraction of debt. Certainly, if he did, I could not feel like agreeing with that view. But that was simply the argument in support of the general conclusion he reached, that that particular case, there being a subsisting contract for the furnishing of all the lumber on a specified tract, and which had not been delivered, the mortgagor might be properly treated as authorized by the mortgagee to act as his agent.

The motion for rehearing will be overruled.

v.23f,no.14—45

BURLINGAME v. CENTRAL R. OF MINN.¹

(Circuit Court, E. D. New York. February 24, 1885.)

VERDICT—POWER OF COURT TO CORRECT MISTAKE IN.

Where a jury, in an action for services, returned a verdict for plaintiff for \$3,500, and two days after, while counsel for both parties were present, the court directed the jury to be recalled, and they all, on being asked if that was their verdict, answered that it was not,—that their verdict was for \$3,500, with interest,—held, that the court had power to cause the mistake to be corrected, and that the plaintiff should have judgment for \$3,500, and interest.

Motion for Judgment on Verdict.

P. W. Ostrander, for plaintiff.

Deforest & Weeks, for defendant.

WHEELER, J. This is an action to recover for personal services rendered while the plaintiff was a director and treasurer of the defendant. The jury was directed to return a verdict for the plaintiff for such services as he rendered, if any, outside the scope of his duties as director and treasurer, at the special request of the president and the rest of the board of directors, and that if they found for the plaintiff they might allow interest from the time when the services were completed. Late in the day they returned a verdict for the plaintiff for \$3,500, and the court was immediately adjourned to the next day. During the next day a statement was made to the court that the jury intended to give a verdict for \$3,500, with interest. On the morning of the next day after that, and on notice to defendant's counsel to be present, and while the counsel for both parties were present, the court directed the jury to be recalled to their places, and that the verdict as recorded, be read to them, and that they be asked if that was their verdict. This was done, and the foreman answered that it was not, that their verdict was for \$3,500, with interest. They were directed to compute the interest and agree upon the amount, which they did, and answered that it was \$2,038.20, making \$5,538.20, and that the verdict was for the plaintiff for that amount, which was ordered to be recorded, and the jury, being interrogated separately, all said that that was their verdict. At the same time an affidavit of all the jurors was presented and filed, stating that the verdict agreed upon was for the plaintiff for \$3,500, with interest.

The plaintiff now moves for judgment on the verdict for the full amount. The defendant objects to judgment on the verdict for more than \$3,500, on the ground that interest was not recoverable, and because it was not within the power of the court to allow the verdict to be varied after it had been received and recorded. As the services were rendered on special request, and to be paid for, the payment was due when they were performed, and after that time was detained by the defendant against the right of the plaintiff to have it. Unde-

¹Reported by R. D. & Wyllys Benedict, Esqs., of the New York bar.

these circumstances it ought to bear interest. *People v. Gasherie*, 9 Johns. 71; *Wood v. Robbins*, 11 Mass. 504; *Burdett v. Estey*, 19 Blatchf. 1; S. C. 3 FED. REP. 566.

The power of the court to cause the verdict to be corrected would seem to be ample, according to the law of the state of New York, and the practice of its courts, as settled by its highest court. In *Dalrymple v. Williams*, 63 N. Y. 361, the jury returned a verdict against two, when the verdict agreed upon was against one, and in favor of the other, and the verdict was recorded and the jury separated; afterwards, on the same day, on the affidavit of all the jurors, the verdict was corrected and the judgment entered upon it. This course was approved. In *Cogan v. Ebden*, 1 Burr. 383, where the issue was as to two rights of way under which the defendant justified, the jury found for the defendant as to one, and for the plaintiff as to the other, but returned a verdict for the defendant as to both and separated. This verdict was corrected on the affidavit of the jurors. In this case there is no suspicion of any unfair conduct on the part of the jurors, or any one. It was an honest mistake, which, if not corrected, would prevent the finding of the jury as it actually was from being carried out. The correction is not an impeachment of the verdict by the jurors in any sense. It upholds the real verdict, and prevents miscarriage in its delivery into court. The verdict as first recorded was not the real verdict of the jury. If it could not be corrected, it should be set aside. Neither party has moved for that.

Judgment on verdict for full amount.

SMALL v. MONTGOMERY.¹

(Circuit Court, E. D. Missouri. April 6, 1885.)

JURISDICTION—SERVICE ON NON-RESIDENT ATTENDING AS WITNESS IN ANOTHER CASE.

Where a non-resident, who has come into the district to attend the trial of a case in which he is plaintiff, is detained within the jurisdiction of this court as a witness in another suit, he is not subject to civil service for the institution of suits against him while so detained.

Plea in Abatement and Demurrer to the Evidence.

The plea states that the defendant is a resident of Tennessee, and came into this district to attend the trial of a case in which he was plaintiff, and a necessary witness on his own behalf; that while attending the trial of said case he was served with a subpoena in another case then pending in the St. Louis circuit court, and while attending as a witness in the latter case, in obedience to said subpoena,

¹ Reported by Benj. F. Rex, Esq., of the St. Louis bar.

was served with process in this case. The evidence substantiated the allegations of the plea.

Krum & Jonas, for plaintiff.

Collins & Jamison, for defendant.

TREAT, J., (*orally*.) The question presented by demurrer to the evidence on the plea of abatement, and the reply thereto, in this case, is one on which, after a great difference of opinion, the various circuit courts of the United States have reached a common conclusion,—one in the first circuit, and one in the adjoining circuit, the seventh. Extended commentaries thereon will be found in 21 Amer. Law. Reg. 672. See *Atchison v. Morris*, 11 FED. REP. 582.

The proposition is this: When a party to a suit, a non-resident, appears in a state, in order to represent himself with respect to his interests therein involved, or when one as a witness is brought into a state for that purpose, whether, thus coming within such jurisdiction, he is subject to civil service for the institution of suits against him. I am cited to a recent case in Connecticut, followed by a commentary in another case by Judge SHIPMAN, a United States district judge. An examination of those cases will show that neither the supreme court of Connecticut nor the United States district judge went to the length contended for in this case. All the United States circuit judges who have passed upon the question of late, as well as *dicta* by the supreme court of the United States in respect thereto, reach this result, viz.: that where a party in *good faith* is brought within the jurisdiction of the state or detained therein, being a non-resident, either as party to the suit or as witness in another suit, he is not subject to service. And the reason—the main reason—is very potential, so far as our country is concerned. There are many states, stretching from Maine to Oregon, and a man who is required to go from one to the other, either as a witness or as a party to a suit, should not be pursued by suit while abroad, instead of being sued at his own residence; otherwise, every one, as is stated in many of these opinions, would avoid, as far as possible, being subjected, thousands of miles away, to suits of this character. The result is, the demurrer to the evidence is overruled. Judgment on the plea of abatement in favor of defendant, which abates the case.

KEHLER v. NEW ORLEANS INS. CO.¹

(Circuit Court E. D. Missouri. April 11, 1885.)

FIRE INSURANCE—NOTICE TO BROKER.

Where a policy of insurance procured through a broker contained the following conditions, viz.: "If any broker or other person than the assured have procured the policy, or any renewal thereof, or any indorsement thereon, he shall be deemed to be the *agent of the assured*, and not of this company, in any transaction relating to the insurance. This insurance may be terminated at any time by request of the assured, or by the company, on giving notice to that effect;" *held*, that notice from the company to the broker who procured the policy, of an election to terminate the insurance, was not notice to the assured.

PRACTICE—MOTION TO SET ASIDE VERDICT—NEW DEFENSE.

A verdict and judgment thereon will not be set aside upon the ground that the defendant has been prevented, by a mistake, and without fault, from being represented at the trial and making his defense, when the defense which he sets up in affidavits in support of his motion to set aside is entirely new, and not disclosed by the original pleadings.

Motion to Set Aside the Verdict and Judgment.

Suit upon a fire insurance policy taken out by the assured through a broker. The policy contained among its conditions the following:

"If any broker or other person than the assured have procured this policy, or any renewal thereof, or any indorsement thereon, he shall be deemed to be the agent of the assured, and not of this company, in any transaction relating to the insurance. This insurance may be terminated at any time by request of the assured, or by the company, on giving notice to that effect."

The answer contains a general denial, and states that the defendant had terminated the insurance by notice to the plaintiff according to the terms of the policy, before any loss occurred. At the trial it appeared that the defendant had attempted to terminate the insurance before the fire, by giving notice to the broker who procured the policy, but that the plaintiff had received no actual notice of the defendant's desire to terminate the insurance until after the fire occurred.

The defendant was not represented at the trial. The verdict was for the plaintiff. The defendant moved to set aside the verdict, and filed affidavits tending to show that the attorney's absence had been caused by a mistake, and that it had a defense not set up in its answer.

G. M. Stewart, for plaintiff.

Eleeneous Smith and E. H. Gary, for defendant.

TREAT, J., (*orally*.) In the case of *Kehler v. New Orleans Ins. Co.* there is a motion to set aside verdict and judgment. The original defense to the case was that, under the terms of the policy, it could be canceled on notice given, and that said notice was given before the loss. On the testimony submitted, it appeared the notice was not given. I supposed the contention would be that the broker who negotiated the insurance must be treated as if he were the plaintiff

¹ Reported by Benj. F. Rex, Esq., of the St. Louis bar.

himself, or his agent for receiving notice. He is not so. That question was before the supreme court and decided in the case of *Grace Insurance Co.* 109 U. S. 278; S. C. 3 Sup. Ct. Rep. 207. His functions terminated when he effected the policy.

Now, this motion goes a step further. It sets up in the affidavit an entirely new defense, which, it seems, was not thought of before to-wit, that the policy executed and delivered to the plaintiff was only on condition that the parent company should assent thereto, which it never did. That is something that was not in the original pleadings. The party had abundant opportunity to do that originally. Now he wishes to set up a new defense, and reopen the case upon a theory which is utterly inconsistent with his own correspondence file.

The motion will be overruled.

MITCHELL v. CATCHINGS.¹

(Circuit Court, E. D. Missouri. April 18, 1885.)

PROMISSORY NOTES—OPTIONS—NOTICE—REASONABLE TIME.

Where a demand note, given as security for a continuing option transaction but valid on its face, was bought in the regular course of business and for full value, 23 days after date, by one who knew the payees of the note dealt in options, and suspected, but did not know, that it had been taken in some option deal, *held*, (1) that the note had been negotiated within a reasonable time; (2) that the purchaser was a *bona fide* holder without notice.

At Law. Suit on a promissory note.

Hugo Muench, for plaintiff.

Phillips & Stewart, for defendant.

BREWER, J., (*orally*.) In *Mitchell v. Catchings*, action on a note for \$5,000, there is really only one question, and that is whether the plaintiff was a *bona fide* holder, before due, of the note in controversy. In its inception the note was a note given as security for option deals,—a pure gambling transaction,—a note void as between the parties beyond any question. The plaintiff claims to be a *bona fide* holder before due. The note is a demand note, dated November 13th, indorsed to plaintiff, December 6th. No demand was in fact made prior to transfer. While it is true a letter was written by McCormick of the firm of Smith, McCormick & Co., the payees of the note, yet there was no presentment of the paper to the maker, no demand within the rules of the law-merchant. Twenty-three days elapsed between the making of the paper and the transfer. Is that such a length of time that the court is justified in presuming a demand, and

¹ Reported by Benj. F. Rex, Esq., of the St. Louis bar.

holding that the paper was taken overdue? The books show it is a mixed question of law and fact as to what is reasonable time within which demand must be made. In Daniel, Neg. Ins., quoting, I think, from Pars. Notes & Bills, the author makes use of an expression something like this:

"That it is unquestionable that one day would not be a reasonable time, and that five years would be an unreasonable delay. Intermediate times there is nothing settled, and each case must be left to be determined upon its own peculiar circumstances."

This note was given as security for a continuing transaction. In the contemplation of the parties it was not to be immediately paid. So the defendant says, and claims really a breach of contract on the part of the payees, in that they closed out his deals more speedily than they were warranted. Hence, as between the parties, it being contemplated that it was to stand as security for a continuing transaction, and not as paper which was to be immediately collected and paid, it does not seem to me that the 23 days can be held to be an unreasonable time. Counsel said in the argument (I do not know whether correctly or not, for I have not had time to examine) that no case can be found in the books in which any period less than 30 days has been held to be an unreasonable time. Applying the law as thus laid down in the books, I cannot hold that the note was transferred after time.

The purchaser suspected that the note was given for one of these gambling contracts. He knew the parties from whom he purchased, and that they were engaged in that kind of business; and so he says he was not blind, but suspected the nature of the transaction. Still, he knew nothing about it. He bought it in the regular course of business at his bank, and paid his money for it. I have a strong feeling in reference to these transactions, (purely gambling transactions,—that is the long and short of it,) and it is a sore temptation to ignore the law laid down by the supreme court, and say that the man who buys under such circumstance does not buy as a *bona fide* purchaser. But the supreme court have held in several cases—and of course that must here be taken as settled law—that mere suspicions or negligence do not invalidate the purchase, or make the purchaser not a *bona fide* purchaser. "There must be [and that is the language of the court] *mala fides*;" and it could hardly be said there was *mala fides* in this case. The note on the face was all right; the plaintiff bought it in the regular course of business and paid his money for it, paying full value; and while, from the knowledge that he possessed of the business in which the payees were engaged, he must have suspected and did suspect the origin of the note, yet he did not know it. I am therefore reluctantly compelled to say that I cannot hold he was guilty of *mala fides* in purchasing the paper; and that, being a *bona fide* purchaser, he is entitled to recover.

BARRY v. UNITED STATES MUTUAL ACCIDENT ASS'N.

(Circuit Court, E. D. Wisconsin. March, 1885.)

1. ACCIDENT INSURANCE—ALLEGED INJURY—QUESTION FOR JURY.

In an action on an accident insurance policy the question whether deceased was injured by jumping from a platform as alleged, is a question of fact for the jury to determine from all the circumstances of the case as shown by the evidence.

2. SAME—"ACCIDENTAL" DEFINED.

The term "accidental" as used in an accident policy is used in its ordinary sense, and means "happening by chance, unexpectedly, or not as expected."

3. SAME—"ACCIDENTAL MEANS" DEFINED.

4. SAME—"EXTERNAL AND VISIBLE SIGNS OF INJURY"—INTERNAL INJURY.

An injury that is internal may afford external indications or evidences, which are visible signs of the injury within the meaning of such term as used in an accident policy.

5. SAME—"SOLE AND PROXIMATE CAUSE OF DEATH."

In an action on an accident policy where it is shown that the deceased sustained an accidental injury to an internal organ, and that necessarily produced inflammation, and that produced a disordered condition of the injured part, whereby other organs of the body could not perform their natural and usual functions, and in consequence the injured person died, the original injury will be considered as the proximate and sole cause of death; but if an independent disease or disorder, not necessarily produced by the injury, supervened upon the injury, or if the alleged injury merely brought into activity a then existing but dormant disorder or disease, and death resulted wholly or in part from such disease, the injury cannot be considered the sole and proximate cause of death.

At Law.

C. M. Bice, for plaintiff.

Finches, Lynde & Miller, for defendant.

DYER, J., (*charging jury*.) On the twenty-third day of June, 1882, the defendant association issued to John S. Barry, then residing at Vulcan, Michigan, but since deceased, what may be termed a contract of insurance, by which it agreed to pay his wife, Theresa A. Barry, a sum not exceeding \$5,000, within 60 days after sufficient proof that, at any time within the continuance of membership of Dr. Barry in the association, he had sustained bodily injuries, effected through external, violent, and accidental means, and that such bodily injuries alone had occasioned death within 90 days from the happening thereof. This is a suit brought by the beneficiary named in the policy to recover the amount of the insurance.

It is alleged that the deceased sustained an injury, within the meaning of the policy, on the twentieth day of June, 1883, and it is proven that he died on the twenty-ninth day of that month. There is no question, therefore, that if he was injured as claimed, he died within the time after the alleged injury named in the policy; nor is there any question that the policy was in force at the time of his death. By the terms of the policy it was provided, as already stated, that to entitle the beneficiary to the sum of \$5,000, the death should be oc-

caused by bodily injuries alone, effected through external, violent, and accidental means. Also that the benefits of the insurance should not extend to an injury of which there was no external and visible sign; nor to any injury happening, directly or indirectly, in consequence of disease; nor to any death or disability caused wholly or in part by bodily infirmities, or disease existing prior or subsequent to the date of the policy; nor to any case except where the injury was the proximate or sole cause of the disability or death. The issue between the parties may be briefly stated:

It is claimed by the plaintiff that, on the occasion mentioned by Dr. Hirschman, when the deceased was at Iron Mountain, he sustained an injury by jumping from a platform to the ground; that this injury was effected by such means as are mentioned in the policy; that the deceased at the time of the alleged accident was in sound physical condition and in robust health; and that the alleged injury was the proximate and sole cause of death. The defendant denies that the deceased sustained any injury that was effected through accidental means, and also contends that if any injury was sustained, it was one of which there was no external or visible sign, within the meaning of the policy; and that the supposed injury was not the cause of the death of the deceased, but that he died from natural causes. The case therefore resolves itself into three points of inquiry: *First*. Did Dr. Barry sustain internal injury by his jump from the platform on the occasion testified to by Dr. Hirschman? *Second*. If he did sustain injury as alleged, was it effected through external, violent, and accidental means, within the sense and meaning of the policy, and was it an injury of which there was an external and visible sign? *Third*. If he was injured as claimed, was that injury the proximate cause of his death? To entitle the plaintiff to a verdict, each and all of these questions must be answered by you in the affirmative; and if, under the testimony, either one of them must be negatively answered, then your verdict must be for the defendant.

The first question,—viz., was the deceased, Dr. Barry, injured by jumping from the platform,—is so entirely a question of fact to be determined upon the testimony, that the court must submit it without discussion to your determination. In passing upon the question, you will consider all the circumstances of the occurrence as laid before you in the testimony, the apparent previous physical condition of Dr. Barry, the subsequent occurrences and circumstances tending to show the change in his condition, the relation in time which the first developments of any trouble bore to the time when he jumped from the platform, the nature of his last sickness, and the symptoms disclosed in its progress and termination. Further, you will inquire what evidence, if any, did the *post mortem* examination, and any and all subsequent examinations of the parts alleged to have been the seat of the supposed injury, furnish of an actual physical injury; what connection, if any, does there or does there not appear to be between the

act of jumping from the platform and the subsequent events and circumstances which culminated in death, including the result, as you shall find it to be, of *post mortem* investigations. The question is before you, in the light of all proven facts, for determination. The court cannot indicate any opinion upon it without invading your exclusive province, and by your ascertainment of the facts the parties must be bound. There is presented in the case a train of circumstances. Do they, or not, so to speak, form a chain connecting the ultimate result with such a previous cause as is alleged? Was the act of jumping from the platform adequate or inadequate to produce an internal injury? Thus may you properly pursue the inquiry, guided by and keeping within the limits of the testimony.

If you find that injury was sustained, then the next question is, was it effected through external, violent, and accidental means? This is a pivotal point in the case, and therefore vitally important. *The means* must have been external, violent, and accidental. Did an accident occur in the means through which the alleged bodily injury was effected? It does not help you to a proper conclusion to say merely that the injury itself, if there was one, was an accident or accidental. That was the result, and not the means, through which it was effected. The jumping off the platform was the means by which the injury, if any was sustained, was caused. Was there anything accidental, unforeseen, involuntary, unexpected in the act of jumping, from the time the deceased left the platform until he alighted on the ground? The term accidental is here used in its ordinary, popular sense, and in that sense it means "happening by chance, unexpectedly; taking place not according to the usual course of things," or not as expected. In other words, if a result is such as follows from ordinary means, voluntarily employed, in a not unusual or unexpected way, then, I suppose, it cannot be called a result effected by accidental means. But if in the act which precedes the injury, something unforeseen, unexpected, unusual occurs which produces the injury, then the injury has resulted from the accident, or through accidental means. We understand from the testimony, without question, that the deceased jumped from the platform with his eyes open, for his own convenience, in the free exercise of his choice, and not from any perilous necessity. He encountered no obstacle in jumping, and he alighted on the ground in an erect posture. So far we proceed without difficulty. But you must go further and inquire,—and here is the precise point on which the question turns,—was there or not any unexpected or unforeseen or involuntary movement of the body from the time Dr. Barry left the platform until he reached the ground, or in the act of alighting? Did he or not alight on the ground just as he intended to do? Did he accomplish just what he intended to, in the way he intended to? Did he or not unexpectedly lose or relax his self-control in his downward movement? Did his feet strike the ground as he intended or expected, or did they not? Did he or not miscalculate the distance, and was

there or not any involuntary wrenching or turning of the body in the downward movement, or in the act of alighting on the ground? These are points directly pertinent to the inquiry in hand; and I instruct you that if Dr. Barry jumped from the platform and alighted on the ground in the way he intended to do, and nothing unforeseen, unexpected, or involuntary occurred, changing or affecting the downward movement of his body, as he expected or would naturally expect such a movement to be made, or causing him to strike the ground in any different way or position from that which he anticipated, or would naturally anticipate, then any resulting injury was not effected through any accidental means. But if, in jumping or alighting on the ground, there occurred, from any cause, any unforeseen or involuntary movement, turn, strain, or wrenching of the body, which brought about the alleged injury; or if there occurred any unforeseen circumstance which interfered with or changed such a downward movement as he expected to make, or as it would be natural to expect under such circumstances, and as caused him to alight on the ground in a different position or way from that which he intended or expected, and injury thereby resulted,—then the injury would be attributable to accidental means. Of course it is to be presumed that he expected to reach the ground safely and without injury. Now, to simplify the question and apply to its consideration a common-sense rule, did anything, by chance, or not as expected, happen in the act of jumping or striking the ground, which caused an accident? This, I think, is the test by which you should be governed in determining whether the alleged injury, if any was sustained, was or was not effected through accidental means. You have the testimony in relation to the occurrence which it is claimed by the plaintiff produced in Dr. Barry a mortal injury, and taking it all into consideration, and applying to the facts the instructions of the court, you will determine whether, if any injury was sustained, it was effected through external, violent, and accidental means.

The defendant claims that if Dr. Barry did sustain injury, it was one of which there was no external and visible sign and therefore that the plaintiff is not entitled to recover. In the discussion of this question, counsel were understood to contend that no recovery could be had under a policy in the form and terms of this one, if the injury was wholly internal. In that view, the court cannot concur. It is true, there must be an external and visible sign of the injury, but it does not necessarily follow from that that the injury must be external. That is not the meaning or construction of this policy. Such an interpretation of the contract as is contended for in that particular, would, in the opinion of the court, sacrifice substance to shadow and convert the contract itself into a snare, an instrument for the destruction of valuable rights. Visible signs of injury, within the meaning of this policy, are not to be confined to broken limbs or bruises on the surface of the body. There may be other external indications or evidences which are visible signs of internal injury. Complaint of

pain is not a visible sign, because pain you cannot see; complaint of internal soreness is not such a sign, for that you cannot see; but if the internal injury produces, for example, a pale and sickly look in the face, if it causes vomiting and retching, or bloody or unnatural discharges from the bowels; if, in short, it sends forth, to the observation of the eye, in the struggle of nature, any signs of the injury,—then those are external and visible signs, provided they are the direct results of the injury. And with this understanding of the meaning of the policy, and upon the evidence, you will say whether, if Dr. Barry was injured as claimed, there were or were not external and visible signs of the injury; and the determination of this point will involve the consideration of the question, whether what are claimed here to have been external and visible signs were, in fact, produced by—were the result of—the injury, if any was sustained.

The next question is, if Dr. Barry was injured as claimed, was the injury the sole or proximate cause of his death? Interpreting and enforcing the policy according to its letter and spirit, it must be held that if any other cause than the alleged injury produced death there can be no recovery. In short, to entitle the plaintiff to recover, you must be satisfied that the alleged injury was the proximate cause of death. Whether a cause is proximate or remote does not depend alone upon the closeness in the order of time in which certain things occur. An efficient, adequate cause being found, must be deemed the true cause, unless some other cause, not incidental to it, but independent of it, is shown to have intervened between it and the result. If, for example, the deceased sustained injury to an internal organ, and that necessarily produced inflammation, and that produced a disordered condition of the injured part, whereby other organs of the body could not perform their natural and usual functions, and in consequence the injured person died, the death could be properly attributed to the original injury. In other words, if these results followed the injury as its necessary consequence, and would not have taken place had it not been for the injury, then I think the injury could be said to be the proximate or sole cause of death; but if an independent disease or disorder supervened upon the injury, if there was an injury,—I mean a disease or derangement of parts not necessarily produced by the injury,—or if the alleged injury merely brought into activity a then existing but dormant disorder or disease, and the death of the deceased resulted wholly or in part from such disease, then it could not be said that the injury was the sole or proximate cause of death.

It is claimed by the plaintiff that the supposed jar or shock said to have been produced by jumping from the platform, caused some displacement in the *duodenum*; that it became occluded; that there was constriction and occlusion of that intestine, which was accompanied with consequent inflammation. In short, that the deceased had *duodenitis* as the direct result of the alleged original injury, and, in con-

sequence, died. This contention is urged upon all the circumstances of the case, and upon the testimony offered by the plaintiff tending to show the symptoms which accompanied the last sickness, the diagnosis of the case made by attending physicians, and the alleged developments of the autopsy. It is contended in behalf of the defendant that there was no constriction, occlusion, or inflammation of the *duodenum*, that the deceased did not have *duodenitis*, and that no physical injury is shown to have resulted from jumping from the platform. This claim is based upon the contention that the various symptoms manifested in the last sickness of the deceased were consistent with natural causes,—with some undiscovered organic trouble, not occasioned by violence or sudden injury; that the conclusions of the physicians who made the *post mortem* examination were erroneous; and that the microscopic examination of the parts in New York demonstrated such alleged error. Concerning the microscopic test made in New York by Dr. Carpenter, the plaintiff contends that it is not reliable and should not be accepted for reasons urged in argument, and which I need not repeat.

Now, between these conflicting claims, weighing and giving due consideration to all the testimony, you must judge. If the deceased died of some disease or disorder not necessarily resulting from the original injury, if there was an injury, then the defendant is not liable under this policy; but if the deceased received an internal injury which, in direct course produced *duodenitis*, and thereby caused his death, then the injury was the proximate cause of death.

Since the plaintiff has alleged in his complaint and claims that the deceased received an injury in the *duodenum*, I am asked by the defendant's counsel to instruct you that if the deceased did not die of *duodenitis*, or if you should find that the alleged jump did not produce or result in a stricture of the *duodenum*, then your verdict should be for the defendant. This instruction I must decline to give, for my opinion is that if the deceased sustained internal injury in any part of his body, of which there was an external and visible sign, and if that injury was effected through the means named in the policy, and if such injury was the sole or proximate cause of death, then the plaintiff is entitled to recover.

As I once had occasion to observe in a case somewhat similar in general character to this, you ought not to adopt theories without proof, nor to substitute bare possibilities for positive evidence of facts testified to by credible witnesses. Mere possibilities, conjectures, or theories should not be allowed to take the place of evidence. Where the weight of credible testimony proves the existence of a fact, it should be accepted as a fact in the case. Where, if at all, proof is wanting, and the deficiency remains throughout the case, the allegation of fact should be deemed not established.

Now, to briefly sum up the case: If you find from the evidence that the deceased, on the twentieth day of June, 1883, sustained a

bodily injury, and that such injury was effected through external, violent, and accidental means, and was one of which there was an external and visible sign, and that the injury was the proximate or sole cause of death, then the plaintiff should have a verdict in her favor. If, on the contrary, you find either that the injury was not sustained, or that, if it was sustained, it was not effected through external, violent, and accidental means, or was an injury of which there was no external or visible sign, or that it was not the proximate or sole cause of death, then your verdict should be for the defendant.

NOTE.—The cases cited by counsel, and considered by the court on the trial of this case, were *Whitehouse v. Travelers' Ins. Co.* 7 Ins. Law J. 23; *Southard v. Railway Pass. Assur. Co.* 34 Conn. 574; *N. A. Life & Acc. Ins. Co. v. Burroughs*, 69 Pa. St. 43; and *McCarthy v. Travelers' Ins. Co.* 8 Ins. Law J. 208.

GENTRY and others v. SUPREME LODGE, KNIGHTS OF HONOR.

(Circuit Court, D. Indiana. April 7, 1885.)

LIFE INSURANCE—KNIGHTS OF HONOR—CHANGING APPOINTMENT OF BENEFICIARY.

A party to whom a benefit certificate has been issued by the order of the Knights of Honor may revoke the appointment of the beneficiary named therein, and appoint a new beneficiary, to whom the benefit will be payable on his death, "in good standing."

At Law.

J. E. Williams, for plaintiffs.

James O. Pierce, for defendant.

WOODS, J. The plaintiffs sue upon a benefit certificate issued by the order of the Knights of Honor, in 1877, to John P. Gentry, in which it was stipulated that the sum of \$2,000 should, upon his death, in good standing, be paid to "such person or persons as he might direct," and upon the margin of which certificate he directed that said sum should be paid to his wife and children, who are the present plaintiffs.

Defendants' answer sets up the charter of the defendant corporation, granted by the legislature of Kentucky, and the constitutions and by-laws adopted by the order, and shows that the privilege was reserved to Gentry, not only to nominate a beneficiary, but to revoke said nomination and change the beneficiary at pleasure; that previous to his death, in 1881, he exercised this privilege, surrendered the benefit certificate now sued on, and applied for a new one, which was issued to him, and in which he directed that his benefit be paid to Mrs. Minnie L. Jones, a creditor and not a relative; and that upon the death of said Gentry, the defendant paid the said sum of \$2,000 to said Mrs. Jones. The demurrer filed by plaintiffs to this answer raises the question of the sufficiency of this defense.

Plaintiffs' counsel relies upon the grant of power in defendant's charter to establish a widows' and orphans' benefit fund, from which, in case of the death of a member who has complied with all its lawful requirements, "a sum not exceeding \$5,000 shall be paid to his family, or as he may direct." It is insisted that this clause of the charter establishes the family of the member, who at his death may fall in the category of "widows and orphans," as a class to which the member is limited in designating his beneficiary. The question has been several times decided by other courts, under this and similar charters or constitutions, and it has been held that the words "or as he may direct," or others of similar import, confer upon the member a general power of designating as beneficiary any person or persons whom he may choose. In the opinion of the court, this must be regarded as the correct rule for the present case.

The defendant's charter was so construed in the following-named cases, in which certificates of membership were involved, in terms substantially the same as the one now before the court: *Highland v. Highland*, 16 Chi. Leg. News, (Ill.) 272; *Tennessee Lodge v. Ladd*, 5 Lea, 716; *Supreme Lodge v. Martin*, 12 Ins. Law J. 628.

For cases in which the unlimited right to change the beneficiary has been conceded to the members of other mutual benefit societies, see *Durian v. Central Verein*, 7 Daly, 168; *Swift v. Conductors' Ass'n* 96 Ill. 309; *Splawn v. Chew*, 60 Tex. 532; *Hellenberg v. I. O. B. B.* 94 N. Y. 580; *Relief Ass'n v. McAuley*, 2 Mackey, 70.

It is urged that the courts of Kentucky, in which state the defendant was incorporated, have taken a different view of the question. It appears, however, that there is no real conflict of authority. The Kentucky cases in which it has been held that the member's power of appointment is limited to his family, or to some portion thereof, as a class, are cases in which such a limitation was found in the charter. *Masonic Ins. Co. v. Miller's Adm'r*, 13 Bush, 489; *Weisert v. Muehl*, 5 Ky. Law Rep. 285; *Hallan v. Gardner*, Id. 857. But the court of appeals of Kentucky, while so deciding, recognizes the principle that in these mutual benefit societies, the member may have as broad a range of choice in selecting his beneficiary as the organic law of his society gives him. *Van Bibber's Adm'r v. Van Bibber*, 14 Ins. Law J. 290; *Duwall v. Goodson*, 79 Ky. 224.

It results that the appointment of the plaintiffs as beneficiaries under the original certificate issued to Gentry was subject to revocation by him, and that the appointment of a new beneficiary and the payment of the fund to her did not violate any right of the plaintiffs.

The plaintiffs electing to offer no reply to the defendant's answer, defendant is entitled to a judgment in its favor on the answer.

CLEVELAND ROLLING-MILL Co. v. TEXAS & ST. L. RY. Co.

(Circuit Court, E. D. Missouri. April 27, 1885.)

PRACTICE—ORDER TO FURNISH LIST OF STOCKHOLDERS—REV. ST. MO. § 737.

Where a creditor of a corporation has obtained judgment and had execution issued against it, and the execution has been returned *nulla bona*, without any demand having been made upon the officer in charge of the company's books, for a list of the names, places of residence, etc., of the stockholders liable for unpaid balances upon their stock, this court will not make a peremptory order on such officer to furnish such list.

At Law.

Fisher & Rowell and Ira C. Terry, for plaintiff.

Phillips & Stewart, for defendant.

Dyer, Lee & Elles, Broadhead & Haussler, and Boyle, Adams & McKeighan, for stockholders.

TREAT, J. On application of plaintiff for peremptory order on J. W. Paramore and A. C. Stewart, respectively president and secretary of defendant company, to furnish a list of the names, etc., of stockholders. It appears from the records in the case that no demand had been made by the marshal, holding the execution, for such list. There is a recital to that effect in the application of February 13th, last, for a rule on the respondents, but there is no return on record thereof. Since the argument on this motion and evidence submitted, a return of the execution *nulla bona* has been filed. The argument before the court proceeded to a large extent as if no such return had been made. It now appears that execution was duly issued; and indorsed thereon is a return of *nulla bona*, January 12th, last, not filed, however, until the twenty-fourth inst. By the statutes, it was necessary, as preliminary to the summary proceedings contemplated against stockholders, that execution should have issued, and an order of court had against the stockholders, respectively, etc.

Section 737, Rev. St. Mo., requires "the clerk or other officer having charge of the books of any corporation, on demand of any officer holding any execution against the same, shall furnish the officer with the names," etc. From the record, the officer holding the execution in this case never made the demand authorized upon either of the respondents. This proceeding is based upon the fact of such demand and refusal to comply therewith. As no such demand is shown, the rule must be discharged. The evidence sufficiently discloses that, under the requirements of law, custody of the stock-book is subject to the control and in charge, lawfully, of the respondents. Hence, if the demand had been made by the marshal when holding the execution, and they had failed or refused to comply therewith, a peremptory order against them would be granted.

¹ Reported by Benj. F. Rex, Esq., of the St. Louis bar.

As heretofore stated, the plaintiff had no right to institute these proceedings in the nature of a *mandamus* until a legal demand had been made by the marshal. The rule is discharged.

UNITED STATES v. BAYAUD and another.

(Circuit Court, S. D. New York. January 22, 1883.)

CRIMINAL LAW AND PROCEDURE—PLEA OF GUILTY—INDUCEMENTS HELD OUT BY DISTRICT ATTORNEY—MOTION TO WITHDRAW PLEA.

On examination of the facts in this case, *held*, that motion on the part of the defendants for leave to withdraw their plea of guilty as indicted should not be granted.

Motion to Withdraw Plea of Guilty.

W. P. Fiero, for the United States.

Benj. F. Tracy, for defendants.

BENEDICT, J. This is a motion on the part of the prisoners above named for leave to withdraw a plea of guilty made by them on the fifteenth of December last, or for a postponement of sentence until a future day. The ground upon which leave to withdraw the plea is asked, is that the prisoners were induced to make it by an assurance on the part of the district attorney in respect to his official action, which has not been fulfilled. It appears that at the October term, 1882, four indictments were found against the prisoners for violations of the internal revenue laws. Two of these indictments were thereafter consolidated by the order of the court. At the December term the cases were upon the calendar for trial, and the government was ready to proceed with a large number of witnesses, whereupon the prisoners asked and obtained leave to file a plea of guilty to the consolidated indictments, and such plea was duly entered. This action on their part was taken upon the advice of intelligent and faithful counsel, who had represented them in this matter from the beginning. Before the entry of the plea of guilty it was understood between the counsel for the prisoners and the district attorney, that, in case the defendants should plead guilty to the consolidated indictments, the district attorney would enter a *nolle prosequi* upon the other two indictments, and would not move sentence upon the consolidated indictments until the prisoners had an opportunity to make an effort to effect a compromise of their case at Washington. In pursuance of his understanding the plea in question was duly entered, and the district attorney delayed moving for sentence until the January term, and until he had been officially informed by the commissioner of internal revenue that the prisoner's offer of compromise had been finally rejected, and that no other offer of a compromise would be entertained.

He now moves for sentence, and the prisoners move for leave to withdraw their plea of guilty.

This application is made in behalf of the prisoners by other counsel than the advisers of the plea, and there is no suggestion from those advisers that they have changed their opinion in regard to the truth of the plea, or that the plea was made under any misapprehension or mistake, or that it was procured by the district attorney or any other person; but it is said by one of the advisers of the plea that the defendants, when making the plea, were advised by their counsel that a compromise of the case would be likely to be effected with the department at Washington. The district attorney swears that he never invited the defendants, either directly or indirectly, through their counsel or through any person whatever, to make a plea of guilty, and that the suggestion of such a plea came to him from the defendants' counsel, without suggestion, promise, or inducement by him.

These are all the material facts disclosed by the affidavits that have been submitted upon this motion. The affidavits do, however, disclose, in addition, that the prisoners, in pleading guilty, acted under the belief that they would be able to effect a compromise of the case at Washington; but there is nothing to show that they were encouraged in that belief by the district attorney, whose actions in the premises were confined to those above stated. Upon these facts it has been stoutly contended that it is the duty of the court to permit a withdrawal of the plea. Two grounds for this contention are stated: *First*, that the district attorney has failed to carry out the understanding had, by omitting to enter a *nolle* as to the other two indictments. To this the answer is that the district attorney announces his readiness to *nolle* those indictments if the plea of guilty stands, and the authority of the court to regulate and control criminal prosecutions before it is sufficient to compel a withdrawal of these indictments in case of a failure on the part of the district attorney to make good his announcement. *State v. Graham*, 25 Int. Rev. Rec. 145. The remaining ground of the contention in behalf of the prisoners is that they were induced to make the plea by the hope of benefit to accrue to them thereafter in their effort to effect a compromise with the department, and by the promise of the district attorney to *nolle* the other indictments. The practice of courts in regard to the plea of guilty is never to receive such a plea when there is probable ground to believe that it is the result of menace or duress, or proceeds from weakness, fear, or ignorance. But no case has been cited, nor has any been found, where the discretion of the court has been exercised to permit the withdrawal of a plea of guilty made under the circumstances of this case. Here the prisoners are intelligent men, charged with defrauding the revenue, fully aware of the nature of the charges against them, and of the meaning and effect of their plea of guilty. They made this plea deliberately, understand-

ing that sentence would follow in case they failed to effect a compromise with the department; and in making it they acted under the advice of intelligent and faithful counsel, who now make no claim of mistake or misapprehension either on their part or on the part of the prisoners.

It is not pretended that the district attorney represented to the prisoners that a plea of guilty would aid their application for a compromise, nor do they state any facts calculated to create a belief that their confession is untrue, but content themselves with saying that they are not guilty. As between their statement in their plea that they are guilty, and their present statement that they are not guilty, the circumstances under which the two statements were made justify the conclusion that the plea is true and their present statement untrue. The careful counsel who advised the prisoners to make the plea express no doubt of its truth. When the plea was made, the prisoners stood face to face with the prosecuting officer then ready to try them, with a large array of witnesses in attendance, gathered from distant points, at much expense, but there was no menace, duress, or influence brought to bear upon them by him. On the contrary, they proposed the course that was taken. By confessing their guilt and entering their confession of record in the form of a plea of guilty they induced the district attorney to consent to *nolle* the other indictments, and to afford them an opportunity to urge a compromise before the department. And now, because the district attorney yielded to their proposition, they claim the right to withdraw their confession and compel the government to reassemble the witnesses and prove their guilt. To permit such a proceeding would, in my opinion, give sanction to an abuse of the forms of law. There was no impropriety on the part of the district attorney in giving his promise to *nolle* the other indictments, nor did his promise so to do afford inducement to the plea of guilty of such a character as to make it proper for the court to refuse to receive it; and the prisoners would have had good cause of complaint if, upon this ground, the court had rejected their plea when tendered, and compelled a trial of the indictments before the jury. If, upon the facts, it was incumbent upon the court to receive the plea, it is equally incumbent upon the court not to permit its withdrawal at a subsequent term, after the witnesses have been scattered, and the ability of the government to prove its case has been thereby impaired. Neither was there any undue influence on the part of the district attorney because of his promise to delay moving sentence, in order to afford the prisoners an opportunity to compromise the case. The statute (Rev. St. § 3229) permits a compromise of criminal cases of this character to be made by the commissioner of internal revenue, and, while any considerable lapse of time between conviction and sentence is not favored by the court, an agreement to give the prisoners reasonable delay, in order that, if so advised, they might endeavor to effect a compromise with

the department, is far from being an inducement of such a character as will justify the court's permitting the withdrawal of a plea of guilty made as this one was made. I find, therefore, no ground upon which to justify granting the prisoners' permission to withdraw their plea of guilty. As to the remainder of the application, namely, a further postponement of sentence, to enable the prisoners to renew their efforts with the department to obtain a compromise, the official announcement of the department that no further application for compromise will be entertained shows that further delay would be of no avail.

The motion is accordingly denied.

OSMER v. J. B. SICKLES SADDLERY Co.¹

(Circuit Court, E. D. Missouri. May 18, 1885.)

PATENTS—HORSE-COLLARS.

Letters patent No. 157,367, issued to John M. Bright, for an "improvement in horse-collars," held not infringed by a sweat-cloth, composed of a series of detachable sections.

In Equity.

Paul Bakewell, for complainant.

W. B. Homer, for respondent.

TREAT, J. The Bright patent, No. 157,367, December 1, 1874, is for "a horse-collar consisting of a frame, combined with a number of detachable pads," as described therein. Defendant alleges that the same was anticipated by the Meyer patent, No. 61,016, January 8, 1867, and the Lovett & Lefevre patent, No. 133,786, December 10, 1872. In the light of the said anticipatory patents, it is more than doubtful whether the Bright patent contained any novelty of invention patentable under the law, unless rigidity of frame and consequent absence of hames, were essential. However that may be, it is apparent from whatever construction may be put on the Bright patent that the defendant does not infringe the same, as the Bright patent is for a "horse-collar with detachable pads" arranged as in his patent described. It would seem that his patent was for a collar adjusted, as by him specified, without reference to hames. Separable pads were provided for by the Meyer and Lovette patents, and consequently in the state of the art there was no room open for invention unless the Bright patent was designed for a collar to which, in the absence of hames, separable pads might be attached by buckles and straps, thereby obviating the use of hames, and producing a new

¹ Reported by Benj. F. Rex, Esq., of the St. Louis bar.

collar with pads. This proposition is not urged, because the defendant uses no such collar.

The contention on the part of the plaintiff, in order to succeed, must cover all use of detachable pads, or sweat-cloths with detachable pads, made so as to relieve sore or gall spots on the neck. Such was not the scope of the Bright patent, or if it had been, could he, within the rules of the patent law, have blocked the pathway for all contrivances, whereby such beneficial results could be effected? He must be held to his special device in connection with a horse-collar, as by him stated. The defendant does not sell any such horse-collar, but only sweat-cloths independent of the collar, more like the Meyer and Lovett patents, though not exactly the same as either. Hence, without formally deciding that the Bright patent is void for want of novelty and patentability, it must suffice that under no construction of the Bright patent can the defendant be held to have infringed the same.

Bill dismissed with costs.

THE E. LUCKENBACK.¹ -

(Circuit Court, E. D. New York. July 2, 1884.)

TUG WITH DREDGE IN TOW—NEGLIGENCE IN STARTING SUDDENLY.

See head-note to same case in the district court, 15 FED. REP. 924. The decision of the the district court in the same case affirmed.

In Admiralty.

Goodrich, Deady & Platt, for libelants and appellees.

Butler, Stillman & Hubbard, for claimants and appellants.

In this case the court (BLATCHFORD, Justice) made and filed the following findings of fact:

On or about the twenty-third of March, 1882, the libelants, being desirous of sending the dredge Brooklyn and nine scows from New York to Fall river, employed the steam-tugs Cyclops and Edith Beard (the latter being owned by the libelants) to tow them to that place. On the twenty-fourth of March, 1882, the Cyclops became disabled by an accident, and the tow was taken into New London, and the tug E. Luckenback was employed by the libelants to continue the towage to Fall river with the Edith Beard. The E. Luckenback arrived at New London about half past 3 o'clock in the afternoon of the twenty-eighth of March, 1882. The dredge was about 65 feet in length and 33 feet in width. Her original width had been 27 feet, and she had been widened by pontoons, 3 feet in width being built on each side of her, her whole length. She was of the same width her whole length, and drew, as she was loaded, over 4 feet. At her stern as she was towed the timbers did not extend from side to side, but the pontoons were extensions, fastened to the side of the dredge without through timbers. In the extreme outer corner of each pontoon a post

¹ Reported by R. D. & Wyllys Benedict, Esqs., of the New York bar.

of yellow pine, 18 inches square, was set. The side timbers and planking, and the stern timbers and planking, were properly secured into the corner posts. The corner posts projected above the deck of the dredge. The construction of the dredge was not unusual or improper, and the dredge was capable of standing all the usual risks and dangers of such a trip, both generally and in respect to the corner posts and the use to which they were put on the occasion.

In the dredge were an engine and boiler and machinery for dredging. The scows were from 50 to 60 feet in length, and were chiefly light. When the E. Luckenback arrived at New London she found the tow already made up. It had been made up by the libelants in such a way that at sea the dredge would be towed ahead of the scows, and the scows would ride in single file behind her. From each of the corner posts of the dredge, which, as she was towed, were on her after corners, a line ran to the forward part of the first scow behind. These lines were about 60 feet in length, and similar lines were run from each scow to the next succeeding scow. The E. Luckenback took the dredge and scows in tow by putting out a hawser, which belonged to the E. Luckenback, of about 100 fathoms in length, to the starboard bitts on the forward end of the dredge, and running a bridle from that hawser to the port bitts of the dredge. The hawser was parceled where the bridle crossed it, and the mode of towage was usual and proper. The Edith Beard made fast along-side of the dredge, and there assisted in the towage, leaving her position from time to time for the purpose of keeping the scows in line and transferring men, and lengthening the lines running from scow to scow.

The tow left New London about 4 o'clock P. M., and proceeded without accident towards Fall River until midnight. It had then arrived at a place off Point Judith. Two days before there had been a strong southerly and easterly gale, which had raised heavy seas. This gale had been followed by a shore wind from the north, which had flattened the sea, but left a long roll. The sea was sufficiently heavy to put the strength of the dredge to the proof, and demonstrate its ability to endure any strain to which it could be properly subjected on the occasion in question. The speed which the E. Luckenback made with her tow was not over three miles an hour. While so proceeding, the hawser between the tug and the dredge chafed and parted. New hawsers were put out from the stern of the tug to each of the forward corners of the dredge, and the tug thereupon started ahead suddenly, and too fast, whereby the scows, which had drifted into great confusion on the port side of the dredge, were rapidly and violently swung astern, and pulled out the rear corner post of the dredge,—being the left-hand or in-shore one, as she was towed,—so that she sank and became a total loss, one man of her crew being drowned. The damage occurred through such negligence of the tug, and without the fault of the libelants. The amount of the damage is that reported by the commissioner in the district court.

On the foregoing facts I find, as conclusions of law, that the tug is responsible for the damage, and that the libelants are entitled to a decree for \$13,210.35, with interest from March 28, 1882, and their costs in the district court, taxed at \$771.05, and their costs in this court to be taxed.

Accompanying the foregoing findings was the following opinion:

BLATCHFORD, Justice. The reasonings and views and conclusions of the district judge in his opinion are satisfactory to me, and nothing is needed to add to their force. The new evidence on appeal does not furnish ground for a different result. The damages fixed in the district court seem to be proper.

ADDICKS v. THREE HUNDRED AND FIFTY-FOUR TONS CRUDE KAINIT.¹

THE CARL.¹

(District Court, S. D. New York. March 22, 1885.)

DEMURRAGE—CUSTOM—DISCHARGE INTO LIGHTERS—FALSE NOTICE—REASONABLE DILIGENCE.

It is the usage in the port of New York for ships loaded with kainit to discharge into lighters. Under this usage it is the ship's duty to wait for lighters a reasonable time before discharging on the dock. The master of the ship *Cleopatra*, loaded with kainit, sent word to the consignees on January 11th that the ship was at the dock ready to discharge, and requested lighters to be sent at once. She did not reach the dock till the morning of the 12th, which was Saturday. No lighter was sent till the 15th. The ship claimed demurrage for the 12th and the 14th. The consignees claimed that she was discharged in a reasonable time. *Held*, that false notice of readiness to discharge was no notice, and therefore the ship was not entitled to demurrage for the 12th. But the notice was sufficient to have enabled the consignees to have a lighter along-side on the 14th, and therefore the ship was entitled to demurrage for that day. *Held, also*, that, under the usage to discharge into lighters, the ship had a right to demand that lighters shall be brought along-side with reasonable diligence, and to receive aboard as fast as the ship can deliver, in the absence of special circumstances preventing; no fixed rate of tons per day being obligatory.

SAME—DISCHARGE ON DOCK IN ABSENCE OF LIGHTER—LIABILITY THEREFOR—CUSTOM.

The ship *Carl*, loaded with kainit, began to discharge into lighters. Having filled one lighter at 12 M., and no other being then along-side, she began at 2 P. M. to discharge on the dock. Another lighter came the next morning. *Held* that, in view of the absence of any fixed usage to discharge a particular number of tons per day, the ship had no right to begin to discharge on the dock without reasonable and timely notice of her intention; and that the slight delay in the coming of the second lighter did not justify the *Carl* in discharging on the dock; and that the consignee was entitled to recover the extra expense thereby occasioned him.

Demurrage.

Hill, Wing & Shoudy, and *H. Putnam*, for libelants.

Wilcox, Adams & Macklin, for claimants.

BROWN, J. The libellant, Addicks, claims two days' demurrage for the detention of the ship *Cleopatra*, during Saturday and Monday, January 12, and 14, 1884, in discharging some kainit, part of the cargo of the ship. The ship arrived in New York on the seventh of January, loaded with petroleum barrels above, and kainit (resembling salt) below. The ship was required by the charter to go to two different wharves to discharge. The bills of lading required each consignee, upon arrival of the ship, to give immediate notice of the dock to which she should go, in order to deliver their respective portions of the cargo. The claimant, accordingly, whose cargo was at the bottom, gave no-

¹ These were two distinct cases, but as the principles involved were similar, and the same proctors appeared in both cases, only one opinion was written. In each case there was delay in getting lighters along-side vessels which were ready to discharge. The *Cleopatra* waited for the lighters before discharging, and then libeled her cargo for demurrage. The *Carl* did not wait for the lighters, but discharged on the dock, and was libeled for the extra expense occasioned thereby.

tice on the 8th, the day after her arrival, that the ship should go to Merchants' stores. The evidence shows that the custom of the port is for kainit to be discharged in lighters, or in schooners, along-side the ship, except occasionally when it is directed to be put on the dock in order to be stored. This usage has grown out of the commercial necessity arising from the fact that kainit is perishable cargo, needing protection from rain, snow, and dampness; and also because it is cheap for its bulk and weight, necessitating economy in handling. Discharge into lighters or schooners subserves these ends. The correspondence of the parties shows that it was understood in this case that the kainit was to be discharged along-side into lighters, as customary. On Friday, the 11th, the claimants received notice from the captain, and also from the ship's agents, that the ship was ready to discharge at Merchants' stores, and they requested lighters at once. On sending to the place of discharge the respondents found that the ship had not arrived there. The next morning, (the 12th,) at a little before 9 o'clock, an agent of the claimants again went to Merchants' stores, and found that the ship still had not arrived. Two letters subsequently passed between the claimants and the ship's agents on the same day; the one complaining of false notices, and the other assuring the claimants that the ship was then actually at Merchants' stores. On further inquiry this was found to be the fact. She arrived there between 9 and 10 on Saturday, the 12th. No schooner was sent by the claimants along-side until Tuesday morning, the 15th, when the discharge was immediately commenced, and completed on the 18th, at 3 P. M. The libellant claims demurrage for two days, the 12th and the 14th. The claimants contend that the ship was discharged within a reasonable time, and that no demurrage can be justly allowed.

1. The time and mode of discharge, not being provided for by the bill of lading, must be governed by the usages of the port, the agreement of the parties, or the rule of reasonable diligence. The usage to deliver kainit into lighters or schooners along-side is, in this case, so clearly proved, except when specially directed otherwise for the purposes of storage, as to form one of the obligations of the ship that she could not disregard without justifiable cause. The mere absence of lighters at the moment the ship arrives at her dock, furnishes, therefore, no warrant for an immediate discharge of the cargo upon the wharf. Her obligation to discharge according to the established usage of the port is an implied part of her contract. In such a case she cannot, at her master's option, discharge upon the dock, except upon the refusal of the consignee to receive, or upon such unreasonable delay as is tantamount to a refusal; and if for such a cause the vessel does discharge upon the dock, she does it under the general authority of the master, who is bound in such a case to make provision for the safety of the cargo, and to give due notice to the consignee. For any ordinary detention through want of lighters she must look

to the consignee and the cargo for damages in the nature of demurrage. In the case of the *Carl*, the delay of a few hours in getting a second schooner along-side was no such delay as warranted the ship to begin to discharge on the dock; and the extra expense caused thereby must therefore be borne by the ship. *The Mary E. Taber*, 1 Ben. 105.

2. The evidence is not sufficient to establish any definite custom or usage, as between the ship and the lighters, in respect to the number of tons of kainit that shall be discharged per day; or any fixed time within which such a cargo must be unloaded. The only rule, therefore, that can be applied, in the absence of any provision on that point in the bill of lading, is that of reasonable diligence. To require of the consignee more than this, would be to allow to the ship all the benefits of a contract for "quick dispatch," when the bill of lading contains no such stipulation. *Fish v. One Hundred and Fifty Tons Brown Stone*, 20 FED. REP. 202, 203; *One Hundred and Seventy-five Tons of Coal*, 9 Ben. 400, 402; *Coombs v. Nolan*, 7 Ben. 301; *Henley v. Brooklyn*, etc., 8 Ben. 471.

The obligation to use reasonable diligence applies equally in providing lighters or schooners for the receipt of the cargo according to custom, and to the rate of discharge after the lighters are along-side. In receiving the cargo there is little to be done on board the lighter or schooner except to trim the cargo as taken aboard,—usually a very slight labor. The chief work in such a mode of discharge is upon the discharging vessel, and the amount that may be discharged depends upon a variety of circumstances; such as the number of men and horses employed; whether the crew, or stevedores, are used; and upon the condition of the cargo, whether loose, or, as sometimes happens, so caked as to require to be dug out with a pick. Practically, therefore, the rate of discharge depends upon the discharging ship, and it would be an unreasonable rule that should limit the ship as to the amount that she might discharge per day, when all that she could discharge might, without any inconvenience to the lighter or schooner, be received by the latter. The evidence before me in this case, as well as in other cases, shows that, with an ordinary complement of men and one horse, from 60 to 70 tons will usually be discharged per day; with additional men and two horses, from 100 to 150 tons, though the latter is very rarely reached. The rule adopted by the maritime exchange, of 60 tons per day for cargoes of salt, iron, and sulphur, represents very nearly an ordinary single team's work. It is but reasonable diligence, however, on the part of the lighter in such cases to receive whatever the ship can offer. The ship may, therefore, rightfully demand of the lighter, while along-side, that she shall receive as fast as the ship can deliver, unless there be some special circumstances, such as ice, for instance, to interrupt the usual changes in the lighter's position; and such, from the testimony of several witnesses, it would seem, has been the practice. I cannot sustain, there-

fore, the contention that any fixed number of tons per day shall be taken as an average by which to determine what is reasonable diligence in receiving the cargo, as respects the whole period from the time the ship is ready to discharge.

In procuring lighters the consignee of part of a cargo is bound to reasonable diligence only. *Higgins v. U. S. Mail, etc.*, 3 Blatchf. 282; *Coombs v. Nolan*, 7 Ben. 301; *Henley v. Brooklyn, etc.*, 8 Ben. 471; S. C. 14 Blatchf. 522; *Finney v. Grand Trunk, etc.*, 14 FED. REP. 171. He is entitled to reasonable notice (which, by the usual custom, is at least 24 hours) of the time when the ship will be ready to discharge, in order to make his arrangements to have a lighter or schooner alongside. After this, he should have additional lighters on hand for the use of the discharging ship without delay, unless the absence of lighters is further excused by reasonable cause. Since a considerable difference, however, may exist in the rate of the ship's discharge, dependent entirely on her own option, it is clear that if additional lighters are required, a slight delay in bringing a second lighter alongside, owing to a rapid discharge by the ship, cannot be deemed negligence in the consignee unless timely notice is given; and where inability to furnish lighters without delay is proved, notwithstanding the exercise of all reasonable diligence to obtain them, the ship has no claim, in the absence of any specified lay days, and where, as in this case, there is no custom nor stipulation fixing the rate of discharge. *Postlethwaite v. Freeland*, 5 App. Cas. 599, and *Coombs v. Nolan*, *supra*.

The false notice given on the 11th I must treat as no notice, and therefore exclude any claim for the 12th. The notice was sufficient to require the claimants to have a lighter or schooner alongside on Monday, the 14th, and the evidence does not show a sufficient legal excuse for one not being sent there by that time. If the *Fannie Brown*, on which the libelants relied to take this kaintit, was free on Saturday the 12th, there is no sufficient reason why she should not have proceeded at once to take the *Cleopatra's* cargo; and if she was blocked up on Saturday, there was sufficient time for the claimants either to have got her clear, or to have procured another schooner for Monday morning. In the case of *Addicks*, therefore, I hold the libelants entitled to one day's demurrage, for which a decree may be entered with costs; in the case of *The Carl*, the libellant is entitled to \$65, with interest and costs.

THE SHADY SIDE.¹THE MORRISANIA.¹

(District Court, E. D. New York. November 13, 1884.)

1. WHARFAGE—STATE STATUTE—DEMAND—DOUBLE WHARFAGE.

The statute of the state of New York (Laws 1877, c. 315) provides that double wharfage may be recovered by a wharfinger from a vessel which leaves the pier without paying wharfage. *Held*, that to entitle the wharfinger to such double wharfage under that statute, there must be proof of a demand of single wharfage before the vessel departs from the pier, though the statute does not require the demand to be made at the vessel.

2. SAME—STATUTORY LIEN—LIMITATION.

A lien created by a state statute, which fixes no limit of time within which the lien must be enforced, is not lost by delay.

3. SAME—PLEADING—LACHES.

The defense that a lien has been lost by laches, if not pleaded, must be excluded. The decision in *The Francesca T.* 9 Ben. 34, modified.

In Admiralty.

A. & C. Van Santvoord, for libellant.

T. C. Cronin, for claimant.

BENEDICT, J. These actions, which were tried together, are to enforce a lien upon the vessels proceeded against respectively for wharfage.

One question presented is whether the libellant is entitled to recover wharfage at double rates by virtue of the law of the state, (chapter 315, Laws 1877,) notwithstanding the conceded fact that no demand for the single wharfage due was made prior to the vessels' leaving the wharf. Upon this question this court is asked to reconsider the opinion expressed in the case of *The Francesca T.* 9 Ben. 34, where it was said that a demand of the single wharfage due, made of the owner, consignee, or a person in charge of the vessel, at the vessel and before she leaves the pier, was necessary to entitle the wharfinger to collect double wharfage. I have accordingly again considered the question, but am unable to see how the statute can be so construed as to entitle a wharfinger to recover double wharfage without proof of the demand of the single wharfage, made before the vessel departs from the wharf, of the owner or the consignee of the vessel, or at the vessel of the person in charge thereof at the time of the demand.

In the opinion delivered in the case of *The Francisca T.* it is said that, in order to recover double wharfage, demand of single wharfage must be made at the vessel of the owner, consignee, or person in charge; but this was inaccurate. The demand of single wharfage due must be made of the owner, the consignee, or the person in charge of the vessel; but the statute does not require the demand to be made at the vessel. With this exception, the opinion delivered in the case of *The*

¹ Reported by R. D. & Wyllys Benedict, Esqs., of the New York bar.

Francisca T. states what seems to me the correct construction to be given the statute.

The argument in opposition to this construction is that the single wharfage does not become due until the vessel has left the wharf, and a lawful demand prior to the departure of the vessel is for this reason impossible, and also for the further reason that the wharfinger has no means of knowing when the vessel intends to leave, and the amount of single wharfage to be demanded cannot be known prior to the vessel's departure.

But the statute must be presumed to have been passed in view of the well-known practice to collect wharfage at the wharf by a person then present for the purpose, who, by observation and inquiry, learns the time when each vessel intends to depart, and collects the wharfage of each vessel as the vessel is about to leave. No real difficulty is found in making out and presenting a proper bill for wharfage prior to the vessel's departure.

The object of the provision in the statute respecting double wharfage was to induce the payment of wharfage when so demanded. This customary demand of single wharfage, substantially contemporaneous with the departure of the vessel, is the demand referred to in the statute where it says every vessel that shall leave a wharf without first paying the wharfage after being demanded, shall be liable to pay double wharfage. No other construction can be given the statute without, as it seems to me, doing violence to the language employed. I am therefore of the opinion that the libellant, having failed to prove a demand of single wharfage before the vessels left the wharf, cannot recover double wharfage.

The question remains whether single wharfage can be recovered. The ground here taken in defense is that the liens have been lost by laches. But no such defense is set up in the answer, and it must therefore be excluded. *The Swallow*, Olcott, 334. Aside from the absence of any averment of laches in the pleadings, it would seem that a lien created by a statute of the state which fixes no limit of time within which the lien must be enforced, is not lost by delay. Limitations declared by statutes creating liens for repairs, etc., and made dependent on the movements of the vessel, are recognized and enforced by courts of admiralty, and any limitation made by such statute to depend upon lapse of time would no doubt be recognized and enforced by admiralty courts. Upon the same principle these courts must recognize and give effect to the absence of such a limitation from the statute.

My conclusion, therefore, is that the libellant is entitled to recover against the above-named vessels, respectively, single wharfage, at the rate prescribed by the statute of the state, for the time such vessel lay at the libellant's wharf. The amount can doubtless be agreed upon. If not, let there be a reference.

THE MARY BRADFORD.¹*(Circuit Court, E. D. New York. July 16, 1884.)*

BILL OF LADING—INDORSEMENT FOR VALUE—MASTER'S COPY—DELIVERY OF CARGO.

The decree of the district court in the same case (18 FED. REP. 189) affirmed.

In Admiralty.

F. E. & A. Blackwell, for libelant.*Beebe & Wilcox*, for claimants.

BLATCHFORD, Justice. In this case I find the following facts:

The agent of the owners of the schooner *Mary Bradford* chartered her to William L. Carbin, of New York, for a voyage from New York to Nickerie, and back to New York, by the charter-party, dated September 12, 1881, of which a copy is set forth in the apostles. D. C. Cobb was the master of said schooner. William L. Carbin shipped on her from New York a cargo consigned to his brother R. J. Carbin at Nickerie. William L. Carbin directed the master to follow the instructions of R. J. Carbin on the arrival of the vessel at Nickerie. Bills of lading were signed in New York by the master for the cargo shipped by the vessel to Nickerie. When she arrived at Nickerie, the master discharged the cargo. He then received on board of the vessel from R. J. Carbin the merchandise covered by the bill of lading, libelant's Exhibit A, dated November 24, 1881, of which a copy is set forth in the apostles. This cargo being on board, the master signed a set of four bills of lading for it, all of the tenor of said Exhibit A. Three of these he delivered to R. J. Carbin, and one he kept himself. This last-named bill of lading was the "captain's copy," and was understood by R. J. Carbin and by the master to be such. When such captain's copy was so left with the master, no instructions were given to him in respect to it. R. J. Carbin took the said three bills of lading, and before the vessel sailed from Nickerie, hypothecated them with the libelant as collateral security for the payment of the sum of \$4,800, or its equivalent in Dutch money, and duly indorsed said bills of lading over to the libelant, and received from it said sum of money. In the bills of lading in the hands of the libelant, the words "as per charter-party" appear written between the words "said produce" and the words "with primage," as in libelant's Exhibit D in the apostles, which words are not in said libelant's Exhibit A.

The libelant was and is a foreign corporation, duly organized and existing pursuant to a charter and under the laws of the kingdom of the United Netherlands. At the time of the receipt by R. J. Carbin of the said sum of \$4,800, or its equivalent in Dutch money, to-wit, November 29, 1881, he drew three bills of exchange in a set (first, second, and third) upon his brother William L. Carbin of the tenor of Exhibit No. 1, annexed to the deposition of Arend 't Angremond, in the apostles; and also executed and delivered to the libelant a paper writing, dated November 29, 1881, a correct translation of which is contained in libelant's Exhibit F in the apostles. The libelant duly transmitted two of said bills of exchange and two of said bills of lading to its agent in the city of New York, who received them December 28, 1881. On December 29, 1881, one of said bills of exchange was duly accepted in writing by the drawee, William L. Carbin. It fell due March 2, 1882. On the eighteenth of December, 1881, the said vessel arrived at the port of New York, from Nickerie, and thereupon B. J. Wenberg, the agent of the vessel,

¹Reported by R. D. & Wyllys Benedict, Esqs., of the New York bar.

with the knowledge of her said master, took from the papers of the vessel the said "captain's copy" of the bill of lading, and delivered the same to the said William L. Carbin; the said Wenberg then knowing that the said copy was the "captain's copy," and the said William L. Carbin, before the twenty-eighth of December, 1881, received under the said "captain's copy" the merchandise named therein, from the said vessel and the said master. None of the said bills of exchange have ever been paid, or any part thereof.

The said agent, in New York, of the libelant learned on the twenty-ninth of December, 1881, that said cargo had been delivered to William L. Carbin, and thereupon, by the first opportunity, communicated that information to the libelant at Paramaribo, where it was established, and where the transaction between it and R. J. Carbin took place; and on the receipt of an answer to such communication, the libel herein was filed on March 31, 1882, as soon as the vessel could be found. On that day, the bill of lading aforesaid was presented to the master of the vessel by the agent of the libelant, and a demand was duly made for said cargo, which was refused. The bill of lading so kept by the master as the "captain's copy," was indorsed in blank at the time by said R. J. Carbin, but it did not, at that time, contain the words, "deliver to the order of William L. Carbin," or any of them, indorsed on the back thereof; nor were said words, or any of them, written thereon at any time by said R. J. Carbin, or by his authority, or that of the libelant; but said words were written thereon by William L. Carbin after the delivery of said "captain's copy" to him at New York, as they now appear in said libelant's Exhibit A.

On the foregoing facts I find the following conclusions of law:

The master was authorized to sign and deliver to R. J. Carbin the bills of lading; and, in any event, the delivery to William L. Carbin by Wenberg, the agent of the vessel, of the captain's copy of the bill of lading, was a ratification of the act of the master in delivering to R. J. Carbin the bills of lading which were delivered to him by the master. The copy of the bill of lading kept by the master was the captain's copy,—the vessel's bill of lading,—and merely for the information of the master and agent and owners of the vessel, and the delivery thereof to William L. Carbin was a wrongful act as against the libelant, for which the vessel is liable to it. The libelant was guilty of no laches.

There should be a decree for the libelant of the same tenor as the decree in its favor in the district court, with its costs in this court to be taxed.

THE CARO.¹

(District Court, E. D. New York. September 22, 1884.)

COLLISION—STEAM AND SAIL VESSELS—APPROACHING STEAMER—TORCH-LIGHT—TUG AND TOW—LOOKOUT—LIGHTS.

Where a collision occurred on the ocean between a bark and a schooner which was in tow of a tug, and the tug's lights were seen by the bark some two miles off, but the bark's lights were not seen by the tug or the schooner till collision was inevitable, the night being dark, but a good night to see lights, and the vessels approached each other on such courses that the bark passed within 100 feet of the tug, *held*, that the bark was in fault for not showing a torch on her bow, and the collision must be held on that ground alone to have been caused by her fault; that, as the bark had her side lights placed on the mizzen rigging

¹ Reported by R. D. & Wylls Benedict, Esqs., of the New York bar.

she was charged with the burden of showing clearly that the lights so placed would not be obstructed by the sails, and that the testimony failed to show this; that the tug was not in fault for having the lookout in the pilot-house, with the man at the wheel, when it was only 15 feet from the pilot-house to the stem, and a lookout stationed on the deck between the pilot-house and the stem would be in danger of being swept off by the sea; that the bark was liable for the damage arising from the collision.

In Admiralty.

Owen & Gray, for the bark.

Jas. K. Hill, Wing & Shoudy, for the schooner.

E. G. Davis, for the tug.

BENEDICT, J. These actions arise out of a collision that occurred on the night of August 15, 1884, on the ocean, about three miles to the southward of the Scotland light-ship, between the bark Caro and the schooner Josephine, at the time in tow of the steam-tug George H. Dentz. The Dentz was bound to New York, steering for the Scotland light. She had the schooner Josephine in tow upon a hawser some 75 fathoms long. The bark Caro was outward bound, and was sailing close-hauled upon the starboard tack. The tug was seen by the bark at the distance of some two miles, but the bark was not discovered by any person on the tug or on the schooner until collision between the bark and the schooner was inevitable. It is proved that the bark had her side lights set and burning, and that the tug had also the proper lights set, including the vertical lights required to indicate that she had a vessel in tow.

The proof shows plainly that the sole cause of the collision was the failure of the tug to see the bark in time. It is also plain that the night, although dark, was a good night to see lights. In the pilot-house of the tug were two persons; one engaged in steering, the other in looking out. This pilot-house was only 15 feet from the stem. A lookout stationed on the deck between the pilot-house and the stem would have been in danger of being swept off by the sea. Under these circumstances it was not negligence to station the lookout in the pilot-house of the tug.

The negligence on the part of the tug, if she was negligent, was not in placing her lookout in the pilot-house, but in the want of diligence in the man who was there placed. If the bark displayed the proper lights, the failure of those on the tug to see the bark in proper time must be attributed to a want of a diligent lookout. If the proper lights were not displayed by the bark, then the failure of those on the tug to see the bark in time must be attributed to the negligence of those on the bark in respect to their lights. One omission on the part of the bark in respect to her lights is conceded: she did not display a torch. In her behalf the contention is that the statute did not require her to exhibit a torch to the tug, because the tug was not approaching any point or quarter of the bark.

The testimony shows that the tug was approaching the bark upon such a course that she passed the tug within less than 100 feet. Un-

der such circumstances the tug was an approaching steamer, within the meaning of the statute, and the statute made it the duty of the bark, when she saw the tug so approaching, to show a lighted torch upon her bow. The burden is upon the bark to show that this omission did not contribute to cause the collision that ensued, and she has failed to do this. Upon this ground alone the collision must be held to have been caused by fault of the bark.

There is in addition considerable foundation for the belief that the location of the bark's side lights was such as to render them ineffectual to warn vessels approaching at a certain angle. These lights were placed upon the mizzen rigging, and of course aft the fore and main sail. The bark was sailing close-hauled, and the testimony leaves it in doubt whether the clew of the sails set forward of the light would not shut off the light to a vessel ahead. I am aware that many vessels carry their lights aft, and that reasons are given for preferring that location; but when on any vessel the side lights are placed aft the sails, I consider the vessel charged with the burden of showing clearly that the light so placed would not be obstructed by the sails when set.

The testimony in this case has not satisfied me that the side light of the bark would not be obstructed by the clew of her sail when close-hauled, owing to her side light being placed upon her mizzen rigging. An obscuration of the bark's side light by the clew of this sail would account for the fact proved, that not only did the two men on the tug fail to discover the bark's light until she was upon them, but the men on the schooner in tow of the tug also failed to see the bark's light until she was close at hand. The tug's lights were seen from the bark at a distance of two miles, and if the bark's lights were unobstructed, it is difficult to understand why neither of two men on the tug, and none of several men on the schooner in tow, saw them until the bark was close by, although, as they say, all were looking forward for lights. An obstruction of the bark's light by the clew of her sail would account for this; and, as before remarked, I am not satisfied that such was not the case, owing to the light's being placed in the mizzen rigging.

Upon these grounds, therefore, the libel of the owner of the bark Caro against the George H. Dentz must be dismissed, and the libel of the owner of the schooner Josephine must be sustained as against the bark Caro, and dismissed as against the tug Dentz.

PRESTON v. SMITH.¹

(Circuit Court, E. D. Missouri. May 26, 1885.)

LL TO QUIET TITLE—LIFE-TENANT AND REMAINDER-MAN.

A remainder-man cannot maintain a bill against a life-tenant to prevent his denying the former's interest in the estate, and from making leases extending beyond the term of his natural life.

In Equity.

Henry Hitchcock, for complainant.

John Wickham and *Given Campbell*, for defendant.

TREAT, J. The bill alleges that the defendant is a tenant for life, and the plaintiff remainder-man in fee, expectant on certain impossible conditions to the contrary. It charges that she has made, and about to make, leases extending beyond the term of her natural life; and also is asserting that the defendant has no title or interest in the estate. The court is prayed to enjoin said defendant from making such leases, and from asserting that defendant has no title or interest in the estate. The proposition is somewhat novel. Without undertaking to review the many cases cited as to bills of peace, *quia timet*, whether parties are in or out of possession, it must suffice that none goes so far as to uphold a bill against a tenant for life, in possession, to restrain him from making leases which might possibly extend in terms longer than his natural life. It is obvious that if defendant is only tenant for life, no lease by her made could extend legally beyond her life. Hence there is no occasion for the interposition of equity to restrain one from doing a legal impossibility. It may be that the purpose of this proceeding was to obtain a judicial decision as to the title in the plaintiff, if any, subsequent to the death of the defendant. Why should she, during her lifetime, be made a party to controversies which can arise only between others after her death? It may or may not be that the claim of the plaintiff is ill-grounded, and that she and the other children of William Christy are entitled to said estate. The court cannot pass on that question on the present demurrer. Demurrer sustained.

Reported by Benj. F. Rex, Esq., of the St. Louis bar.

v.23F,no.15—47

WABASH, ST. L. & P. R. CO. v. CENTRAL TRUST CO. OF NEW YORK

(Circuit Court, D. Indiana. May 9, 1885.)

1. RAILROAD COMPANIES—PERSONAL INJURIES—CONTRIBUTORY NEGLIGENCE—MATTER OF DEFENSE.

In actions for injuries caused by negligence, contributory fault is, in the federal courts, matter of defense, of which the burden of proof is upon the defendant, and consequently reasonable presumptions in respect to matters not proven or left in doubt should be in favor of the injured party

2. SAME—CONTRIBUTORY NEGLIGENCE DEFEATS ACTION, WHEN.

Culpable negligence of the complainant, properly so called, which contributes to the injury, must always defeat the action; but the nature of the primary wrong has much to do with the judgment, whether or not the alleged contributory fault was blameworthy. If it was of a negative character, such as lack of vigilance, and was itself caused by, or would not have existed, or no injury would have resulted from it, but for the primary wrong, it is not in law to be charged to the injured one, but to the original wrong-doer.

3. SAME—ACTING ON PRESUMPTION THAT RAILROAD TRAINS WILL BE OPERATED WITH DUE CARE.

A party has not an unqualified right to act on the presumption that railroad trains and other dangerous agencies will always be operated with the care and vigilance required by law or custom; and if he goes upon railroad and highway crossings, or into like dangerous situations, without precautions against negligence on the part of those in charge of such agencies, he will himself be guilty of negligence.

4. SAME—FINDING NOT SUSTAINED BY EVIDENCE.

Every case must be determined upon its own circumstances. Finding of the master that petitioner was guilty of contributory negligence, and not entitled to recover for the injury received, held not sustained by the evidence.

Exceptions to Master's Report. Intervening petition of Thomas Ingram.

Jacob B. Julian, for petitioner.

Chas. B. Stuart, for receivers.

WOODS, J. The master has found against the petitioner on the ground of contributory negligence, and the question presented is whether or not the finding is supported by the evidence. The entire evidence upon the point, and the master's view of it, are set forth in the report as follows:

Elijah Ingram testified as follows: "I am petitioner's son, and had charge of team when mare was injured. It was between 10 and 12 o'clock A. M. Was hauling gravel for Hanway & Cooper. I was unloading gravel on the north side of the tracks, on East street. A Wabash train came backing down. I was not looking for a train. I saw it across the street, and tried to get horses away, and could not. There was a man walking along at rear of train and I told him to stop it, and he gave the signal, but it did not stop until the rear car struck the mare. I did not hear bell nor whistle." *Cross-examined* "I had been hauling there 3 or 4 days or a week, and knew trains were running on that track. I did not want to drive onto the track, because it was dangerous; but was told to drive in there by the man who was there in charge for Hanway & Cooper. My team was facing west, and there was no time for me to get them out of the way after I saw the train coming. I knew I would be in that fix if train came. The brakeman who was walking along by the

rear end of the train was walking as fast as the train was coming. From where I was the only way I could get out was to back out. I could not see the engine from where I was. The rear end of train passed the length of a box car past me before it stopped. Nobody told me to get out of the way. One of the wagon wheels were on the track. I was dumping gravel near the north rail of the north track, on the west side of East street. The mare that was injured was probably on the track with her fore feet. I could not drive ahead, because there was a deep gutter. I could not turn around, because the flag-man's station was in the way; and I could not drive ahead or check the team, for the wagon was partly unloaded, and the planks, which had been turned to let the gravel out, prevented my moving the wagon in the condition it was."

Martin Higgins, for defense, testified as follows: "Was working there for Conway & Cooper, contractors; it was my business to count loads, give tickets to teamsters, and direct them where to dump gravel. I gave this boy a ticket and told him to unload and get out; that a train might be in soon. I crossed over to the south side of the tracks to the office and sat down. Presently I heard somebody holler. I looked, and ran over and helped the boy get wagon out. There was nothing to prevent the boy from getting out by driving across the track. He stood holding the horses and made no effort to get them out. The train was moving very slow. He had plenty of time to drive over the track. I do not know who yelled to the boy. The boy spoke to me and said it was my fault in ordering him to drive on. I said, 'No; you ought to have unloaded and got out.' I told him to go home. The planks of the wagon would not have prevented the team from pulling out." *Cross-examined.* East street is 60 feet wide. When I heard the noise I looked up and saw the cars. They had not got to the east side of the street yet. I looked at the cars and then at the boy. Did not hear the boy tell brakeman to stop train. Heard shouting, and think it was the flag-man or some one on the train. I did not hear bell or whistle. I expect likely I would have heard signal if it had been given. The boy was holding horses, and they were turned south. Either horse was on track. May be they had fore feet on track. I was there when the boy came, and it was my duty to direct them where the dumping was to be done. I told the boy to drive in there, and he put gravel where I told him to put it. The boy could have driven across the track with empty wagon. Do not know how it would be if loaded or with $\frac{1}{2}$ load on. The first saw cars 30 feet away he could not have got out. He was about 56 feet east of west gutter of East street. From time I saw him holding horses, he could have driven out. Do not know width of west gutter. The horses stood quartering on track; one horse a little bit on track. I do not know whether boy went right to work unloading when I gave him ticket. Boy, from where he was, could see up track as far as I could." *Re-examined.* If boy had kept a lookout and unloaded, he could have got out. I do not know whether the load was dumped or not. The boy could see 100 feet east of East street from where he stood."

[By request of parties the master accompanied counsel to the place where the animal was injured, and discovered that, from where the boy stood with his team, he could see up the track in the direction from which the train came distance of over 300 feet.]

Upon this evidence I report and find that the petitioner's claim should be disallowed, for the reason that, in my opinion, the evidence shows that the carelessness and negligence of the petitioner's son, who was in charge of the team, contributed to produce the injury for which damages are claimed.

I find that the receivers' employes were guilty of negligence in failing to give the signals required, but that the defendant's son, with full knowledge of the danger, and after being warned of it just before the injury occurred, placed his team where a moving train would certainly injure it, and never

once looked in the direction from which the train approached until it was so close that he could not get his team away. From where he stood, he could have seen the approaching train, which was not moving faster than a man could walk, at least 300 feet up the track. He says that when he looked up the track the train was less than the width of a street away, and he did not have time to get out.

I am not satisfied that the failure of the teamster, while dumping his load along-side the railroad track, to look in the direction from which the train came, should be deemed to be of such significance as to control the decision of the case. In actions for injuries caused by negligence, contributory fault is, in the federal courts, matter of defense, of which the burden of proof is upon the defendant, (*Railroad Co. v. Gladmon*, 15 Wall. 401; *Railroad Co. v. Horst*, 93 U. S. 291; *Hough v. Railway Co.* 100 U. S. 213;) and consequently reasonable presumptions and inferences in respect to matters not proven or left in doubt should be in favor of the injured party.

Under this rule it may be presumed—as, indeed, on argument it was conceded—that the car by which the injury was done, was not part of a passing train, but was being moved by a switching engine, and was in charge of men presumably familiar with the locality, and, as the work had been in progress for three or four days, doubtless cognizant of the fact that the street was being improved at and near the railroad crossing. With this knowledge, besides the sounding of the locomotive bell, which is required by the city ordinance, they were bound to use all reasonable precautions to prevent injury to those engaged in the work, and this the driver of the petitioner's team had the right to expect, and presumably did expect, of them; but even if no such thought was in his mind, and if in the exercise of greater caution he had been on the lookout, and had seen the car 300 feet or more away, moving slowly behind the walking brakeman, no signal by bell or otherwise being given of a purpose to cross the street, he would have been justified in inferring that a crossing of the street was not intended. The cars were evidently under full control, and might have been easily and promptly stopped; indeed, it is inexplicable why they were not stopped. That they were not, was gross carelessness, amounting, apparently, on the part of the brakeman, to a conscious willingness, if not to a desire, to inflict the injury. If the boy was less vigilant than he might have been, it is reasonably certain that, if proper signals had been given, he would have been aroused in time to have escaped, and would have escaped, all harm. Whatever want of diligence there was, therefore, may well be said to have occurred because of the antecedent fault of those who were moving the cars, and the consequences are attributable to them and to the receiver, rather than to the driver of the team.

It is probably too much to say, in this connection, as in effect it seems to have been said in some cases, that the negligence of the wrong-doer may excuse that of the injured party. Culpable negligence of the complainant, properly so called, which contributed to the

injury, must always defeat the action; but the nature of the primary wrong has much to do with the judgment, whether or not the alleged contributory fault was blameworthy. If it was of a negative character, such as lack of vigilance, and was itself caused by, or would not have existed, or no injury would have resulted from it, but for the primary wrong, it ought not, in reason, and I believe is not, in law, to be charged to the injured one, but rather to the original wrongdoer. This seems to be the meaning of the Indiana supreme court in the case of *Chicago & E. R. Co. v. Boggs*, decided February 18, 1885, and supported by the following among other citations: *Railway Co. v. Martin*, 82 Ind. 476; *Railway Co. v. Yundt*, 78 Ind. 376; *City v. Gaston*, 58 Ind. 224; *Beisiegel v. Railroad Co.* 34 N. Y. 622; *Queen v. Railroad Co.* 35 N. Y. 516; *Ernst v. Railroad Co.* 39 N. Y. 1; *Davenport v. Ruckman*, 37 N. Y. 568; *Kennayde v. Railroad Co.* 5 Mo. 255; *Pennsylvania R. Co. v. Ogier*, 35 Pa. St. 71; *French v. Taunton B. R. R.* 116 Mass. 537; *Sweeny v. Railroad Co.* 10 Allen, 68.

It would not be correct, I think, to say on this subject that citizens have an unqualified right to act upon the presumption that railroad trains and other dangerous agencies will always be operated with the care and vigilance required by law or custom. Experience too often proves the contrary; and ordinarily prudent men will not, and with out negligence do not, go upon railroad and highway crossings, or into like dangerous situations, without precautions against negligence on the part of those in charge of the dangerous agencies. But every case must be determined upon its own circumstances; and for the reasons already indicated I do not think that the injury suffered by the petitioner in this instance is, in the sense of the law, shown to be attributable to the fault of his agent. The damages are shown to have been \$85, and for that amount the claim should be allowed. Ordered accordingly.

SMITH v. EWING and another.

(Circuit Court, D. Oregon. June 1, 1885.)

CERTIFICATE OF PURCHASE UNDER PRE-EMPTION LAW.

A certificate of purchase issued in due form, in favor of a pre-emptor, for land subject to entry under the pre-emption law, cannot be canceled or set aside by the land department for alleged fraud in obtaining it; but in such case the government must seek redress in the courts, where the matter may be heard and determined according to the law applicable to the rights of individuals in like circumstances.

INNOCENT PURCHASER.

Semble, that a purchaser in good faith, and for a valuable consideration, from a pre-emptor of the land included in the latter's certificate of purchase takes the same purged of any fraud which might have been committed in obtaining said certificate.

Suit to Determine Estate in Real Property and for an Injunction
John J. Balleray and J. M. Bower, for plaintiff.

James F. Watson, for defendants.

DEADY, J. This suit is brought by a citizen of Georgia, to obtain a decree enjoining the defendants, who are citizens of Oregon, from trespassing on certain lands situate in Umatilla county, Oregon, and that any claim they may have thereto may be declared null and void. The defendants answered separately, and the cause was heard on objections to the answer of the defendant Ewing for impertinence.

It appears from the bill that on August 20, 1881, Arthur Webb settled, as a pre-emptor under the laws of the United States, on and improved the S. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of section 2, in township 2 N., of range 32 E. of the Wallamet meridian, and on the following day filed in the local land-office at La Grande a declaratory statement therefor; that on July 29, 1882, after due publication of notice thereof, Webb made his final proof of such settlement and improvement to the satisfaction of the register and receiver of said office, and paid for the land at the rate of \$2.50 per acre, \$396.20 in all, for which he received from said receiver "a certificate of purchase and entry of said land as by law required," which on July 31, 1882, was duly recorded in the county clerk's office; that on the same day D. K. Smith purchased said land from said Webb in good faith and for a valuable consideration, to-wit, \$2,000; and he took a conveyance thereof from said Webb, which was duly recorded on the same day; that on December 1, 1884, the plaintiff purchased said land from said Smith, subject to a mortgage thereon given to the American Mortgage Company of \$1,000, in good faith and for a valuable consideration, to-wit, \$1,000, and received a conveyance thereof from said Smith, and is now the owner and in possession of the premises, which are valuable for agricultural purposes and reasonably worth \$5,500; that on or about July 10, 1883, the defendant Ewing wrongfully entered on the premises and built a dwelling house thereon, in which he has since and now resides, and cultivated about five acres thereof and cuts timber thereon; and that he denies the plaintiff's title and interest in said land, and disputes his possession thereof, and claims an estate or interest therein adverse to the plaintiff.

By his answer, the defendant Ewing admits that Webb erected a building on the premises, and filed a declaratory statement thereon and entered the same, as a pre-emptor, as alleged in the bill; but denies that the plaintiff, or those under whom he claims, were ever the owners of the premises, or that the plaintiff is in possession of the same; and alleges that on April 21, 1876, he, being duly entitled to the benefit of the pre-emption law, settled on the premises under said law and filed his declaratory statement thereon; and afterwards, on December 4, 1876, with the permission of the register and receiver "duly changed" "said entry,"—meaning, I suppose, said "declaratory

statement;" that the settlement and entry of Webb was in "conflict" with that of Ewing's, as changed on December 4th; that soon after the entry of the premises by Webb, but when is not stated, the defendant applied to the register and receiver to contest "the claim" of the former to the land included in his "declaratory statement and pre-empted entry upon the grounds above stated;" that thereafter such proceedings were had on such application that a contest was ordered thereon by the commissioner of the general land-office, and a hearing had before the register and receiver on January 17, 1883, whereupon decided that neither said Webb nor said Ewing had complied with the pre-emption law in the matter of residence, cultivation, and improvement, and recommended "the cancellation of the filings and entries of both of said parties by the commissioner;" that Webb appealed from said decision to the commissioner, who affirmed the same, and from there took the case to the secretary of the interior, where D. K. Smith, the grantor of the plaintiff, intervened for his rights as a purchaser from Webb, as alleged in the bill herein, and asked that a patent for the land included in the declaratory statement of the latter be issued to him, but the secretary denied said application, and on February 21, 1884, affirmed the decision of the commissioner, and that thereupon said filings and entries were canceled by said commissioner, and "all rights thereunder wholly annulled;" and that by reason of such contest and cancellation, the defendant became entitled under the law to enter said lands within 30 days from the date of said cancellation, and that he did within such period, to-wit, on March 17, 1884, apply to said land-office "to enter said tract as a homestead," which application was allowed; whereupon he commenced to reside upon and cultivate and improve said land as homestead," and has ever since continued to do the same.

The plaintiff excepts to so much of this answer as sets up the settlement and filing of Ewing on the premises in 1876, the contest thereabout with Webb in 1883, and the decisions thereon, and his subsequent entry of the land as a homestead, as impertinent. The ground on which this exception is based is that as soon as Webb entered the land at the local land-office, and received the certificate of purchase, it became his property; the legal title remaining in the vendor in trust for him until the patent should issue in due course of proceeding. That while any person interested may appear on the notice of final proof required by the act of March 3, 1879, (20 St. 72,) and contest the right of a settler to become a purchaser under the pre-emption law, and thereby prevent a certificate of purchase from being issued to such settler, or cause the same to be canceled on appeal from the decision of the local land-office allowing the entry to be made, yet the government of the United States, having satisfied itself through its local agents, in the manner provided by law, that Webb was entitled, under the pre-emption law, to purchase the land, and having thereupon sold it to him, cannot institute a contest in

the land department between the purchaser and any one else, or even itself, to set aside, cancel, or recall said certificate.

Section 2273 of the Revised Statutes gives the register and receiver the right to determine "all questions as to the right of pre-emption arising between different settlers" on "the same tract of land," saving the right of appeal to the commissioner and the secretary of the interior. But at the date of Webb's entry and this alleged contest, Ewing's claim to the premises under his filing in 1876 was forfeited for want of final proof and payment within 30 months thereafter. Section 2267, Rev. St. He was then a stranger to the proceeding, and without interest in or relation to the land. No question could arise between Webb and him, as settlers thereon, nor as to the right of either to pre-empt the same. By reason of his neglect to make his final proof and payment, the effect of Ewing's filing had ceased, and he had long lost his *status* as a claimant under the pre-emption law. Therefore this proceeding in the land department that resulted in the attempted cancellation of Webb's certificate must be regarded, not as a contest under section 2273 of the Revised Statutes between two settlers on the same tract of land, but as an *ex parte* proceeding, instituted by the commissioner for the purpose of canceling Webb's certificate, upon the suggestion of a stranger that it was fraudulently obtained. The fact that Webb saw proper to participate in it with a view of protecting his certificate, does not affect its character in this respect.

Has the commissioner any such power? It is not given to him in terms by any act of congress that I am aware of. His right to pass upon conflicting claims to land under the pre-emption law seems confined to cases that come before him on appeal from the decision of the register and receiver, in case of a contest between two or more settlers under such law. Doubtless the commissioner may also refuse to give effect to a certificate, and issue a patent thereon, when it appears from the face thereof, or the proof accompanying it, that it was issued contrary to law. But if the land is open to pre-emption, and the proof is formally sufficient, as that it is made by the oaths of the proper and prescribed number of witnesses to the necessary facts, the commissioner cannot disallow the certificate, or refuse to issue a patent thereon because the proof is not satisfactory to his mind, or because it is suggested to him that it is false. The law devolves the determination of that question on the register and receiver, (Rev. St. § 2263,) and it can only come before the commissioner on an appeal from their decision by a party to a contest before them.

When a certificate of purchase has been issued to a pre-emptor in due form, and no appeal has been taken from the decision or action of the register and receiver, the land described in the certificate becomes the property of the pre-emptor. He has the equitable title thereto, and has a right to the legal one as soon as the patent can issue in the due course of proceeding; and he can dispose of the

same, and pass his interest therein, as if the purchase had been made from a private person. *Carroll v. Safford*, 3 How. 460; *Myers v. Croft*, 3 Wall. 291; *Camp v. Smith*, 2 Minn. 155, (Gil. 131;); *Cornelius v. Kessel*, 58 Wis. 237; S. C. 16 N. W. Rep. 550; *Brill v. Stiles*, 35 Ill. 309; *Sillyman v. King*, 36 Iowa, 207; *Moyer v. McCullough*, 1 Ind. 339.

In *Carroll v. Safford* it was ruled that land held under a certificate of purchase from the United States land-office was subject to state taxation as the property of the purchaser. In delivering the opinion of the court, Mr. Justice McLEAN said:

"When the land was purchased and paid for it was no longer the property of the United States, but of the purchaser. He held it for a final certificate, which could no more be canceled by the United States than a patent. It is true, if the land had been previously sold by the United States or reserved from sale, the certificate or patent might be recalled by the United States, as having been issued through mistake. In this respect there is no difference between the certificate holder and the patentee."

In *Moore v. Robbins*, 96 U. S. 538, it was held that a patent, issued by the land department, acting within the scope of its authority, passes the legal title to the land, and all control of the executive department of the government over the title thereafter ceases; that if any wrong has been done to the United States, the courts of justice are open to it, as in the case of an individual, to have redress by cancellation of the patent or reconveyance of the land. But whether a final certificate or certificate of purchase, issued in due form to a pre-emptor or other purchaser of public land by the register and receiver of a local land-office, is within this rule, subject to the right of the commissioner or secretary to modify or set the same aside upon a direct appeal to either of them, the supreme court has not decided, that I am aware of. The cases of *Lytle v. Arkansas*, 9 How. 314, *Garland v. Vynn*, 20 How. 6, and *Harkness v. Underhill*, 1 Black, 316, have been cited and considered, but however they may bear on the question, they are not, in my judgment, decisive of it.

To my mind, the certificate of purchase, subject to the condition mentioned, is within the reason of the rule laid down in *Moore v. Robbins*, in the case of a patent. The issue of a patent or final conveyance on such a certificate is a mere ministerial act, of which the purchaser, in the case of private parties, might compel the performance. Several of the state courts have decided that the certificate of purchase, when issued in due form, for land subject to entry, is beyond the power of the commissioner, otherwise than on a direct appeal from the register and receiver. In *Perry v. O'Hanlon*, 11 Mo. 585, the supreme court of Missouri held that a cancellation of a pre-emption certificate by the commissioner was a nullity. To the same effect is the ruling in *Brill v. Stiles*, 35 Ill. 309; *Cornelius v. Kessel*, 58 Wis. 241; S. C. 16 N. W. Rep. 550.

The statement in the answer as to the time and manner of insti-

tuting the alleged contest with Webb seems purposely obscure. The hearing therein, before the register and receiver, appears to have been had in January, 1883; while it appears from a notice signed by the register of Webb's application to make final proof, addressed to Ewing at "Rio Vista, California," and annexed to a written brief filed by him herein, that he was living in California as late as August, 1882. So that instead of being "soon after," it must have been more than a year after the certificate was issued to Webb that Ewing returned to Oregon and applied for leave to contest the former's entry. But assuming, as I do, that the proceeding before the register and receiver was had on the direction of the commissioner, without the authority of law, the cancellation of Webb's certificate of purchase and Ewing's subsequent entry of the premises under the homestead law are mere nullities. This being so, the exceptions for impertinence are well taken. The matter embraced in them is altogether immaterial, and not a defense to the relief sought by the bill. Neither does it appear from Ewing's answer that the second or changed filing of December 4, 1876, was for the land in question. The allegation is that on that day, with the consent of the register and receiver, he changed his declaratory statement, but how much or wherein is not stated. In the opinion of the secretary, which is annexed to the answer as an exhibit, however, it crops out incidentally that the change consisted in throwing out the S. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of the section, and adding thereto lots 6 and 7 of the same. Nothing definite can be ascertained from this without reference to the plat of the public survey of the section, from which it appears that the boundary line of the Umatilla reservation cuts off the south-east corner of it, leaving the S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ a mere fraction containing 3.32 acres, and known as lot 6; and the N. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$, also a fraction, containing 38.9 acres, and known as lot 7. Practically, then, the second or changed Ewing statement includes three of the four 40-acre tracts included in Webb's purchase, and lot 6 of the same section. Whether this was "a second declaration for another tract" within the prohibition contained in section 2261 of the Revised Statutes is a question. Certainly it was not for the same tract as the first filing, though not wholly for "another" or different one.

On the argument counsel for the plaintiff laid great stress on the fact, as he assumed it to be, that he was a purchaser in good faith for a valuable consideration, claiming that, as the defendant had not answered the allegation of the bill to that effect, it was admitted to be true. But such is not the rule in equity pleading, though it would be very convenient if it were so. An allegation in a bill which is neither admitted nor denied by the answer is still only an allegation, and must be proved before the plaintiff can have any relief based on it. If he wishes to prove it by the answer of the defendant, he can compel the latter to testify upon the point by excepting to the answer for insufficiency.

The exception made in section 2262 of the Revised Statutes, in favor of a *bona fide* purchase for a valuable consideration from a person holding a certificate of purchase under the pre-emption law, is only against the forfeiture of the land denounced by that section on account of the falsity of the oath thereby required of the settler as to his right to enter land under the pre-emption law, and his purpose in doing so. But in this case it was alleged that the pre-emptor never complied with the law as to residence, improvement, and cultivation, and that the certificate of purchase was issued to him upon false or insufficient proofs of these facts. To such a case section 2262 does not appear applicable. But at common law, where a party obtaining a conveyance of real property by a fraud practiced upon the grantor conveys the same to a third person, who buys in good faith and for a valuable consideration, the latter will hold the property purged of the fraud. *Fletcher v. Peck*, 6 Cranch, 133; *Somes v. Brewer*, 2 Pick. 184; *Deputy v. Stapleford*, 19 Cal. 302; 2 Story, Eq. Jur. § 1502; 2 Washb. Real Prop. 597. And in *U. S. v. Minor*, 5 Sup. Ct. Rep. 836, lately decided by the supreme court, it is said that when a person obtains a patent for land under the pre-emption law by "fraud and perjury, it is enough to hold that it conveys the legal title; and it would be going quite too far to say that it cannot be assailed by a proceeding in equity, and set aside as void if the fraud is proved *and there are no innocent purchasers for value.*"

But whether this rule is applicable to a purchase made from a pre-emptor after entry and before patent issues may be a question. Regarding the sale of the land, however, as completed when the proof of compliance with the law is made to the satisfaction of the agents of the vendor,—the register and receiver,—and the purchase price paid to them, my impression is that an innocent purchaser for a valuable consideration from the party having the certificate of purchase takes the land, and the right to the patent, purged of any fraud that may have been committed by his grantor in obtaining such certificate. Of course, where the invalidity of the certificate is apparent on its face or is a matter of law, of which all persons are presumed to have knowledge, the purchaser would take with notice of such invalidity, and be bound by it accordingly. But be this as it may, my conclusion is that a certificate of purchase issued in due form, in favor of a pre-emptor, for land subject to entry under the pre-emption law cannot be canceled or set aside by the land department for alleged fraud in obtaining it; and that in such case the government must seek redress in the courts, where the matter may be heard and determined according to the law applicable to the rights of individuals under like circumstances. The right of a party holding a certificate of purchase of public land, and that of his grantee, is a right in and to property of which neither of them can or ought to be deprived without due process of law.

The exceptions to the answer are allowed.

UNITED STATES *v.* KANE and others.*(Circuit Court, D. Colorado. 1895.)*

1. RECEIVERS—INTERFERENCE OF STRIKERS—INDUCING EMPLOYEES TO LEAVE SERVICE—CONTEMPT.

Where employees of a railroad company that is in the hands of a receiver appointed by the court, are dissatisfied with the wages paid by the receiver, they may abandon the employment, and by persuasion or argument induce other employees to do the same; but if they resort to threats or violence to induce the others to leave, or accomplish their purpose, *without actual violence*, by overawing the others by preconcerted demonstrations of force, and thus prevent the receiver from operating the road, they are guilty of a contempt of court, and may be punished for their unlawful acts.

2. SAME—CONSPIRACY TO DO UNLAWFUL ACT—LIABILITY OF ALL FOR ACTS OF INDIVIDUAL CONSPIRATOR.

Where a party of men combine with intent to do an unlawful thing, and in the prosecution of that unlawful intent one of the party goes a step beyond the balance of the party and does acts which the balance do not themselves perform, all are responsible for what the one does. It is essential, however, that there should be a concert of action,—an agreement to do some unlawful thing.

H. H. Hobson, U. S. Dist. Atty., and *E. O. Wolcott*, for receiver.
Ralph Talbot, for defendants.

BREWER, J., (*orally.*) Now, coming to these contempt cases, the stenographer very kindly copied out all his notes last night and furnished the transcript to me; so I have had an opportunity to read over the testimony, and I have done it very carefully.

I think a few preliminary considerations, in reference to the common rights which we all have as free men in this country, may not be amiss. Every man has a right to work for whom he pleases, and to go where he pleases, and to do what he pleases, providing, in so doing, he does not trespass on the rights of others. And every man who seeks another to work for him has a right to contract with that man, to make such an agreement with him as will be mutually satisfactory; and unless he has made a contract binding him to a stipulated time, he may rightfully say to such employe at any time, "I have no further need of your services."

Now, it is well to come down to simple things. Supposing Mr. Wheeler has a little farm of 20 acres. He comes to Mr. Orr and says to him, "Here, work for me, will you?" and Mr. Orr goes to work for him under some contract. Now, every one of us realizes the fact that if Mr. Orr is tired of working there, if he does not think the pay is satisfactory, or if it is a mere whim of his, he has a right to say, "Mr. Wheeler, I won't work for you any more," and Mr. Wheeler would have no right to do anything. Mr. Orr is a free man, and can work for whom he pleases, and as long as he pleases, and quit when he pleases; and that right which Mr. Orr has Mr. Wheeler has also. The fact that Mr. Wheeler happens to be an employer does not abridge his freedom. If he is tired of Mr. Orr's work, or if he dislikes the man, or if he does not want any more of his assistance on his

place, he can say to Mr. Orr, and say very properly, "I have paid you for all the time you have worked; now you can leave, and seek work elsewhere." Those are common, every-day, simple rules of right and wrong we all recognize. Nobody doubts that. Nobody would think for a moment, in a simple case of that kind, of questioning the right, either of Mr. Orr to quit or of Mr. Wheeler to say, "You may leave." And that which is true in these simple matters where there is a little piece of property, and a single owner and a single laborer, is just as true when there is a large property, a large number of employes, and a corporation is the owner. Rules of right and wrong, obligations of employer and obligations of employe, do not change because the property is in the one instance a little bit of real estate, and in the other a large railroad property; and if we apply these simple, commonplace rules of right and wrong, we avoid, oftentimes, a great many of the troubles into which we come.

Moving on a little further to another matter. Supposing Mr. Wheeler had two men employed, and that he finds that in the management of his little farm he is not making enough so that he can afford to employ two laborers, and he says to one of them: "I will have to get along without your services, and I will do with the services of the other," and the one leaves. That is all right. Supposing the one that leaves goes to the one who has not left and says to him: "Now, look here; leave with me,"—giving whatever reasons he sees fit, whatever reasons he can adduce,—and the other one says: "Well, I will leave," and he leaves because his co-laborer has persuaded him to leave,—has urged him to leave; that is all right. Mr. Wheeler has nothing to say; he may think that the reasons which the one that is leaving has given to the one that he would like to have stay are frivolous, not such as ought to induce him to leave, but that is those gentlemen's business. If the one whom he would like to have stay is inclined to go because his friend has urged him, has persuaded him, has induced him to leave, Mr. Wheeler cannot say anything. That is the right of both these men,—the one to make suggestions, give reasons, and the other to listen to them, and act upon them.

But supposing—and I will take the illustration that I partially suggested yesterday—supposing one is discharged and the other wants to stay, is satisfied with the employment; and the one that leaves goes around to a number of friends and gathers them, and they come around, a large party of them,—as I suggested yesterday, a party with revolvers and muskets,—and the one that leaves comes to the one that wants to stay and says to him: "Now, my friends are here; you had better leave; I request you to leave;" the man looks at the party that is standing there; there is nothing but a simple request,—that is, so far as the language which is used; there is no threat; but it is a request backed by a demonstration of force, a demonstration intended to intimidate, calculated to intimidate, and the man says: "Well, I would like to stay, I am willing to work here, yet there are too many

men here, there is too much of a demonstration; I am afraid to stay." Now, the common sense of every man tells him that that is not a mere request,—tells him that while the language used may be very polite and be merely in the form of a request, yet it is accompanied with that backing of force intended as a demonstration and calculated to make an impression; and that the man leaves, really because he is intimidated.

If I take another illustration I will make it even more plain. Supposing half a dozen men stop a coach, with revolvers in their hands, and one man asks the passengers politely to step out and pass over their valuables; and they step out and pass over their valuables; and supposing those men should be put on trial before any court for robbery, would not you despise a judge that would say, "Why, there was no violence; there were no threats; there was simply a request to these passengers to hand over their valuables, and they handed them over; it was simply a request and a loan of their valuables?" Would not the common sense of every man say that that request, no matter how politely it was expressed, was a request backed by a demonstration of force that was really intimidation, and made the offense robbery? Would not you expect any judge to say that? Would not you despise any one that would say otherwise? And so, as I suggested yesterday to my brother TALBOT,—and he has argued his case with very great clearness,—that is really the question here: whether these parties went there simply, as persons have a right to do, to request engineers and train-men to desist from further labor, or whether they went there, under the circumstances, with such a demonstration of force, with such an attitude and an air, that although nothing but a request was expressed, it was a request which men did not dare decline to comply with. The fact that half a dozen men went there and asked an engineer, or a brakeman, or a train-man to quit,—that is all right, if it was simply a mere matter of request, a mere matter of giving views and reasons. That is a part of the common right of us all. We all can express our opinions. We can go to any friend and urge him to do this or do that; that it is a part of the common liberties of every man in this country; and the question is not, whether these gentlemen went there in a pleasant way and stated reasons, or urged their friends to quit work, but, did they go with such an intended demonstration of power, and in such an attitude, that though, as they have stated here, they simply requested these engineers and employes to quit, they did it under circumstance that the engineers and the train-men were intimidated, and quit because they felt compelled to. I do not suppose that the court would be concluded by the mere statement of an engineer that he was afraid, because that might have been simply an excuse for his conduct, or it might have been because he was a timid man, and there was really no such demonstration that a sensible man, an ordinary man, a prudent and fair-minded man, had any reason to expect any further trouble.

So, before the government can properly ask the court to treat these defendants as in contempt, it must satisfy the court that these requests were, in fact, something more than mere requests; that whatever language may have been used, it was used under such circumstances and with such demonstrations that the employes, the engineers, and the train-men felt that, as prudent men, they must leave; that, because of due regard for their own safety and their own well-being, they had to leave; and also that that demonstration was made under the circumstances with the intent to accomplish that result. If that is shown, if the testimony makes it clear that these parties went in such numbers, and conducted themselves in such a way, that while they simply said, "Please get off this engine," or ("We want you to get off this engine," they intended to overawe,—intended, by the demonstrations which they made, to impress upon the minds of the engineers and train-men that personal prudence compelled them to leave,—why, then the government has made out its case. It is not necessary that there should be actual violence. As my brother TREAT said in a similar case, (*In re Doolittle*, ante, 544,) that we had before us in St. Louis, a request, under these circumstances, is a threat. Every sensible man knows what it means, and courts are bound to look at things just as they are, to pass on facts just as they are developed, to treat the conduct of men just as it is, and to impute to them that intention which their acts and their conduct disclose was their intention.

Then there is another proposition that comes in,—a familiar rule of law,—that where a party of men combine, with the intent to do an unlawful thing, and in the prosecution of that unlawful intent one of the party goes a step beyond the balance of the party, and does acts which the balance do not themselves perform, all are responsible for what the one does. In order to make that rule of law applicable, there must be a concert of action; an agreement to do some unlawful thing. If there is no such agreement, no such preconcert of action, why then each individual is responsible simply for what he does. Thus, for instance, if there should happen to gather here on the street 50 or 100 or 200 men, with no preconcert of purpose, accidentally meeting here, and a street fight should develop in their midst, all of that crowd are not responsible for it; that would be unjust; that would be unfair; because they did not go there, they did not meet together, with a preconcerted purpose to do anything unlawful, and, although something unlawful may be done in that crowd, yet only they are at fault who do the unlawful thing. But if they all met, as I said, for the purpose of doing some unlawful act, having formed beforehand the purpose to do it, and are present there to carry that purpose into effect, then every man, by virtue of uniting in that preconceived purpose to do the unlawful thing, makes himself responsible for what any one does.

A familiar illustration which often comes before a court is this: Supposing three or four men form a purpose to commit burglary, and

break into a house for the purpose of committing that burglary; that is all they had intended to do; that is the unlawful act, and the single unlawful act, which they had set out to accomplish; they get into the house and somebody wakes up, and one of the party shoots and kills. Now, the three or four persons who went into that house never formed beforehand the intent to kill anybody; they simply went in there to commit burglary; but, combining to do that unlawful thing, in the prosecution of that burglary, and to make it successful, one of the party shoots and kills, and the law comes in and says: "All of you are guilty of murder; we do not discriminate between you; you broke into that house to commit burglary; in the prosecution of that burglarious entrance one of your party committed murder; all are guilty."

Now that is a reasonable rule, when you stop to think of it; it is not a mere harsh, arbitrary, technical rule which the courts have laid down, and the statutes have established; it is a rule intended to prevent combinations or conspiracies to do an unlawful thing, and where there are many together it is often difficult to distinguish the one who does any particular act. I have a very forcible illustration right in this testimony before me. Mr. Tyler is charged by one or two witnesses with having said, in one of those interviews with one of the engineers, after some colloquy, and a man saying he was not afraid to take that engine and train out, "What about the after-clap?" Now Mr. Orr comes forward and says, and Mr. Tyler too, that Mr. Tyler did not use that expression. Mr. Orr said he heard the remark, but it was a remark from some one at his right, and was not made by Mr. Tyler. That will often be true where there are many together; in the excitement which attends such a gathering, it is often very difficult to individualize the particular actor or speaker, and while one witness may say this man did it or this man said it, another witness equally credible, and present at the time, may have it in his mind that another man did or said it. So, because it is often in the nature of things difficult to individualize a man that does or says a particular matter, the rule is laid down that if they have met with a preconceived purpose to do an unlawful act, all must respond for what each one does and says. That is, as I said, no harsh and arbitrary rule, but a rule in the interests of justice, for the protection of society.

Now, with these preliminary observations, let us come down to the testimony itself. All parties, the defendants and the witnesses for the government, agree that there was a large gathering there,—quite a crowd; and, as Mr. Orr says, there was a "fever of excitement." He used the expression once, "It was the rage;" interpreting that afterwards with the idea that there was an excitement pervading the crowd, which surged backwards and forwards, now to this engine and now to that, and that there was an excited, eager crowd of people there, bent on accomplishing a certain result. They wanted to stop the movement of trains; they did not seek to destroy an engine; they

did not seek to destroy property; they had obviously that respect for the rights of property which made them unwilling to touch an engine, a car, or any of the property of the company for the sake of destroying it; and in that they are to be commended; in that their conduct differs from that which oftentimes is found in movements of this kind; for it is part of the public history of the country, as we all know, that, in what are called strikes, excited men, wicked men, have wrought oftentimes fearful destruction of property.

You will all remember the Pittsburgh riots, years ago, when millions of dollars of property were destroyed. These men, and I say it to their commendation, I do not see from the testimony that they put a finger on a dollar's worth of company's property to destroy it; but they did go there with the intent to prevent this company, whose property is in the hands of the court, from moving its trains,—from attending to its regular business. Of that there can be no question. What the grievances were, what the reasons for the strike were, are obscure. I do not fully understand them. The parties defendant in this case, when they were on the stand themselves, did not seem to have a definite idea of the wrongs that they complained of, or of what their grievances were. If they had any grievances, if there was anything of which they had a right to complain, it is one of the peculiar features of property situated as this is that the court is always open to hear and adjust them; and in one respect this company, whose property is in the hands of the court, has not the freedom which ordinary property owners have. Although owning this railroad, it is not for it to say who shall be employed and who not. The court has taken possession of that property, and any man connected with the administration or management of that road, I do not care who he is, whether he is doing the most humble, common work on the line of that road, has the same right that the receiver himself has, that any creditor of the road has, to come into this court and insist that any grievance which he has against the management of that road shall be considered and passed upon. Ordinarily, you know, when a company has property, it has absolute liberty. It may dismiss whom it pleases, and employ whom it pleases; but when the courts take possession of property in this way, that liberty is abridged, and the company cannot say,—Mr. Jackson, the receiver, cannot say,—“I will discharge all of these men; I will pay them only so much a day; I will require so many hours' work; I will require this and that of them;” for there is no one in the employ of the company but who has the right to come and say to this court, “Mr. Jackson is making an unreasonable requirement; it is more than he has fairly and reasonably a right to require of us;” and the court is bound to listen to that complaint, and to see that justice is done between the receiver and any employe. But this party of strikers, not coming into this court, assumed at that time to try to stop the operation of the road; tried to prevent the engineers from running out the

trains; tried to prevent the train-men from working; and while, as I say, they touched no property to injure it, yet I think there was no one that heard the testimony but felt that that demonstration was made with the intent to overawe these engineers; to make them feel that it was not personally prudent to run those trains; that there was a risk to themselves in attempting to continue the operations of the road there; and that these engineers acted under a reasonable sense of personal danger accruing from the demonstration that was made in their presence.

I have no doubt that some men, who are excessively bold, might have laughed at it, and waited, believing that no personal violence would be used; but men are not all equally bold and courageous; the average man has a feeling that it is his duty to regard his personal safety; we all know that, and we act upon that presumption; and when these men met there in that fever of excitement, when the crowd surged backwards and forwards, from one end of that yard to the other, approaching now this engine and now that, they knew, and every man knows, that that kind of a demonstration was calculated to intimidate; and they knew, and every man knows, that ordinarily prudent men are not going to risk their personal safety when there is nothing to be gained by it. They are going to say, "Well, here is a crowd; they are in excitement here; they pass backwards and forwards through this yard; and though they say we cannot do any violence, we cannot order you to leave, but you had better leave; we request you to leave; you are not going back on us, and we had better quit." Every one understands that these men felt overawed, intimidated, and quit work, not because they wanted to,—some of them, at least,—but because they felt that their personal safety, personal prudence, required them to do it. It would be, as it seems to me, blinding my eyes to obvious facts to say that there was not intimidation. I think these men that were there would themselves feel that I did not respect their good sense, that I did not give them credit for ordinary intelligence, if I should say that that was a mere peaceable gathering of a few men to present a request; and I have come reluctantly to the conclusion that there was an effort, a preconcerted effort, at that time, by a demonstration of force, to overawe these engineers and train-men, and to prevent the receiver from operating the road there.

Coming to that conclusion, there is but one duty that a court may discharge. Courts are organized for the protection of persons and property, and while in the discharge of their duties oftentimes there are unpleasant burdens cast upon them; yet no man is fit to occupy a position as a judge, especially in a court which, like this, has such vast powers and such solemn responsibilities, who can hesitate, whenever a wrong is brought to his attention, to treat it as a wrong and punish accordingly.

I have looked over this testimony to see if I could distinguish in

any way between the conduct of these defendants,—if I could find who were, in the language of some of the witnesses, the ringleaders, the ones that were urging on the others; for it is part of our common knowledge that in movements of this kind the great majority are led by the few; they listen to those who are the leaders. As some of these defendants said, not knowing really what the trouble was, yet because they were led and urged by others, they went into this strike. Now, those who are in the great majority in such a case, who are simply the followers of a few leaders, the court ought to treat very mildly; those who are the ringleaders, those who lead off in any unlawful movement, must expect to be treated as such.

The first one that I shall notice is Mr. Wheeler. For the reasons which I have already indicated, independent of the particular matter which I shall refer to, it seems to me that he must be held responsible with the others. Beyond that is his connection with an engine and cars that went to Poncha, and the setting off of a car there. Mr. Wheeler gives his version of that affair, and, according to that, his thought in what he did was rather to protect the company than otherwise. Well, it is fair to him to give him the benefit of his explanation as to that matter, though I can but think that he must be held responsible generally with the others. But there is a circumstance connected with himself personally which leads me to make a different ruling in his case from the others; certain family matters which I need not mention here, and which seem to justify and require me to treat his case as exceptional. While courts are exacting and sometimes severe, they are never cruel; and, in view of these family matters, Mr. Wheeler will be discharged, on giving his personal recognizance to keep the peace and not interfere with the management of the road by the receiver.

The next case is that of Mr. Murphy. Upon the general considerations that I have given I think that he must be held responsible, and technically, I might say, within the rule of the law heretofore stated, that he must be considered as equally guilty with the others; but as I read the testimony through, notwithstanding one or two matters in which he figured personally, it does not impress me that he can be regarded as a leader, and I shall impose a slight punishment on him. The order will be that he will be committed to the county jail for 10 days.

In respect to Mr. Tyler, I think his conduct shows that he was more of a leader than these other two. I do not see that his conduct was such that he could be called, in the severest sense of the term, one of the leaders. Here was possibly a man who was talking a good deal, yet his conduct does not seem to me to merit the condemnation that Mr. Orr's does, and the order will be in his case that he be committed for 30 days.

In regard to Mr. Orr, he denies one by one, and *in toto*, the specific charges made against him by the several witnesses, or else, where he

admits a part of what was said, he qualifies it by giving his recollection of the conversation. If there were but one witness who made these specific charges against him,—as he appeared very frank in his manner on the witness stand, outspoken, straightforward,—I should feel that in his case the duty which exists of giving the benefit of all doubts to a party charged with wrong, would make me place his conduct along-side that of the others; but there are three or four witnesses testifying to separate matters, and it seems to me I should not be doing justice to take his single denial as against the testimony of these several witnesses. It may be, and I think regard for every man requires me to say, that possibly, in the excitement of that day, having made these remarks or threats, they have passed from his mind, and that he really did not intend, on the witness stand, to state anything other than as he remembered; but these witnesses who speak in reference to what threats he made are too specific, too positive, too clear, for me to doubt that on that day he did make the threats which are charged against him, and those threats are of no trifling nature. I cannot pass over such conduct lightly. I do not know what testimony was adduced before my brother HALLETT in reference to the two cases which he disposed of; but where a party is guilty of no actual injury to property, I think a distinction should be drawn between his case and that of parties who forcibly seize and destroy property. I had occasion the other day, in St. Louis, to go through with matters of this kind at great length, where I felt constrained to impose a milder punishment than my brother TREAT, the district judge, thought the cases warranted; and I did it then on the ground that there was no destruction of property, and that, perhaps, in that case, there was no specific intent to interfere with the property in the hands of the receivers. In this case, without intending to say that six months might not be a proper punishment, yet, as the parties did not do any violence to the property, I think that it would be fair to impose a penalty of only four months on Mr. Orr. I do that partially for this further reason,—and, as, perhaps, some of these gentlemen who are in the court-room are interested in this matter, it will not be out of place for me to add a word.

So far as I am advised, this was the first demonstration of the kind along this road, and the parties engaged in it did no violence to property, for which, as I said, they are to be commended. It seems from the testimony that they were trying to accomplish their purposes without any violence to property, and perhaps some—some certainly, and perhaps all—believing that in what they were doing they were not interfering with the property in the hands of the court, or placing themselves in a position where they could be held liable for contempt. It is fair to every man to believe what he says, unless there is developed on the other side such testimony as compels a disregard of his statements. But this case, in all its features, has developed to these men the fact that where property is in the possession of the

court, the management of that property cannot lightly be trifled with, and the lesson it teaches will not, I think, be forgotten. And while the penalties which I have imposed are not so severe as have been imposed in many cases elsewhere, and indeed here, I want to say in conclusion that no subsequent demonstration of a similar nature anywhere within my jurisdiction, or at least within this state, where these cases have transpired, and where others must take notice of what was done, may expect any such light treatment at my hands. It is the duty of the court to see that property which is put into its hands, or in the hands of its receivers, is absolutely protected, and that nobody, directly or indirectly, interferes with the management of that property. No man is bound to stay a single day in the employment of the receiver appointed by this court, and no man must interfere with the property or with the management of that property so long as it is in the hands of the court; and if there is any subsequent demonstration of a similar nature, I want now to say most kindly, but most emphatically, so that nobody may misunderstand, that any parties who are engaged in it and who are brought before me for contempt, must expect the severest penalty which the law permits. If there is any man; as I said awhile ago, who feels that he is wronged in any way by the receivers appointed by this court, all he has to do is to come and make his grievances known, and they will be heard, and the court will try to do justice by him as well as by the receivers; but no violence, in any way, shape, or manner, will be tolerated in the slightest degree.

FRANK and others v. DENVER & R. G. Ry. Co.

(Circuit Court, D. Colorado. May 22, 1885.)

RECEIVERS—STRIKE.

Complaints of railroad employes considered, and duties of receiver and employes discussed, in regard to management of road.

BREWER, J., (*orally*.) In reference to this matter of the employes of the Denver & Rio Grande, certain gentlemen came before me the other day, with a petition, and I set a day for the hearing of the matters there complained of, which was the day before yesterday. On that day the parties on both sides appeared, and we had quite an amount of testimony taken down, which has been copied by the stenographer. At the same time the complaining parties filed a further statement as to matters to which they wanted to call the attention of the court. I have those two statements before me. I will not take time to read them in detail; but they include substantially these matters. They claim, in the first place, that the wages of the apprentices are not reasonably advanced. Then, in the second place, they say that men em-

ployed in the freight department have been required to do extra work without extra pay. Then, in the third place, they claim that a number of men were discharged on the pretense that there was not work enough for them, when, in fact, there was work, and when, if there was not an abundance of work, the remaining employes were willing to work on shorter time. They also say that the employes in one specific department presented a petition to the officers of the road, asking for the discharge of one of the foremen, Mr. McClellan; and they say here that that foreman was so blasphemous and tyrannical as to unfit him for the position he holds. Well, there are some of these things, frankly, that I think very trivial, and I think, gentlemen, that you will so agree with me when you stop to consider the situation.

Here are 10 young men who came forward to complain that their wages have not been reasonably advanced. They were young men, all the way from 16 to 22 or 23 years of age. Only one of them, according to his own statement, during the time that he had been working for the company, has had his wages reduced, and he was a boy only 16 years of age, whose wages were reduced from \$1.50 to \$1.25 a day, and a boy who, very obviously, was not overly strong. That was the only case of reduction. There was one other whose wages had remained what they were when he started; but the other eight had had a steady increase of wages. I do not mean regularly so much every month or every six months, but their wages had been increased. I asked two or three of them who seemed to be very sore, whether they had tried to get work or higher wages elsewhere. They had not, and did not know whether they could, yet their wages had been increased, while during the past year or more this road has been defaulting in all its interests. It has cost over \$30,000,000 to build this road of 1,300 miles, and the men whose money built it, the men who put their money into the building of this road so as to furnish work and support to-day to the 3,000 or 4,000 men employed along its line, have not during the last year received a dollar. Now, is it not fair and but common justice that they should have something, and that the earnings should not be all turned in one direction to lift up the wages of laboring men? It is not now as it was three or four years ago, when this road was doing a large business and paying interest, when it could afford to increase wages, for its earnings have dropped from 1882 to 1884 over \$800,000.

There is not one of you that if you started a business of your own would not do just as the officers of this company are doing. You start a little establishment for manufacturing, or anything of that kind, and have four or five men working for you. The times get hard and you cannot pay your debts. What would every one of you say to the men who were working for you? You would not say, "Well, now, I will go and increase your wages;" but, "My business is poor, I am making nothing; I am not paying my debts, and I cannot pay you any more wages;" and very likely in many cases you might say, "I will

have to reduce your wages; if you can do better elsewhere, well and good, but if you work for me I cannot pay you as much as I have been doing, because I cannot pay my creditors; I am in debt." Every man wants to pay his debts,—feels that he ought to; and while we call this a corporation, it is nothing but a combination of a great many men who put their property into this one form; and they think, and every man thinks and feels that he ought, so far as he can, to pay his debts, and that it would not be right for him to be extravagant in his living or his expenses when he is in debt. And it is not a matter, either, in which the present officers of the company, the men who are managing the road to-day, have any discretion. It is not for them to say, "We will increase wages and build cars and extend the track, and so give employment to a great many." The court has said to them, "In taking possession of this road you do so because it is a defaulting road; it does not pay its interest or its debts, and now, gentlemen, we put you in charge of this road and you have got to run it just as economically as you can. You must not expend a dollar in extending the road; you must not expend a dollar more than is necessary in keeping up the road;" and if it should appear that they were going on, I will not say extravagantly, but even carelessly, as owners of roads sometimes do, why then the court should step in and tell them: "You forget that this road does not pay its debts; that it is defaulting, and it has not the means, and you must stop." That which every man has to do in his own business, those gentlemen who are placed in charge of this road have to do in the management of this road; so they could not do what, perhaps, many of them would like to do,—increase wages, increase their laboring force. They have got to keep within the limits of their instructions.

I will not go over the matter that I went over the other day, where I said to you that the employe was at liberty and the employer was also at liberty. Whatever laws may exist by and by, to-day, in this country, the employe is free to go or free to stay, and the employer is free to discharge him. That is the law in this country. The courts do not make the laws, but take them as the legislators make them. The parties may bind themselves by contract, but where they have made no contract for a stipulated time, the employe may leave when he wishes and the employer may discharge when he pleases. So that if it had been simply a mere naked question of law that you put to me in regard to this matter, I would have to say to you, in the fewest words, that the law is that the employer can discharge, and that in regard to the matter of wages and discharge the management of this road had simply exercised their legal rights; but I did not care to put it upon that simple proposition of law. I wanted to talk about the particular matters in which you felt you were wronged. I have no more to say in reference to this matter of wages. And the same thing applies to the extra work in the freight department. It is true, the witnesses differ a little; some thought they were never detained

longer than 15 or 20 minutes; others thought they were detained till 7 or 7:30 p. m. Several of them said that part of the day there was very little work to do; the freight coming in late in the afternoon and piling up work then, while right after dinner there was little to do and they were comparatively idle. Be that as it may, accept it just as broadly as any of these men put it, that they were called upon at times to work late at night, that they had to get there at 7 in the morning, be around all day, and were detained in the evening and got nothing extra for it,—take it as broadly and strongly as any one has put it,—well, the first thing that comes to any man's mind is, "Why do you stay there if the work is so hard? If there is work all around here and you can get a better or easier place, why don't you take it?" We all know the reason. It casts no reflection upon them. They stay there because they think there is a permanence about the work and perhaps for other reasons. I do not know what they all are, but they prefer to stay, even with the inconvenience of waiting one or two hours after 6 o'clock.

But there is back of that another thing. A railroad, of all business in the world, has to be prompt in all things. Their customers are the most urgent of all men. If any man goes to ship a bill of goods he wants to ship it right away; and if he has an invoice of a bill of goods coming from the east, he wants those goods delivered the moment they come. If a railroad manager said, "Well, there is no pressure, let it go over until to-morrow or next day," he would be receiving constant complaints; the business of the road would be lost. If a man wants things shipped, he will not have dealings with a road unless it is attentive and prompt. In courts there are many lawsuits tried where roads are sued for damages, and we have to lay down the rule every time that the highest diligence and the utmost care are required on the part of these railroads. If there is neglect of any kind,—the slightest neglect or delay,—the road has to respond for it; and it is one of those urgent, pressing, imperative occupations which inevitably and universally require that those in charge shall push things, shall see that the work is gotten out of the way as quickly and rapidly as possible, and that the utmost care is paid in every department of the business. If the officers did not do this they would be brought up here day after day with a suit for damages, or a suit on account of delay in transportation, or something of that kind.

There is no occupation in the country to-day where there is more of what you may call almost a military necessity, and where there is any more imperative demand for that quick, pushing, sharp way of doing things. You and I, when we travel, we want everything provided for us and in the best condition. If we do not have it, we complain. If we ship goods, we want those goods delivered in promptness, in the quickest time. If they are not, we make complaint. And so these men that are managers and officers of a railroad corporation have got to face all the while this demand of the traveling and shipping

public, for best accommodations, the utmost speed, and absolute exactness, in all their transactions. That being so, I do not know of any large organization of business, any aggregation of labor, where there is a more imperative demand for almost military law and discipline; it has to be exact all the way through, from the first to the last man. I do not know how many employes there are on this road. There are 1,300 miles of road, and there must be four or five thousand men. The neglect of any one of them would bring large damages upon the road. When business is blocked up, the company must have men that they can depend on, and that do not stand upon the question of half an hour or three-quarters of an hour. If the work is there it must be done, and the men must be there to do it. And when I think of such an organization, with its imperative needs, I am frank to say to you, gentlemen, that it seems to me that it was trifling a little to be making the point that you were sometimes called upon to stay an hour or so to finish work. That was not true in the machine-shops, where there was regular work; the only complaint was in the freight department, and I can now think of only one thing which reminds me of the conduct of those men who objected to work after 6 o'clock. During the war, when Gen. Price's army marched up through Missouri to the borders of Kansas, the Kansas militia was called out, and when we got to the state line between Kansas and Missouri, there were a dozen or 15 men in one regiment who refused to go over the state line; they thought there was a limit beyond which their patriotism did not go; they would go to the borders of the state line, but no further; and, although Gen. Price was within six or eight miles of that line, they would not go beyond it,—they were particular about that line.

The other matter which I have considered is of a different nature, and that is in regard to Mr. McClellan. The employes under him presented a petition to Mr. Sample first, I believe, and afterwards to Mr. Jackson, the receiver, and they there represented that Mr. McClellan was overbearing and profane; and those employes have made the same complaint here. They say that Mr. Jackson kept the petition a few days, and then reported that he had examined, and did not think the charges were sustained; but admitting that Mr. McClellan might swear occasionally; that in so doing he was not doing an uncommon thing, and that he (Mr. Jackson) did not find enough reason for making the discharge. Now, they bring the same matter up here. I could very fairly say, and I presume a great many judges would, that we have appointed a receiver in whom we have confidence, and that when these employes went to him, and he took the matter up and examined it, and was satisfied that Mr. McClellan was an efficient, and not a tyrannical and unfit, foreman, that his decision should be final, because he is in a position where he can get at all the facts. But I did not care to put it upon that ground, and so I told these gentlemen to make a statement of all their complaints, which they did, and then I heard

the statements of Mr. McClellan, Mr. Groves, Mr. Sample, and Mr. Jackson. Doubtless Mr. McClellan does swear,—many men do,—and yet it seemed to me it could not be that he was one of those terribly profane men, for out of those various witnesses three or four said they never heard him swear but once, when he said to one of them, "What in hell are you doing?" or something of that kind; and one man, who was there several months, says he never heard him swear at all.

If you take out the testimony of Mr. Culmsee and one or two other witnesses, the evidence of the balance of the employes who were examined would show that Mr. McClellan did not swear half as much as perhaps nine-tenths of the people right here in this court-room. I do not mean to approve of swearing. I do not mean to indorse it at all; but I have seen some very good men who would swear most terribly. I could not but think, when I heard those gentlemen tell their stories, that Mr. McClellan was not very profane; and while he doubtless does swear occasionally, it is not very common, or else some of these men other than Mr. Culmsee and one or two others would have recollections thereof. Outside of three witnesses, the balance of them either say they never heard him swear, or that they remember only one or two instances, and some of them have been there for two or three years. They say he is tyrannical. I guess he is a driving man. I take it from the testimony on both sides that he is a pushing man. He says himself he tries to get a full day's work, and it is very natural. I can believe, without any hesitation, that a man who is an earnest, pushing man, trying to get all the work that he can out of a large body of men, sometimes makes mistakes. I never saw a man that did not do it; and I have no doubt that it is true, as some of you feel, that at times he may have been, in this or that matter, unjust, so far as you were personally concerned, and that you had really done all that you ought to have done. But such mistakes as that will always happen where a man is earnest, energetic, and driving. If he is a fair man, if he is a man that tries to do right towards his employer and the employe, although he may be one of those driving, resolute, pushing men, he is not a man to be discharged from any occupation. Upon the testimony of these complaining witnesses I could not but think that that was all that could be fairly said against him. On the other hand, there were Mr. Jackson, Mr. Sample, and Mr. Groves, the last two being so situated that they must know the facts of his conduct and the character of the man, and two or three foremen who were about there, who all testified that he was an efficient, faithful, honest, fair man. Ought he to have been removed? I think not.

It is fair to say that there is a matter back of that. Prior to this petition, prior to the discharge of any of those 10 men, it seems there was some trouble with an employe of the name of Ash, who was discharged, and a committee called on the officers in regard to the mat-

ter, not a committee of the employees exclusively, but with one outsider at least. They went to see Mr. Groves and said to him that there was an organization which had brought larger corporations than the Rio Grande to terms, and that they intended to bring this road to terms. That was the first demonstration from these employees, a demonstration aided by outsiders. I do not mean to say that one of the employees made the above threat; it was from that one of the committee who was not an employee; but they were all there together. Now, let a number of men—employees—go with such a threat as that, if they afterwards come along with a petition of this nature, don't you know that every man will instinctively feel that it is simply an effort to carry out that threat, and very naturally will not feel as kindly towards it as he otherwise would, because, as I said a while ago, any employer expects his employees to be loyal to him, and not obeying the orders or respecting the wishes of any other person or organization; and there is no business which requires the same loyalty that a railroad does. Only by it can the management of a large railroad guard against accident and against being mulcted in damages in the courts; and so when these men came, after making that threat, to the officers of the road with this petition, I do not wonder that these officers felt, before they had made any inquiry, that this was simply a movement in pursuance of that threat; especially as Mr. McClellan has been acting as foreman for about five years to the apparent satisfaction and with the confidence of the employees under him,—only one prior complaint having been made against him during all that time. If it was an attempt, by any organization outside of the management of this road, to control it, it was the duty of the officers of the road to resist it. The road cannot be run by outsiders. The management of the road must have absolute control. There is too much at risk. It is not like keeping a grocery store; it is not even like running a manufacturing establishment, where the employers, the managers, can take many chances. In the management of a railroad you can take no chances. You must have a corps of employees who are loyal to the road, who are looking after its interests ungrudgingly and without any divided allegiance. The moment it comes that a corps of employees in this shop or in that shop, or the train-men on the road, are wanting in loyalty to the road, the road had better stop; it is not safe to run it; and the officers of the road owe it to themselves,—owe it to the court that has appointed them,—to see that they have no man in that employ who is not absolutely loyal to the interests of the road.

I may have omitted some minor matters, but I believe I have spoken all that I desire about those grievances. I am frank to say to you that no one of them impressed me or arrested my attention, except that in reference to Mr. McClellan. So I made inquiries of all the men that were here, and heard Mr. Sample and the officers of the road who were likely to know of Mr. McClellan's efficiency; I had them subpoenaed to come, and they came, and I heard their testi-

mony. As I said, that was the only one of their grievances which, after you, gentlemen, had told your story, I felt was sufficient to arrest my attention; and after hearing all the testimony in the matter, I must say that I think the company have a most efficient and capable, and not an unjust, foreman.

Of course, you know from what I have said that I think you have made a mistake. I think you did not realize the fact that that road had to reduce its working force to get itself out of debt and out of the courts. I think, also, that some of you are embittered against the road; that you feel hostile to it. That cropped out in the testimony before me from several witnesses. Men whose feelings towards the road are vicious, who feel ugly towards it, such men it would not be safe for the road to have. I do not suppose that all of the employes came before me, but only such as were chosen or selected, or desired to come; and of those who came, some seem to me to be very fair men. Well, I think they made a mistake, yet I do not think they were acting viciously. I do not think to-day that they feel ugly towards the road; I think they would be perfectly loyal to its interests; I think they are fair men. I do not know how much additional force, if any, the officers need in the shops and about the depot. If they do not need any, why that is the end of it. If they can get along with what laboring force they have, they ought to do it until they get out of debt, or at least until they have paid some of their indebtedness.

But I want to say to Mr. Jackson, right here, that I do not think you ought to make, I should not want you to make, the mere going out of these employes from work on the fourth of May a reason for not re-employing them. I do not know how many men you may need,—I do not know how many left, for that matter,—but I think it would be the thing for you to do, so far as you need men, instead of going away from here, sending elsewhere for laborers or mechanics,—I know you can get them all over the land; there are plenty who would like to come, for work is scarce,—instead of doing that, I think what you ought to do is, so far as you need mechanics and laborers of any kind, to take such of these as are the fairest and best men; men who have not been ugly or vicious. Of course, there are men—I saw it right here on the witness stand, and I saw it upstairs—that it would not be safe to take into your employment. I do not know those men; I cannot make any selection. The court has placed you in charge of that property. You have the responsibility, and you must make the selection. You have to employ men, and there is a responsibility resting upon you for employing good men. Legally, the responsibility is with you; the court places it with you; and, in the nature of things, the court could not make any selection. So the responsibility of selection is cast upon you.

But I do want to say, and I want to say it to you in the presence of these men, that I do not want to see you shut the door down absolutely, and say: "I won't take any man that went out on the fourth

of May." I said to them that they were mistaken, and I said, and I say it again, that I think some of them are bad men; that they went out viciously, and feel ugly towards the road, and ought never to be in its employ. But at the same time, I think some of the men simply made a mistake; that they are fair men, and mean to do what is right; that they did as multitudes do, act with their associates, go because they went, and, having simply done that, I think that you should not lift up the barriers against them. If they want to work, and if you have work for them, then such men as you select I should be glad to see you take back.

I do not know that I can say anything more in reference to this matter. Ever since I have been here, for eight days, I have had the troubles of this strike, and of the employes of the road, before me in one shape or another. It has been an embarrassing, difficult question. I have tried to make it plain to you that the laws must be enforced, that the employer is a free man, as well as the employe; that there are rights which the law guaranties, and will enforce, and I have had to punish some who I thought were intimidating, trying to coerce the management of the road. I did it reluctantly; I did it firmly. And I can only say in conclusion, for I suppose this is the last of this matter that will come before me, I have tried to be perfectly fair and frank with you all. You are all comparative strangers to me. I never was here holding court but once before. The attorneys and citizens here are all comparative strangers. I had no feeling one way or the other. I heard every man that had anything to say, and I have tried to decide each matter as under the law it ought to have been decided. .

MAURITZ v. NEW YORK, L. E. & W. R. Co.¹

(Circuit Court, E. D. Wisconsin. November 28, 1884.)

1. CARRIERS OF PASSENGERS — LIMITING LIABILITY FOR LOSS OF BAGGAGE — PRINTED CONDITIONS ON TICKET.

The liability of a railroad company for the safe carriage of a passenger's baggage is not limited by a notice printed upon the face of the ticket issued by it, stating the terms upon which baggage will be carried, unless the passenger's attention is called to it when purchasing the ticket, or unless the circumstances of the transaction are such as to make the omission of the passenger to read the conditions on the ticket negligence *per se*.

2. SAME—PASSENGER UNABLE TO READ—EXPLANATION BY AGENT.

Where the passenger is unable to read, and no explanation is made by the agent of the company selling the ticket, he is not bound by the special terms and conditions printed on such ticket.

3. SAME—CONNECTING LINES—DUTY AND LIABILITY—SPECIAL CONTRACT.

Where a railroad company, whose road connects with other roads, receives baggage for transportation beyond the termination of its own line, it is only

¹Reported by Robertson Howard, Esq., of the St. Paul bar.

bound, in the absence of a special contract, to safely carry over its own route and safely to deliver to the next connecting carrier; but any one of the companies may agree that its liability shall extend over the whole route.

4. SAME—EVIDENCE OF SPECIAL CONTRACT.

The sale of a through ticket is a fact that may be taken into account in determining what the undertaking of the company issuing the ticket was; but such facts and circumstances growing out of the negotiations of the parties, or otherwise arising, ought to be shown, as make it evident that it was the understanding and agreement on both sides that the company selling the ticket undertook to be responsible for the safety of the baggage over connecting lines through to its ultimate destination.

5. SAME—DAMAGES—RECOVERY LIMITED TO VALUE OF BAGGAGE.

A passenger, in the absence of special contract, will only be entitled to recover the value for use of such articles lost, while in transit, as properly constitute baggage; and what articles come within the rule is to be determined according to circumstances.

At Law.

Wyman & Roehr, for plaintiff.

Finches, Lynde & Miller, for defendant.

DYER, J., (*charging jury*.) This is a suit to recover from the defendant, the New York, Lake Erie & Western Railroad Company, the value of certain lost baggage shipped from New York in June, 1888, over the defendant's line of road and destined for Weyauwega, Wisconsin. Many of the facts relating to the shipment and transportation of the baggage in question are undisputed. It seems that the plaintiff and his family and one Schelongowsky were a party of seven emigrants from Germany, who, on their arrival in New York, desired to obtain transportation for themselves and their luggage to Weyauwega, their point of ultimate destination. To that end the plaintiff's daughter applied to an agent of the defendant, at his office in New York, for passage tickets over the defendant's railroad and connecting lines of road, by means of which they and their baggage should be carried to Wisconsin. As a result of negotiations with the agent, the plaintiff, by his said daughter, purchased three third-class coupon tickets for each person in the party, one of which was a ticket from New York to Chicago over the defendant's road to Salamanca, thence over the New York, Pennsylvania & Ohio Railroad to Mansfield, and thence over the Pittsburgh, Fort Wayne & Chicago Railroad to Chicago. The second ticket in the series was one from Chicago to Milwaukee, over the Chicago, Milwaukee & St. Paul Railway, and the third was a ticket from Milwaukee to Weyauwega, over the Wisconsin Central Railroad. For all the tickets the agent was paid \$129.50. These tickets having been procured, the plaintiff and his companions then proceeded to Castle Garden, where their baggage was deposited, and there received checks for the same over the defendant's road and connecting roads to Chicago. The baggage thus checked, including the box in question, was then carried by boat across the river to Jersey City, and there seems to be no doubt that it was placed on the train upon which the plaintiff and his family took passage for Chicago.

When near Chicago, and while yet on board the cars, the plaintiff and his associates surrendered their checks to a railroad official, taking in exchange the checks furnished by that official; and after their arrival at the station, and while they were in the depot waiting-room, they exchanged those checks for six joint checks of the Chicago, Milwaukee & St. Paul and Wisconsin Central roads; these checks being given for the carriage of their luggage from Chicago to Weyauwega. It appears that all of the baggage in due time arrived at Weyauwega, except the box in question, the loss of which has occasioned this suit. It seems that the plaintiff and his companions did not see any of their baggage in Chicago, but the undisputed evidence establishes the fact that it all arrived at the Chicago depot; and that the loss occurred after that time appears quite evident from the fact that all the other pieces of baggage rechecked in the manner before stated, arrived safely at Weyauwega. All of the passage tickets received in New York were labeled, "New York, Lake Erie & Western Railroad Company;" and upon all of them was printed in the English language the following:

"Subject to the following conditions and regulations: In consideration of the reduced fare at which this ticket is sold, it will be valid only for one continuous third-class passage, if used to destination before midnight of the date canceled on the margin of this contract. And this ticket will be good only when officially stamped and dated, and upon presentation with checks attached. The checks belonging to this ticket will not be received if detached, nor will this ticket be recognized for passage if more than one date is punched out. In selling this ticket for passage over other roads this company acts only as agent for them, and assumes no responsibility beyond its own line. None of the companies represented in this ticket will assume any liability on baggage except for wearing apparel, and then only for a sum not exceeding \$50 in value. No stop-over allowed."

Each of the tickets stated on its face that it was a "third-class ticket, good for one continuous third-class passage;" the first of the series covering such passage from New York to Chicago; the second, from Chicago to Milwaukee, and the third, from Milwaukee to Weyauwega. The coupons respectively named the different lines of road on which the tickets were receivable, and each coupon was indorsed: "Special ticket; subject to conditions of contract."

The uncontradicted testimony on the part of the plaintiff is that neither the plaintiff, nor his daughter who bought the tickets, nor any of their party, could speak, read, or understand the English language at the time the tickets were purchased; and there is no proof that the agent from whom the tickets were purchased, read or explained to them, or called their attention to the conditions printed on the tickets. The theory upon which the plaintiff seeks to recover in this action is that he made an express verbal contract with the agent of the defendant company for the transportation of himself and his fellow travelers and their luggage from New York to Weyauwega; by which alleged contract he claims the defendant undertook to furnish safe carriage for passengers and baggage, not only over defendant's road,

but over the connecting lines named, to the place of ultimate destination; that it was one entire through contract, creating a liability on the part of the defendant for the safe transportation of baggage as well over the Chicago, Milwaukee & St. Paul and Wisconsin Central roads as over the road of the defendant company, and therefore that the defendant is liable for the loss of the box in question, although that loss may not have occurred on its road.

The contention of the defendant is—*First*, that it did not make such a contract as is alleged by the plaintiff, and that the evidence on the part of the plaintiff does not establish such a contract; *secondly*, that the contract between the parties was expressed on the face of the tickets; that it consisted of the conditions and limitations printed thereon, and that the defendant's liability for baggage was therein limited to loss occurring on its own line, and to wearing apparel not exceeding \$50 in value. The issuance of the passage tickets mentioned, their acceptance by the plaintiff, the omission of the defendant's agent to explain to the plaintiff or his daughter who purchased them what was printed on their face, and the inability of the parties who obtained the tickets to read the statements and conditions printed thereon, and their consequent ignorance of the same, being undisputed facts in the case, there seems to be nothing to submit to the jury upon the question whether or not the conditions and regulations expressed on the face of the tickets constituted the contract between the parties. As the question is here presented, it is one of law to be determined by the court.

There are many reported cases in which it has been held that, where the shipper of property over a line of railroad receives from the carrier a bill of lading containing limitations upon its common-law liability, such bill of lading constitutes the contract of shipment, binding upon the shipper, and that he cannot thereafter avoid the limitations of liability expressed therein in favor of the carrier, by pleading ignorance of the contents of the bill of lading. This is the principle invoked by the defendant in support of its contention that the tickets issued in this case with the conditions and qualifications of liability thereon expressed, constituted the contract under which the baggage in question was carried. As to railroad passage tickets, there are other decisions which hold that the liability of a railroad company for the safe carriage of a passenger's baggage is not limited by a notice printed upon the face of the ticket issued by it, stating the terms upon which baggage will be carried, unless the passenger's attention is called to it when purchasing the ticket, or unless the circumstances of the transaction are such as to make the omission of the passenger to read the conditions on the ticket negligence, *per se*, that is, such as to make the omission of itself negligence. Thus a distinction is taken between the case of a shipper receiving a bill of lading on account of his shipment, and a traveler receiving a passage ticket for the carriage of himself and baggage over the carrier's road. I think

there is ground for the distinction. In the one case the shipper is supposed to understand and know that according to commercial usage a bill of lading is essential to the regular and safe transportation of property which is shipped and carried as freight, and that of necessity it must constitute the contract of shipment and carriage. In the other case, the ticket is ordinarily regarded as a mere voucher for the money paid for it, a token or evidence of the purchaser's right to be carried, or to have his baggage carried a certain distance. And where, from the undisputed circumstances of the transaction, it is apparent that the passenger rightfully took the ticket as a mere receipt or voucher evidencing his right to be carried, and enabling him to follow and identify his property, and without any notice that it embodied the terms of a special contract, or was intended to subserve any other purpose than that of a voucher, it would seem that his omission to read the paper ought not to be held negligence, and that, as matter of law, he should not be held bound by limitations of which he had no knowledge, and to which, therefore, he did not assent, especially where, as in this case, the purchaser was unable to read the English language, and was ignorant not only of the printed matter on the ticket, but of the ways of business in this country.

Since the decisions of the courts on this subject are not entirely harmonious, I rule upon this question not without some hesitation; but for the purposes of this trial, and subject to review by the full bench, if a review shall become necessary, I instruct you upon the undisputed facts, as developed on this branch of the case, that the plaintiff was not bound by the special terms and conditions printed on these tickets; and that whatever legal rights he may have acquired by his purchase of the tickets are unaffected by those conditions. The question is then presented, did the agent of the defendant company, by express verbal contract, undertake, in defendant's behalf, with the person who purchased these tickets, to safely carry the baggage in question to Weyauwega,—a point confessedly beyond the termination of the defendant's line,—and there deliver it to the owners? The law relating to this branch of the case, at least in the federal courts, is this: If a railroad company, whose road connects with other roads, receives goods for transportation beyond the termination of its own line, its duty is to deliver safely the goods to the next connecting line,—the next carrier on the route beyond. The common law imposes no greater duty than this. If more is expected from the company receiving the shipment, there must be a special agreement for it. Each road confining itself to its common-law liability, is only bound, in the absence of a special contract, to safely carry over its own route, and safely to deliver to the next connecting carrier; but any one of the companies may agree that its liability shall extend over the whole route. In the absence of a special agreement to that effect, such liability will not attach. *Myrick v. Michigan Cent. R. Co.* 107 U. S. 106; S. C. 1 Sup. Ct. Rep. 425. If, there-
v.23r,no.15—49

fore, the defendant in this case, the New York, Lake Erie & Western Railroad Company, carried the baggage in question safely to Chicago and there delivered it to the next carrier in the line, the Chicago, Milwaukee & St. Paul Railway Company, then it performed its whole duty, unless it specially agreed with the owners of the baggage in New York that it would carry the baggage through, or would undertake or be responsible for its carriage through to its final destination. Did the defendant so contract with the owners of this baggage? If it did not, then it performed its whole duty if it delivered the property safely to the next carrier in Chicago.

Now, the question of fact for you to determine is, did the defendant make such a special agreement with these parties when they purchased their tickets? Such an agreement ought not to be inferred from doubtful expressions or loose language, but only from clear and satisfactory evidence. If, for example, I go to the agent of a railroad company in New York, and ask him if he can sell me tickets for myself and baggage over his line of road and other connecting lines to Ashland, Wisconsin, and he says he can, and he sells me such tickets, and that is all there is of the transaction, I think that would not be sufficient of itself to establish a contract on the part of the New York company for the safe carriage of my baggage beyond its own line. Of course, the sale of through tickets is a fact that may be taken into account in determining what the undertaking of the company issuing the tickets is; but such facts and circumstances growing out of the negotiations of the parties, or otherwise arising, ought to be shown as disclosing an understanding and agreement on both sides that the company selling the tickets undertook to be responsible for the safety of the baggage over other lines of road than its own through to its ultimate destination. Now, in view of what transpired between these parties and the agent in New York, in view of all the facts and circumstances attending the purchase of the tickets, did or did not the defendant so undertake and agree? If you find that such was the agreement or undertaking of the defendant, then your verdict should be for the plaintiff. If you do not so find, then your verdict should be in favor of the defendant.

If you should find for the plaintiff, the next question to be determined is, what is the extent of the defendant's liability? For the loss of what goods is the plaintiff entitled to be compensated, if entitled to recover at all? The box in question contained a variety of articles, all of which have been full enumerated by the witness testifying on the subject, and which at the time of the loss were owned by different persons,—some by the plaintiff, others by different members of his family, and still others by Schelongowsky. The plaintiff has produced in evidence an assignment to himself from the other parties in interest of all claims and rights of action accruing to them on account of the loss of such of the enumerated articles as belonged to them respectively. I do not understand the validity of this as-

signment to be questioned, and so the plaintiff stands here as the sole claimant for the entire loss.

The plaintiff's claim must be limited to baggage. But the question is, what is baggage? The rule on this subject can only be stated in general terms. The question what articles come within the rule is to be determined by the jury according to the circumstances of the case. Baggage, of course, includes wearing apparel, and this is not limited to such apparel only as the traveler must necessarily use on his journey. Regard being had to the condition in life of these parties, the plaintiff may recover—if entitled to recover at all—for the loss of all such wearing apparel as these people had provided for their personal use, and as it would be necessary or reasonable for them to use after their arrival and settlement in this country. And so I think that cloth not yet made into garments, but which they may have procured for manufacture into wearing apparel, and which they intended to make such use of, to a reasonable amount, may properly be included as part and parcel of their wearing apparel. So, too, these parties had the right to carry as baggage such jewelry and personal ornaments as were appropriate to their wardrobe, rank, and social position, but no further. As to bedding and bed furnishings not intended for use on the journey,—curtains, table-cloths and covers, books, pictures, and albums,—they come under the head of household goods, and not personal baggage, and cannot be recovered for, and must be excluded from your consideration, unless you find that the agent of the defendant company, when he sold the tickets, was informed or understood that the baggage which was to be carried with the passengers included articles of this character. Of course, if the defendant was informed that this box contained household goods as well as wearing apparel, or had good reason to understand and know that such was the fact, and then consented to accept the property as baggage under check, if liable at all, it is liable therefor the same as for wearing apparel, otherwise not. So, too, the painter's utensils and drawings, and the tailor's utensils enumerated in the list of articles lost, cannot be included as baggage; and for the loss of this property the plaintiff is not entitled to recover unless it is made to appear that the defendant knew or understood that such articles were in the box, and accepted them as baggage.

If your conclusion shall be that under the evidence the plaintiff is entitled to recover, you will consider this question of what constituted the baggage of these parties with care, and within the limitations I have stated; and in determining the amount of the recovery, you will ascertain what was the fair and reasonable value of the articles for which the plaintiff should be compensated. This value will depend upon the age and character of the articles, and the use for which they were intended. Of course the question is not what they could have been sold for in money, but what was their fair and reasonable value for use to the parties who owned them at the time of their loss.

The jury rendered a verdict for plaintiff, and on motion for a new trial, argued before the circuit and district judges, the foregoing instructions to the jury were approved.

CONDITIONS ON RAILWAY TICKETS OR CHECKS. It is now well settled that a railway company or other common carrier may, by special contract, limit its liability for the safety of persons and property intrusted to it for carriage, except for injuries caused by its own or its servants' negligence. In a few jurisdictions, like, for example, New York, its liability even for negligence may be limited. The general, though not the universal, rule is that the liability of a common carrier may be limited only by contract, and the question, in cases where limitation of liability is set up as a defense to an action for damages for injury to persons or property, is whether such contract has been made. This is usually determined by evidence showing acts of the passenger; such as, among other things, accepting a ticket for his passage or a check for his baggage, upon which is printed some condition or limitation of liability.

CASES WHEREIN THE LIABILITY WAS HELD LIMITED. In some cases the courts have had little difficulty in affirmatively answering the question whether a contract limiting liability was assented to. In *Shaw v. York & N. M. R. Co.*¹ it was decided that the shipper of horses is bound by a limitation of liability printed on the ticket for their transportation.² In *Steers v. Liverpool, etc., Steam-ship Co.*³ the court sustained the limitation of liability printed upon a ticket issued for a passage across the ocean in a steam-ship. The court considered the purchase of a steam-ship ticket a matter of more deliberation and care than the purchase of a ticket for railway transportation, and that the passenger buying the steam-ship ticket might be presumed to have read its conditions, and to have consented, so as to make them part of the contract of transportation. From *Van Toll v. Southeastern R. Co.*⁴ it would appear that a distinction exists between carriers and warehousemen in regard to limiting liability by notice on the back of a ticket given for baggage stored with them. The plaintiff, a passenger by the Southeastern Railway, on arriving at the terminus at London bridge, deposited in the cloak-room there a bag containing wearing apparel and jewelry to a value considerably exceeding £10, receiving as a voucher a ticket, on the back of which was printed a notice that the company would "not be responsible for any package exceeding the value of £10." A similar notice printed in large characters was posted in the office, but plaintiff swore that she did not see it. She was not asked whether she had seen the notice on the back of the ticket, but she produced it when she applied for the bag, which had part of its contents abstracted while in custody of defendants. It was held that the company having received the deposit, not as carriers, but as ordinary bailees, upon the terms contained in the printed notice, (which plaintiff, having the means of ascertaining, must be taken to have consented to be bound by,) was not responsible for the loss. While a distinction between warehousemen and carriers is suggested, the opinions of the judges appear to rest more upon the fact of actual knowledge of the notice and assent thereto by plaintiff. In *Zunz v. Southeastern Ry. Co.*⁵ the plaintiff took a ticket of the Southeastern Railway Company to be conveyed as a passenger from London to Paris, on which was printed "The Southeastern Railway Company is not responsible for loss or detention of or injury to baggage of the passenger traveling by this

¹ 6 Ry. Cases, 87.

² See, also, *Austin v. Manchester R. Co.*
10 C. B. 454.

³ 57 N. Y. 1.

⁴ 104 E. C. L. 75, (12 C. B. N. S. 75.)

⁵ L. R. 4 Q. B. 539.

through ticket, except while the passenger is traveling by the Southeastern Railway Company's trains or boats." The plaintiff did not sign this memorandum, and his portmanteau was lost between Calais and Paris on a French railway. Held, that the company was protected by the condition on the ticket: COCKBURN, C. J., said: "However it may appear in practice to hold a man liable by the terms and conditions which may be inserted in some small print upon the ticket, which he only gets at the last moment after he has paid his money, and when, nine times out of ten, he is hustled out of the place at which he stands to get his ticket by the next comer; however hard it may appear that a man shall be bound by conditions which he receives in such a manner, and, moreover, when he believes that he has made a contract binding upon the company to take him, subject to the ordinary conditions of the general contract, to the place to which he desires to be conveyed; still, we are bound, on the authorities, to hold that when a man takes a ticket with conditions on it he must be presumed to know the contents of it, and must be bound by them." But this case appears to be overruled by a subsequent case,¹ wherein the lord chancellor declared that he was unable to find the authorities relied upon by Chief Justice COCKBURN.

PASSES. The acceptance of a pass, indorsed, "The person accepting this free ticket assumes all risks, etc., and expressly agrees, etc.," forms a contract on the part of the passenger with the company. "It seems necessary," said the court, "that the word 'agrees' means the concurrence of two parties, and that the act of acceptance binds the acceptor as fully as his hand and seal would."² "Applying for a pass or free ticket, taking it, and having it in his possession some six or eight hours before the starting of the train in which he was to go, and having his attention expressly called to its terms, taken in connection with the fact found by the jury that he was at the time of the accident actually riding on this ticket, if not conclusive as a legal presumption, would at least be evidence that he assented to the terms indorsed upon the ticket, from which a jury would be authorized to imply such assent."³

COMMUTATION TICKETS—REGULATIONS. The courts have also found little difficulty in inferring assent to the conditions printed upon the ticket, where such conditions were not limitations of liability, but reasonable regulations intended to govern the conduct of the passenger, and where the ticket, instead of being for a single passage, was a season or a commutation ticket; thus a passenger purchased a "season ticket" entitling him to transportation for a certain time between two points on the defendant's railroad at a considerable reduction from the regular rate of fare. Upon the ticket were indorsed the following conditions: "This ticket is not transferable, nor will any allowance be made to the within-named in case it may not be used for the whole time for which it was issued. It is subject to inspection at any time by the conductor; a refusal to comply will necessitate collection of full fare each time. It is good only for a continuous passage between the points named. If lost or mislaid, it will not be replaced by the company. The holder will please return when renewing." Upon the face of the ticket the words "for conditions see other side" were printed in small capitals. Plaintiff, having lost his ticket, refused to pay fare, and was accordingly ejected from the train. It was held (1) that plaintiff was bound to know the conditions, and the law would presume that he did so. *Semble*, that he would be bound to inform himself of the regulations of the company, even if not indorsed on the ticket. (2) That even if actual notice to him were necessary, the conditions in this case were printed in a sufficiently conspicuous manner to have

¹ Henderson v. Stevenson, L. R. 2 Sc. & Div. 470.

² Perkins v. New York Cent. R. Co. 24 N. Y. 202.

³ Wells v. New York Cent. R. Co. 24 N. Y. 183.

attracted the attention of a man of ordinary prudence. (3) That the conditions were lawful, reasonable, and proper regulations, and not an attempt to limit the liability of the defendants as common carriers. (4) And that plaintiff was therefore excluded from the train and cannot recover.¹

A passenger by railway upon a commutation coupon ticket, conditioned to be shown to the conductor on every trip, and to be void if the coupons were detached by any other person than the conductor, was proceeding to detach a coupon himself, and being warned by the conductor that he would not accept the coupon if he did so, persisted, offered the conductor the coupon, refused to show the ticket, and profanely dared the conductor to put him off. It was decided that this justified the conductor in ejecting him, and that the passenger's subsequent tender of the ticket and detached coupon before the ejection was complete, but in an insulting, profane, and boisterous manner, would not have restored the passenger's right to complete the journey.²

Where a ticket had upon it a condition that it was to be "used on or before" the twenty-sixth of September, and was presented and accepted on that day, but after the expiration of the 26th, the journey not being ended, the passenger was ejected for not having a proper ticket, it was held that the ejection was wrongful. When the ticket was presented on the 26th, it was "used," and passenger was entitled to ride to the end of his journey.³ Assent has also been inferred from acceptance of a receipt given by a mercantile agency for an account presented to them, and left with them for collection.⁴ But where a non-transferable ticket contained a condition that, "I failing to comply with this agreement, either of these companies may refuse to accept this ticket," it was held that this did not give the conductor the right to take the ticket up, only to refuse to receive it for passage.⁵

In all the foregoing cases the acceptance of a receipt or a ticket was a matter of some deliberation, wherein the acceptor had ample time to ascertain the nature of the contract as expressed on the ticket accepted.

CASES WHEREIN THE LIABILITY WAS HELD NOT LIMITED. The general principle of law is well established that a ticket for passage upon a railroad car or a steam-boat does not of itself create a contract between the carrier and the passenger. Such tickets are rather tokens or vouchers that passengers have paid their fare, and are entitled to seats in the car or berths in the steam-boat. As such they are to be surrendered when the passenger's right to the seat or berth is recognized.⁶ In this respect tickets differ from bills of lading, which are well-recognized commercial contracts, and known to be such by all who receive them. Therefore it is that persons receiving bills of lading and other similar commercial instruments are conclusively presumed to know that they contain the terms upon which the property is to be carried, and to have assented thereto.⁷ But there is no such conclusive presumption as to tickets. The question as to the character in which the paper is received is to be determined by all the surrounding circumstances. It is to be determined by the nature of the transaction, and not by the fact that the words "domestic bill of lading" or some such phrase may be printed on the ticket.⁸ By these

¹ *Cresson v. Philadelphia & R. R. Co.* 11 Phila. 597; S. C. 32 Leg. Int. 313.

² *Louisville, N. & G. S. R. Co. v. Harris*, 9 Lea, 180; S. C. 42 Amer. Rep. 668. See, also, *Bland v. Southern Pac. R. Co.* 55 Cal. 570; S. C. 36 Amer. Rep. 59; *Hoffbauer v. Delhi & N. W. R. Co.* 52 Iowa, 312; S. C. 3 N. W. Rep. 121; S. C. 35 Amer. Rep. 278.

³ *Auerbach v. New York Cent. & H. R. R. Co.* 42 Amer. Rep. 200; 89 N. Y. 281.

⁴ *Sanger v. Dun*, 47 Wis. 615; S. C. 3 N. W. Rep. 388.

⁵ *Post v. Chicago & N. W. R. Co.* (Neb.)

1883, 15 N. W. Rep. 225; S. C. 9 Amer. & Eng. R. Cas. 345.

⁶ *Nevins v. Bay State Steam-boat Co.* 4 Bosw. 226; *Logan v. Hannibal & St. J. Ry. Co.* 12 Amer. & Eng. R. Cas. 142, (Mo. 1882;); *Quimby v. Vanderbilt*, 17 N. Y. 315.

⁷ *Detroit & M. R. Co. v. Fire & Marine Bank*, 20 Wis. 127; *Morrison v. Phillips & C. Con. Co.* 44 Wis. 405; *Strohn v. Detroit & M. R. Co.* 21 Wis. 561; *Grace v. Adams*, 100 Mass. 508; *Kirkland v. Dinsmore*, 62 N. Y. 175.

⁸ *Madan v. Sherrard*, 10 Jones & S. 355;

authorities the distinction drawn by Judge DYER in the principal case between tickets and bills of lading, and the presumptions to be drawn from the receipt of each, is well sustained.

The injustice of considering tickets purchased in the usual manner to be contracts between the carrier and the passenger, is made clearly apparent from the remarks of the supreme court of Virginia.¹ "Usually the ticket office is opened but a short time before the train leaves, and the ticket has to be exhibited to the baggage master before he will check for the baggage, so that a passenger has scarcely any time to read the ticket before the train leaves. In general he only asks for a through ticket to the place of his destination, and relies upon the agent to give him the proper tickets, and if the passenger had time to look at it for an instant in this case, she would have seen that it was a ticket issued by the railway from Richmond to the White Sulphur Springs. She would hand it to the porter or a friend to get checks for her baggage, while she would look out for a seat. It is returned with the checks, upon which are the letters 'W. S. S.' She feels assured all is right, and the next moment the train is moving. If she reads what is on the ticket at all, it is because she has nothing else to do, or from mere curiosity, and she reads for the first time: 'Responsibility for safety of person or baggage, on each portion of the route, confined to the proprietors of that portion alone.' She would say to herself, that was not my understanding when I asked for a through ticket, and when I paid for it to the railroad agent, and when they gave me a check for my baggage, which by the letters on it indicated that they undertook to carry it through to the White Sulphur Springs. But the train has been bearing her away from Richmond with the speed of twenty miles an hour, and it is too late to turn back."

The discussion in *Henderson v. Stevenson*² is also to the point: "Plaintiff purchased at defendant's office in Dublin a ticket from Dublin to Whitehaven on one of defendant's steamers. This ticket had on the face these words only, 'Dublin to Whitehaven,' without referring to the back of the ticket, on which was the following indorsement: 'This ticket is issued on the condition that the company incur no liability whatever in respect of loss, injury, or delay to the passenger, or to his or her luggage, whether arising from the act, neglect, or default of the company, or their servants, or otherwise. It is also issued subject to all the conditions and arrangements published by the company.'" Plaintiff did not read the indorsement, and his attention was not directed to it by any one. The steamer was wrecked on the passage, entirely through the negligence of the captain and crew, and all of plaintiff's luggage lost. He sued in Scotland for its value and obtained judgment, which was taken on appeal to the house of lords by the company, which held again the plaintiff was not bound by the condition in the ticket. Said the lord chancellor: "It seems to me that it would be extremely dangerous, not merely with regard to contracts of this description, but with regard to all contracts, if it were to be held that a document complete upon the face of it can be exhibited as between two contracting parties, and without any knowledge of anything aside from the mere circumstance that upon the back of the document there is something else printed, which has not actually been brought to, and has not come to, the notice of one of the contracting parties, that contracting party is to be held to have assented to that which he has not seen, of which he knows nothing, and which is not in any way ostensibly connected with that which is printed or written upon the face of the contract presented

Blossom v. Dodd, 43 N. Y. 269; *Baltimore & O. R. Co. v. Campbell*, 36 Ohio St. 647; 3 Amer. & Eng. R. Cas. 246; *Wilson v. Chesapeake & O. R. Co.* 21 Grat. 675; *Sunderland v. Westcott*, 2 Sweeney, 230; *Indianapolis & C. R. Co. v. Cox*, 29 Ind. 360;

Prentice v. Decker, 49 Barb. 21; *Limburger v. Westcott*, 49 Barb. 283; *Brown v. Eastern R. Co.* 11 Cush. 97.

¹ *Wilson v. Chesapeake & O. R. Co.* 21 Grat. 674.

² L. R. 2 Sc. & Div. 470.

to him. I am glad to find that there is no authority for such a proposition in any of the cases that have been cited." Lord CHELMSFORD said: "The lord chief justice, in the case of *Zunz v. Southeastern Ry. Co.* L. R. 4 Q. B. 544, which has been referred to, thought himself bound by the authorities to hold that when a man takes a ticket with conditions printed on it he must be presumed to know the contents of it and to be bound by them. I was extremely anxious to be referred to the authorities which influence the judgment of the lord chief justice, but, although numerous authorities were cited by Mr. Maynard, none of them go to the length of establishing that a presumption of assent is sufficient. Assent is a question of evidence, and the assent must be given before the completion of the contract. The company undertake to convey passengers in their vessels for a certain sum. The moment the money for the passage is paid and accepted, their obligation to carry and convey arises. It does not require the exchange of a ticket for the passage money, the ticket being only a voucher that the money has been paid; or, if a ticket is necessary to bind the company, the moment it is delivered the contract is completed, before the passenger has had an opportunity of reading the ticket, much less the indorsement." Lord HATHERLY said: "I agree with the observation that was made by my noble and learned friend, Lord CHELMSFORD, that the money having been paid, and the ticket having been taken up, the contract was completed, upon the ordinary terms of conveyance, for himself and his luggage, unless it can be made out that he had entered into any special contract to the contrary. A ticket is in reality in itself nothing more than a receipt for the money which has been paid."

The courts in the following instances refuse to infer assent to a contract limiting liability from the receipt of a ticket having such limitation printed upon it:

Where the ticket had printed upon it the following: "Passengers are not allowed to carry baggage beyond \$100 in value, and that personal, unless notice is given and an extra amount paid at the rate of a price of a ticket for every \$500 in value." On the journey one of the trunks was lost containing wearing apparel and articles of ordinary baggage to the value of \$690, and other property to the value of \$730. Held that, notwithstanding the memorandum printed on the ticket, the plaintiff is entitled to recover the value of his trunk, and of such portion of the contents as is customarily known and carried as travelers' baggage, although worth more than \$100, and though nothing extra was paid for baggage exceeding that sum in value.¹

A passenger bought a ticket to a place, but desired to "stop over" *en route* at an intermediate point. The ticket had printed upon it, "Good for this day only," but the ticket agent assured the passenger that the conductor would issue a "stop-over check." This the conductor, in obedience to orders from his superiors, refused to do, but left the ticket in possession of the passenger who "stopped over," and, proceeding on his journey at a later day, presented it to the conductor, who refused to accept it and demanded fare. This was refused, and the passenger was ejected. Held, that the ticket was not the sole evidence of the contract to carry the passenger, but that evidence of the conversation with the ticket agent might be introduced, under which the passenger had a right to stop over, and might recover for his expulsion.²

Defendant's agent came into a railway car in which plaintiff was traveling and called for baggage. He received the check for plaintiff's trunk, with directions as to its delivery, and marked on a blank receipt the date, number of check, place of delivery, which he handed to plaintiff without anything being said as to its contents. The car was dimly lighted, so that plaintiff, when he was seated, could not have read the receipt, and, without looking at it o

¹ *Nevins v. Bay State Steam-boat Co.* 4 F. Cas. 226.

² *Burnham v. Grand Trunk R. Co.* 6 Me. 301.

reading it, he put it in his pocket. The receipt was marked upon the margin, "Domestic bill of lading," and purported to be a contract relieving defendant from or limiting its liability in certain specified cases, and, in particular, limiting its liability, save in case of a special contract, to \$100. The court refused to charge as a matter of law that the delivery of the receipt created a contract for the carriage of the trunk under the terms printed thereupon, and limited defendant's liability to the amount specified, but submitted the question to a jury.¹

The plaintiff's daughter, accompanied by another young girl, delivered a check for a trunk to a transfer company in New York, with directions to carry it to her home in Brooklyn. She was about to leave the office, when, at her companion's suggestion that she ought to have a receipt, she returned to the desk, and demanded one of the clerk, who handed her a receipt, in which it was stipulated that the company should not be liable to an amount exceeding \$100, unless a special contract was made. The trunk and contents were worth \$300, but nothing was said as to its value; neither did she read the receipt or see its contents until after the loss of the trunk. Held, that the notice was ineffectual.²

Another case decides that there is no presumption of law that a passenger on a railroad has read a notice limiting the liability of the railroad corporation for baggage, printed on the back of a passenger check, delivered with his ticket, and having on its face the words, "Look on the back," whereon notice of such limitation of liability was printed in small type. Nor is there any presumption of notice of similar limitations contained in placards posted in the cars. But the court expressly refrained from adjudicating "upon the broader question, whether a limitation of the liability of the railroad company as to the amount and value of the baggage of passengers transported on the road may not be effectually secured by the delivery of a ticket to the passenger, so printed in large and fair type, on the face of the ticket, that no one could read the part of the ticket indicating the place to which it purports to entitle him to be conveyed without also having brought to his notice the fact of limitation as to liability for his baggage."³

The agent of an expressman entered a railway coach, took up the checks of a passenger desiring his valise delivered, and gave such passenger a receipt for the check, having a special contract limiting the the expressman's liability printed on one side of such receipt. The special contract was printed in very small type on the side of the receipt, and the passenger could not read it in the dimly-lighted car. Held, that his acceptance of it did not make it a contract between himself and the expressman. The court expressly distinguished such a receipt from a bill of lading: "As to bills of lading, and other commercial instruments of like character, it has been held that persons receiving them are presumed to know, from their uniform character and the nature of the business, that they contain the terms upon which the property is to be carried. But checks for baggage are not of that character, nor is such a card as was delivered in this instance. It was, at least, equivocal in its character. In such a case a person is not presumed to know its contents or to assent to them."⁴

In another case it was sought to establish a contract limiting a liability by delivering a ticket containing a notice of limitation to a German unable to read English. "The plaintiff was a German," said the court, "wholly ignorant of the English language. It is therefore the case of a passenger uninformed of the terms and conditions of the notice appended to the ticket, on which the defendants rely for protection. * * * It in truth would be ab-

¹ Madan v. Sherard, 73 N. Y. 330.

² Woodruff v. Sherrard, 9 Hun, 322.

³ Malone v. Boston & W. R. Co. 12 Gray,

392. See, also, Verner v. Sweitzer, 32 Pa. St. 213.

⁴ Blossom v. Dodd, 43 N. Y. 269.

surd to hold, under the circumstances, the company exempted from their common-law responsibilities on the foot of a special or express contract, when he was ignorant of the terms of the proposed agreement. Granting that tickets in any case, without more, may be considered as evidence of a special agreement, it is surely not exacting too much to require the carrier to have his tickets printed and his advertisements made in a language which the passenger can understand, or that he should be required to explain to him the nature and effect of the proposed agreement." This case very well illustrates the disposition of railroad companies to shirk and evade all the responsibilities incident to their duties, while at the same time grasping every dollar and advantage they can claim as compensation for doing those duties. While in this case the company took the passenger's money, and assumed the care and carriage of his baggage, they tried to rid themselves of responsibility by stipulating on the ticket that "All baggage at the risk of the owner thereof; the proprietors binding themselves to no charge or care of the same whatever." This case is directly in support of Judge DYER's decision in the principal case.¹

In *Hopkins v. Westcott*,² A., a passenger on a railroad, delivered to an expressman a metallic check which he had received for his trunk, as baggage, so that the expressman might obtain the trunk and deliver it to the residence of A., who received from the expressman at the time a piece of paper on which the number of the check was indorsed, and which contained a printed notice that the expressman would "not become liable for merchandise or jewelry contained in baggage received upon baggage checks, nor for loss by fire, nor for an amount exceeding one hundred dollars upon any article, unless specially agreed for in writing on this check-receipt, and the extra risk paid therefor." * * * And the owner hereby agrees that Westcott Express Company shall be liable only as above." It was held that A. was chargeable with actual notice of the contents of this paper, and bound thereby. But the court evidently was unwilling to allow this ruling to release the expressman from liability for the value of the baggage in excess of \$100, for it held that the words "any article" did not mean the trunk or piece of baggage and its entire contents in gross, but meant any article contained in the piece of baggage, and there being no single article worth more than \$100, judgment was rendered for the value of all the articles together, aggregating \$700. This case was discussed by Chief Justice CHURCH,³ who said: "I infer that the learned judge who delivered the opinion in [*Hopkins v. Westcott*] intended to decide that something short of an express contract will suffice to screen the carrier from his common-law liability, and that a notice personally served, which could be read, would have that effect. The attention of the court does not seem to have been directed to the distinction between such a notice and a contract. The delivery and acceptance of a paper containing the contract may be binding, though not read, provided the business is of such a nature, and the delivery is under such circumstances, as to raise the presumption that the person receiving it knows that it is a contract containing the terms and conditions upon which the property is received to be carried. In such a case it is presumed that the person assents to the terms, whatever they may be. This is the utmost extent to which the rule can be carried without abandoning the principle that a contract is indispensable."⁴

In the United States courts, the rule has always been very strongly laid down. Thus, in *The Pacific*,⁵ it was decided that in the federal courts, while the rule is that a common carrier may limit his liability, except for negligence,

¹Camden & A. R. Co. v. Baldauf, 16 Pa. St. 67; but see *Fibel v. Livingston*, 64 Barb. 179.

²6 Blatchf. 64.

³*Blossom v. Dodd*, 43 N. Y. 263.

⁴*Id.* 268, 269.

⁵*Deady*, 17.

by *express* agreement, nothing short of an express stipulation will constitute such an agreement, it must not depend upon implication or inference or conflicting evidence, and mere notice to the shipper is not sufficient. Where the drayman of the shipper, on the delivery of a package, takes a receipt from the freight clerk of the ship for the same, marked, "Not accountable for contents," this of itself does not constitute an agreement limiting the carrier's liability; it is a mere *ex parte* proposition on the part of the carrier after receiving the package, to which there must be direct and unequivocal evidence of the assent of the shipper to exonerate the carrier.

In *New Jersey Steam Nav. Co. v. Merchants' Bank*,¹ speaking of the right of the carrier to restrict his obligation by a special agreement, the supreme court of the United States said: "It by no means follows that this can be done by an act of his own. The carrier is in the exercise of a sort of public office, from which he should not be permitted to exonerate himself without the assent of the parties concerned; and this is not to be implied or inferred from a general notice to the public limiting his obligation, which may or may not be assented to. He is bound to receive and carry all the goods offered for transportation, subject to all the responsibilities incident to his employment, and is liable to an action in case of refusal. If any implication is to be indulged from the delivery of the goods under the general notice, it is as strong that the owner intended to insist upon his rights and the duties of the carrier, as it is that he assented to their qualification. The burden of proof lies on the carrier, and nothing short of an express stipulation by parol or in writing should be permitted to discharge him from duties which the law has annexed to his employment."

Commenting upon this case, Mr. Justice DAVIS said: "These considerations against the relaxation of the common-law responsibility by public advertisements, apply with equal force to notices having the same object, attached to receipts given by carriers on taking the property of those who employ them into their possession for transportation. Both are attempts to obtain, by indirection, exemption from burdens imposed in the interests of trade upon this particular business. It is not only against the policy of the law, but a serious injury to commerce, to allow the carrier to say that the shipper of merchandise assents to the terms proposed in a notice, whether it be general to the public, or special to a particular person, merely because he does not expressly dissent from them. If the parties were on an equality in their dealings with each other, there might be some show of reason for assuming acquiescence from silence; but in the nature of the case this equality does not exist, and therefore every intendment should be made in favor of the shipper when he takes a receipt for his property, with restrictive conditions annexed, and says nothing, that he intends to rely upon the law for the security of his rights. It can readily be seen, if the carrier can reduce his liability in the way proposed, he can transact business on any terms he chooses to prescribe. The shipper, as a general thing, is not in a condition to contend with him as to terms, nor to wait the result of an action at law in case of refusal to carry unconditionally. Indeed, such an action is seldom resorted to, on account of the inability of the shipper to delay sending his goods forward. The law, in conceding to carriers the ability to obtain any reasonable qualification of their responsibility by express contract, has gone as far in this direction as public policy will allow. To relax still further the strict rules of the common law applicable to them, by presuming acquiescence in the conditions on which they propose to carry freight, when they have no right to impose them, would, in our opinion, work great harm to the business community."²

¹ 6 How. 244.

² *Railroad Co. v. Manuf'g Co.* 18 Wall 230.

As a result of the foregoing cases, the following conclusions may be stated: In making a contract with a passenger for his transportation, a railway company may limit its liability, but, as a general rule, not for its negligence. Mere notice that the railway company will not be liable in certain named contingencies will not suffice to create a contract of limitation; there must be a clear, unequivocal assent on the part of the passenger. Such assent may be express or implied, but it will not be implied (1) where the notice is obscurely printed, or printed in a language which the passenger cannot understand; (2) where the nature of the transaction is not such as necessarily to charge the passenger or shipper with knowledge that the paper contains a contract; *e.g.*, the acceptance of a bill of lading would be a transaction carrying notice of a contract printed upon it, but the acceptance of a ticket with conditions printed on it would not be such a transaction; nor (3) would a contract be created where the circumstances attending the delivery of the ticket repel the idea that the acceptor had knowledge of, or in fact assented to, the contract printed thereupon.

Tested by these considerations, the decision of the principal case upon this point appears to be unquestionably sound.

ADELBERT HAMILTON.

LAIRD v. CITY OF DE SOTO.¹

(Circuit Court, E. D. Missouri. May 8, 1885.)

1. MUNICIPAL CORPORATIONS—LIABILITY OF SUCCESSOR—INVALID REORGANIZATION.

An invalid reorganization of an incorporated town as a city cannot affect its corporate existence; and where the invalid reorganization is dissolved by a decree in *quo warranto* proceedings, and a valid city organization, composed of the same people and trustees, is created in the place of the town, the new organization becomes liable, as the successor of the town, upon its bonds.

2. SAME.

Where in such a case the city contains a trifle less land within its limits than the town, that fact does not affect its liability.

3. PRACTICE—MOTION FOR REHEARING.

Query, whether a motion for a rehearing of a motion for a new trial should be entertained.

Petition for a Rehearing of a Motion for a New Trial.

For opinion upon motion for a new trial, see 22 FED. REP. 421.

Mills & Flitcraft, for plaintiff.

Joseph A. Williams, for defendant.

MILLER, C. J. This motion for a rehearing of the motion for a new trial is a very unusual proceeding, and I have great doubt whether it ought to be entertained, even if the motion ought originally to have been granted; but looking over the case again, in the light of the pleas and agreed statement of facts, I am still of opinion that the defendant, the city of De Soto, is the lawful successor of the town of De Soto, which issued the bonds on which the judgment was rendered. The fact that the present city contains 400 acres less land in its lim-

¹ Reported by Benj. F. Rex, Esq., of the St. Louis bar.

its than the former town, does not change the liability of the people who constitute that town, nor does the change from a town to a city, nor does the decree attempting to abrogate the city organized in 1877, destroy the obligations of the town of 1872. When these people became organized into a city which is now in existence, that city, as the successor of the town of 1872, is liable for the debts of the former.

The motion for a rehearing is overruled.

HOLCOMB v. HOLCOMB.

(Circuit Court, E. D. Michigan. May 25, 1885.)

PRACTICE—RIGHT TO DISCONTINUE ACTION—REFERENCE—SET-OFF—STATUTE OF LIMITATIONS.

Where defendant pleaded a set-off, and the case was referred, and the referee had reported a balance due to the defendant, and the statute of limitations had run against an original suit upon his claim, *held*, that the plaintiff had no right to discontinue the action.

On motion of defendant to set aside an order of discontinuance, and for judgment against the plaintiff on report of referee. Plaintiff's declaration was upon the common counts. Defendant pleaded the general issue and notice of set-off. The case was referred to a referee, and the referee found and reported that the plaintiff was indebted to the defendant in the sum of \$26,531.49. Notice of the filing of this report was given plaintiff as required by law, and no objections were filed, but plaintiff entered an *ex parte* order discontinuing the case.

De Forest Paine, for the motion.

George S. Hosmer, for plaintiff.

BROWN, J. The right of a plaintiff, in an ordinary action at law, to discontinue his suit at any time before verdict, upon the payment of costs, is beyond question, and is expressly recognized in the practice of the circuit courts of this state. Circuit court rule 26. Whether this right exists in cases where the defendant has filed a set-off, and claims an affirmative judgment in his favor, as by statute he is entitled to do, is an open question, and the authorities are in hopeless conflict. The principal cases are collated in *Merchants' Bank v. Schulenberg*, 19 N. W. Rep. 741, in which the justices of the supreme court of this state were equally divided in opinion. Without expressing a decided opinion upon the general subject, it is sufficient for the purposes of this case to hold that where a cause is referred to a referee, and the referee has found a balance due to the defendant, and the statute of limitations has run against an original suit upon his claim, (as it is conceded to have done in this case,) the plaintiff ought not to be permitted to discontinue without the assent of the de-

fendant. Having provoked a conflict with defendant, and lulled him into the belief that he was willing to test his claim by way of set-off to his own demand, he should not be allowed, after a virtual defeat, to reap the fruits of a victory. The examination before the referee is a substantial trial of the action. Edw. Ref. c. 1, § 3. His report is equivalent to the verdict of a jury, (chapter 4, §§ 18-28,) and has the same effect by way of estoppel upon the parties. Chapter 27, § 10; Bigelow, Estop. c. 18. Now, the right to discontinue terminates with a verdict, and we think, by analogy, with the filing of the referee's report.

The motion is therefore granted.

HIGGINS and another v. McCREA.

(Circuit Court, N. D. Ohio, E. D. 1885.)

CHICAGO BOARD OF TRADE—RULE 26, § 6—CROSS-ACTION—CONTRACTS.

The cancellation by a broker of original contracts, without the substitution of others, as provided for by rule 26 of the Chicago board of trade, and without the previous knowledge or consent, or subsequent ratification, of the party for whom he is acting, will not be binding on such party, and he will be entitled to recover the "margin" advanced by him to the broker on the original contracts in a cross-action, in an action by the broker for the amount expended by him on such contracts.

At Law.

This case was tried to a jury at the April term, 1885, of above-named court, Hon. JOHN BAXTER, circuit judge, and Hon. MARTIN WELKER, district judge, presiding.

The plaintiffs claimed that they had expended, for and at defendant's request, \$31,644.31, for which they demanded a judgment. The evidence adduced in support of this claim showed that the plaintiffs were commission merchants and brokers, residing and doing business in the city of Chicago, and members of the Chicago board of trade; that the defendant authorized and requested them, in May, 1883, to buy large quantities of pork and lard for his account, to be delivered during the month of August, 1883. Pursuant to said order of defendant, the plaintiffs entered into several contracts in their firm name with other brokers, and members of said board of trade, for, and on defendant's account and risk, for August delivery, 3,000 barrels of pork and 2,000 tierces of lard, and duly notified him thereof. These contracts were made under the rules prescribed by the said board of trade. The evidence tended to show that the defendant was familiar with these rules, and tacitly consented to be bound by them.

The plaintiffs appeared as witnesses on the trial of the case and produced their books and exhibits, and it appeared, by their admis-

sions as such witnesses, that soon after the consummation of said contracts—to-wit, in the latter part of May and early in June following—the plaintiffs, in adjusting profits realized and losses sustained in other transactions in which they were personally liable, canceled said original contracts of purchase, made for defendant, and released the contracting parties from all further liability thereunder. They did this by what they termed “set-off” contracts. They claimed the right to do this under the sixth section of rule 26 of said Chicago board of trade, which rule is as follows:

“RULE XXVI.

“Sec. 6. In case any member of the association, acting as a commission merchant, shall have made purchases or sales by order and for account of another, whether the party for whom any such purchase or sale was made shall be a member of the board of trade or otherwise, and it shall subsequently appear that such trades may be offset and settled by other trades made by said commission merchant, he shall be deemed authorized to make such offset and settlement, and to substitute some other person or persons for the one from or to whom he may have purchased or sold the property originally: provided, that in case of such substitution the member or firm making the same shall be held to guaranty to his or their principal the ultimate fulfillment of all contracts made for account of such principal which have been so transferred, and shall be held liable to said principal for all damages or loss resulting from such substitution.”

On cross-examination the plaintiffs conceded that at the time of canceling said contracts they did not then, or at any time thereafter, *specifically* substitute any other party or parties in place of the original parties with whom they had contracted for defendant's account; nor did they notify the defendant of said cancellation and alleged substitution of other parties. And, on being asked who they considered bound to the defendant after such cancellations, for the deliveries contracted to be made, answered that they (the plaintiffs) only were so bound. They claimed, in explanation, that they had contracts for August delivery of pork and lard in quantities sufficient to enable them to make good the amounts agreed to be delivered to the defendant, and that they had in fact received from other parties the amount of pork and lard bought for defendant's account, and tendered the same to him pursuant to the terms of the original contracts, which he declined to receive and pay for. The plaintiffs further conceded that their books did not show what contracts took the place of those originally made for defendant, and which they afterwards canceled. The defendant had, at plaintiffs' repeated requests, advanced them on these contracts \$19,897 to indemnify them against loss. These advances were called “margins.” When the defendant declined on August 1st to accept and pay for the pork and lard tendered by plaintiffs, they sold the same in the usual way on defendant's account at a loss, in excess of the “margins” advanced, of \$31,644.31, the sum claimed in their petition.

The defendant pleaded that said contracts were gambling trans-

actions,—bets on the future prices of pork and lard,—that no actual delivery of those articles was contemplated; and that said transactions were contrary to public policy and illegal under the laws of Illinois; and again, for a second defense, that plaintiffs canceled said original contracts, without specifically substituting others, and, without his knowledge or consent, sold and disposed of the property for their own use and benefit; and that at no time after June 16, 1883, did the plaintiffs hold any contracts whatever for defendant's account. Defendant filed a counter-claim, and asked a judgment for the sums advanced by him as margins, viz., \$19,897, with interest, etc.

C. C. Bonney and F. J. Wing, for plaintiffs.

S. Burke and W. B. Sanders, for defendant.

The court, through Judge BAXTER, after disposing of the defense that said transactions were of a gambling character, in directions as to the law, to which no exceptions were taken by either party, proceeded to further instruct the jury as to the other defense, substantially as follows, to-wit:

"If you shall, under the instructions heretofore given, find that the contracts in question were made for legitimate purposes, and were therefore valid, you may, for the purposes of this case, assume that the the sixth section of the twenty-sixth rule of the Chicago board of trade, read in evidence in this case, authorized the plaintiffs to cancel the contracts first made for defendant's account, and substitute other and like contracts with other parties in lieu thereof, and that the defendant understood its force and effect, and consented to be governed thereby in his transactions with plaintiffs; and still the plaintiffs will not be entitled to recover in this action, because they did not, in fact, substitute other contracts with other parties, as required by the said rule, in such manner as that the defendant could enforce them, or proceed against the vendors therein for damages in a case of a failure to comply therewith.

"The cancellation of the original contracts in the manner conceded in the testimony, that is to say, without the specific substitution of other contracts, and without the previous knowledge or consent of the defendant, or his subsequent ratification, absolves him from all liability thereunder, and entitles him to recover back from the plaintiffs the amounts advanced as 'margins,' with interest thereon from the respective payments."

Under these instructions, the jury found in favor of the defendant upon the causes of action set forth in plaintiffs' petition, and against the plaintiffs upon the counter-claim set up in the answer, in the sum of \$22,062.42.

A motion for a new trial has been filed, but has not yet been disposed of.

McKINNEY v. ROSEN BAND and another.

(Circuit Court, S. D. New York. May 19, 1885.)

FRAUD ON CREDITORS—DIVERSION OF PARTNERSHIP FUNDS.

Mercantile partners, though knowing that they are in some difficulty, so long as they have a reasonable expectation of extricating themselves, cannot be charged with a fraudulent diversion of their property from firm creditors, for simply drawing money upon private account, within small and reasonable limits, whether for the payment of their individual expenses, or the payment of their honest individual obligations.

Motion to Vacate Attachment.

S. F. Kneeland, for plaintiff.

Angel & Ward, for defendants.

BROWN, J. The defendants, being in business as copartners under the name of J. & B. Rosenband, on the third of January, 1885, made a general assignment for the benefit of their creditors. In this action, brought upon partnership claims, the plaintiff, on the twelfth of February, 1885, obtained an attachment in the state court against the property of both defendants, on the ground that they had "assigned, secreted, and disposed of property with intent to defraud their creditors." The suit having been removed into this court, a motion is now made to dissolve the attachment.

The only act proved, alleged to be fraudulent as to creditors, is the appropriation by Jacob Rosenband, one of the defendants, of the sum of \$748.50 from the funds of the firm during the month of December, 1884, to pay an individual debt of \$355, owed by him to one Blumberg; \$300 to pay a just debt of his to his sister Jennie; and \$93.50, a part of her wedding expenses. The entire drafts of the defendant Jacob Rosenband from the firm during the year, including the three items last mentioned, amount to \$2,252.94. The other defendant during the year drew on individual account \$2,321.03, and these drafts were not unreasonable, considering their business.

It is urged that the use of firm moneys for the payment of individual obligations is a violation of the rights of copartnership creditors in the distribution of the joint and separate estates,—a right which exists upon the equitable marshaling of assets; and that such an appropriation of the firm moneys is, therefore, legally fraudulent as to them. I have much doubt whether section 636 of the New York Code, by the words "with intent to defraud his creditors," is designed to include any such injury to the mere equitable rights of the firm creditors prior to a condition of known and acknowledged insolvency, or prior to some act, such as an assignment of their property, which in itself calls for an equitable marshaling of assets as between the joint and individual creditors. Until actual insolvency arises, no such right practically exists. In the present case, it is not so clearly established that the insolvency of the firm, and its inability to continue

its business, were so far known in December, at the time when the small payments in question were made, as to justify the application of the principle contended for to this case. The mere fact, subsequently proved, that they were at the time insolvent, is not sufficient. Merchants, though knowing that they are in some difficulty, so long as they have a reasonable expectation of extricating themselves, cannot be charged with a fraudulent diversion of their property from firm creditors, for simply drawing moneys upon private account, within small and reasonable limits, whether for the payment of their individual expenses, or the payment of their honest individual obligations.

The attachment in this case should be dissolved.

JEFFRIES v. LAURIE.¹

(Circuit Court, E. D. Missouri. May 1, 1885.)

1. ATTORNEY AND CLIENT—RETENTION OF MONEY COLLECTED—PRACTICE.

Where an attorney collects money for his client in a suit instituted here, and keeps it, the court will make an order requiring him to pay it over, and, if he fails to obey, will take measures to prevent his further practicing before it.

2. SAME—DISPUTE AS TO FEES.

Where, in such a case, the attorney claims that his client is indebted to him for his services and expenses in a certain sum less than the amount collected, and the client denies that the amount claimed is due, the court will order the surplus over what the attorney claims to be paid over.

3. SAME—PARTNERSHIP—PARTIES.

Where an attorney brought suit for a client while in partnership with another attorney, and, after the firm was dissolved, collected a large sum and retained the whole, and more than five years after said dissolution said client applied for an order to compel his attorney to pay over the amount collected, *held*, that the fact that there is an unsettled account between the said partners, involving a comparatively small sum, is not a sufficient ground for refusing the order against the attorney who made the collection alone.

Motion for an Order to Compel Joseph S. Laurie to pay over money collected for C. S. Jeffries, administrator.

On March 25, 1885, this matter was called up, and Judge BREWER said:

"Evidently there has been some misunderstanding between the counsel and the court as to the *status* of this case, and I have been waiting for some days in the hope that counsel on both sides would be present, so that I could put the thing in proper shape for disposition. I see they are here this morning, in response to the notice that I required to be given yesterday.

"The facts in this case, as they are disclosed by the papers here, are these: "Jeffries, administrator of Kennedy, deceased, brought an action against an insurance company, and recovered judgment here. The case was taken to the supreme court. While the case was pending there, the attorney or

¹ Reported by Benj. F. Rex, Esq., of the St. Louis bar.

attorneys for Jeffries compromised that judgment and received payment. Jeffries, by his attorney, Mr. Crews, filed a motion, setting up the original judgment and payment, and saying that Joseph S. Laurie, counsel for Mr. Jeffries, the administrator, received between nine and ten thousand dollars in that settlement; that Mr. Laurie is an officer of this court, an attorney admitted to practice here; that he has failed to pay over the money thus collected to his client, and asks the order of this court that he be directed to pay it over. That petition was filed by Mr. Jeffries, through Messrs. Crews & Bragg, as attorneys, some time last spring.

"To the petition setting forth these facts, Mr. Laurie filed an answer setting forth as one matter that there had been no adjustment of his fees; that the fee was contingent, etc. I think that cuts no figure in the case, even if his compensation as counsel was contingent and unsettled. An attorney may not withhold the entire proceeds of the collection to enforce an adjustment as to the amount of fees which he claims; he is bound to pay over that about which there is no dispute, and then afterwards settle that as to which there is a dispute. But beyond that, he says that it would be unjust to proceed in this summary way to compel the payment of the money thus collected, because, as stated, Mr. Crews, the attorney of Mr. Jeffries in this present motion, a son-in-law of Mr. Jeffries, (though I do not think that makes any difference,) was a partner of Mr. Laurie when this suit of Jeffries, administrator, against the insurance company was commenced; that they were partners in business as attorneys; that there were difficulties which arose between them; that there is an unsettled account between them; that Mr. Crews collected a fee of \$20,000 belonging to the partnership of Crews & Laurie, which he pocketed and refused to account for; and that this proceeding on the part of Mr. Jeffries, administrator, is in bad faith, in that it is against Mr. Laurie, one of the firm, and not against Crews & Laurie, the partners; and that the object is by a summary order to compel one member of this firm to pay over moneys which had been collected by the firm, leaving that member of the firm to his action for an accounting with his partner, who has, according to the statement, collected \$20,000—double the amount of this judgment—and pocketed it. That, briefly, is an outline of the answer set forth by Mr. Laurie.

"Last fall, when I was here, the papers were handed to me, (there was no testimony accompanying them,—just simply the petition and answer,) on the claim made by Mr. Crews for the petitioner, that, notwithstanding these facts set up in this answer of Laurie, they were entitled, as of right, to this order. Well, I looked it over, and it seemed to me that they were not entitled to such an order, if the facts were as stated in the answer, and I returned the papers, saying that there must be testimony presented to me as to the facts in the case. No testimony has yet been taken; no traverse, in any shape or form, has been filed to this answer of Mr. Laurie. So it stands to-day, upon the statement of Jeffries, administrator, that one of the firm of Crews & Laurie has this amount of money which he has failed to pay over, and the counter-statement of Mr. Laurie not denying the receipt of that nine or ten thousand dollars, but saying that it is a proceeding in bad faith introduced by his former partner to use the summary processes of this court to compel him to pay over money collected by the firm, and avoid an adjustment of the partnership account between himself and his former partner.

"Well, we might as well look at these questions squarely; there is no use of trying to avoid them. If an attorney collects money and fails to pay it over, he is an officer of this court, and it is the duty of this court to make an order requiring him to pay over that money, and, if he fail to pay it over, then take such measures as will prevent his further practicing in this court. It is the simple question whether an officer of this court discharges his duty by his client. And if this proceeding had come from an entire stranger to this transaction, I should have suggested to him to make both members of

the firm parties defendant,—let them both appear,—and if the fault rest with one, why that one alone would be summarily punished. But whether that is true, and it is equally true that, independent of any relations between the partners, any client may maintain his action against either one of the partners for money collected by the firm, whether he was the individual that received the money or not; yet when it comes to these summary proceedings in which the court does not simply determine the legal rights, but endeavors to preserve the character of the bar, and to see that no wrong is done by one of them to a third party, or by one of them to a brother lawyer, then the question comes in a little different shape.

"Of course, I know nothing about this case except what appears upon the statements; and if it be true that Mr. Crews has collected \$20,000 belonging to the firm of Crews & Laurie, and that Mr. Laurie has collected \$10,000, a judgment which, less the fees, goes to the petitioner, then I shall say that such petitioner must proceed against the firm of Crews & Laurie, and that neither one of them will be released from the obligation to pay by reason of any differences between themselves, or absolved from the reach of the order of this court directing payment, or any subsequent remedies which are proper in the case; that is, I do not propose in this summary way to use the process of the court to perfect or prevent an adjustment of partnership affairs between the partners. If it is a mere excuse, a mere sham, a mere pretense, which Mr. Laurie has put forth to avoid payment, that fact must be developed, and when developed it will be disregarded without hesitation. If it is an honest claim,—if it is true that Mr. Crews, the son-in-law of the petitioner, has in his pocket twenty thousand dollars of fees belonging to the firm of Crews & Laurie,—then I would not allow Mr. Crews' father-in-law or a friend of his to take a summary order against Laurie alone; I would let him have an order against Crews & Laurie, and enforce it against both. That is the way it impressed me before and still impresses me. So I state to them that there seems to be a misunderstanding in regard to it, and that I shall want testimony to show what the facts are. Of course, there is no dispute as to what the facts are of record; but there has been no formal traverse to this reply of the respondent, Mr. Laurie. Counsel are both here, and I wish to put the matter in such a shape that there shall be a formal traverse, making up the issues, so that each party can make his showing of the case. So far as this defense is concerned, it is a matter which Mr. Laurie must establish if it is traversed. As I said, there has been no traverse, and so the order will be that the petitioner can traverse within three days, for it requires but a little time to traverse this return or answer of Mr. Laurie; and that within 10 days thereafter Mr. Laurie may, by affidavit or deposition, present his testimony as to the facts in that answer or return of his; and the petitioner can have ten days thereafter, in a similar way, to file affidavit or take testimony by deposition as to his understanding of the facts; and then I will have the matter before me as to whether this return is a mere excuse to avoid the obligation a lawyer owed to his client, or whether it is an honest presentation of a dispute as between partners. Until I know those facts, I do not feel like making any peremptory order in the matter. As there seems to have been some misunderstanding, counsel were notified to be here this morning, that they might have the matter stated when they were both present."

The answer having been traversed and affidavits filed, the following opinion was delivered.

T. B. Crewes, for plaintiff.

Joseph S. Laurie, pro se.

BREWER, J., (orally.) In this case of *Jeffries v. Laurie* counsel are not present, but as I shall leave the city to-night or in the morning

ing I must dispose of it. It is one of those cases that it is not very pleasant for the court to consider or decide. It is an application by Mr. Jeffries, as administrator *de bonis non* of the estate of Allen A. Kennedy, for an order on Joseph S. Laurie, who was his attorney in a case brought against the Mutual Life Insurance Company of New York, to pay over moneys collected by him, and belonging to the administrator. There has been a long and bitter controversy, which it is not necessary to enter upon, but it appears that in 1879 Mr. Laurie, as the attorney of the administrator, settled the case which was then pending against the insurance company, and received in cash \$9,401. None of that money has ever been paid to the administrator. Mr. Laurie claims that there was an agreement for a contingent fee for one-half the amount collected, and that he went to the expense of two trips to New York city, amounting to \$130, leaving, according to his own statement, \$4,635.50 belonging to the administrator, and which, on or before the tenth of March, 1880, he stated that he had in his hands for the administrator, and which he was ready to pay over upon the signing of a receipt by him prepared, and recognizing the correctness of the contingent fee. The counsel for Mr. Jeffries in this application is Mr. Crews. At the inception of the litigation against the insurance company Mr. Crews and Mr. Laurie were partners. That partnership was dissolved in 1873 or 1874. There has never been a settlement between those gentlemen of their partnership affairs, and Mr. Laurie resists this application, on the ground, as alleged in his answer, that his partner had collected from Franklin county large fees, amounting to \$15,000 or \$20,000, and failed to account with him, and that this proceeding by the administrator, the father-in-law of Mr. Crews, was at the instigation of Mr. Crews, and simply an attempt in this summary way to prevent a settlement of the partnership affairs between the two partners; Mr. Crews being, as claimed, financially irresponsible.

This matter has been here some time, and in the fore part of this term I directed both parties to file affidavits within a certain time, and make such showing as they saw fit to do with reference to the actual affairs,—the underlying facts; and the testimony has been presented. I do not think, from that testimony, that Mr. Laurie has any interest in the Franklin county fees; and, while there is an unsettled partnership account between them, the amount involved therein is nothing like the \$9,000 received and retained by Mr. Laurie. Of course, in this summary way no partnership affairs can be settled; and, while it would have relieved this case of all embarrassment if the administrator had filed this application against both Messrs. Crews and Laurie, yet I do not think that there is developed enough in the testimony to justify Mr. Laurie in retaining this \$4,635, which unquestionably belongs to the administrator. If there was, and there is, an unsettled partnership account between Messrs. Crews and Laurie, the matters involved therein were closed more

than five years ago, and they ought not now to relieve from the duty resting upon a lawyer, holding money which unquestionably belongs to his client, to pay that money over. If he had any claim to retain that, or any portion of that amount, as between himself and his partner in legal business, it was his duty to have proceeded to an accounting, and have had the matters between himself and his partner adjusted long before this. Whatever might have been the results of such an accounting, from the testimony here it seems very clear in my mind that there would not have been found due Mr. Laurie anything, certainly nothing like the \$9,000 by him received.

The relations between a lawyer and his client are not those merely of debtor and creditor. The lawyer collects money of his client, to speak, in trust for him, and it is the duty of the court, in upholding the character of the profession, to see that moneys so collected are paid to the client. It would be very hard, indeed it would be a lasting disgrace to the profession, if, when a lawyer collects money belonging to his client, the only remedy which the client has is a suit at law against the lawyer. There is here a dispute as to whether the counsel were entitled to the contingent fee of half the collection.

It is so. Such dispute the court is not called upon to settle in any summary proceeding. But there is no dispute but that \$4,635—one-half of the \$9,000—does belong to the estate,—to the administrator; and there is no question but that the person who received that money—the whole \$9,000—is Mr. Laurie. I do not think that it lies in his mouth to say, having received that money—the whole of it,—“I won't pay over the half which I admit belongs to the administrator, simply because I have got an unsettled partnership transaction with my former partner in the practice.” He has had time enough to settle that. He admits the amount of \$4,625 is due the administrator; and while Mr. Creech may be the son-in-law of the administrator, (and, as is very proper, there is a great deal of bitterness of feeling and a good many things that do not reflect much credit on either party,) yet the administrator stands here without the money; Mr. Laurie having received and admitting that some of it is unquestionably due, and disputing only as to whether such amount should not be paid by his former partner.

As I said in reference to this case at the first of this term, the court will not attempt to settle partnership affairs between members of the bar by any summary proceedings of this nature; but it is also true that they will not permit a failure of such partners to make a settlement, especially when that failure is prolonged for many years, to become an excuse to either partner for holding moneys concededly belonging to the client.

I think justice requires that an order should be made—a summary order—for the payment of this undisputed amount into court for the benefit of the administrator; and the order will be that Mr. Laurie, within 90 days, pay to the clerk of this court the sum of \$4,635.

*In re ZIEBOLD.*¹

(Circuit Court, D. Kansas. May 14, 1885.)

CONSTITUTIONAL LAW — "DUE PROCESS OF LAW" — KANSAS ACT OF MARCH 7, 1885—HABEAS CORPUS.

A person imprisoned for refusing to appear or testify before a county attorney in a proceeding under the eighth section of the act of the legislature of Kansas, approved March 7, 1885, being an act amendatory of the act prohibiting the manufacture and sale of intoxicating liquor, is restrained of his liberty without "due process of law," within the meaning of the fourteenth amendment to the constitution of the United States, and entitled to be released on *habeas corpus* issued by the United States circuit court.

The petitioner was committed to jail for refusing to testify before the county attorney, and sued out a writ of *habeas corpus*. Further facts appear in the opinion.

B. P. Waggener and Thomas P. Fenlon, for petitioner.

W. D. Gilbert, Co. Atty., for the State.

FOSTER, J. The petitioner in this case alleges that he is imprisoned and deprived of his liberty, in violation of the provisions of the fourteenth amendment to the constitution of the United States. That amendment provides, among other things, that no state shall deprive any person of life, liberty, or property without "due process of law." The federal courts and judges are authorized, among other causes, to issue the writ of *habeas corpus* for a person in custody and imprisoned in violation of the constitution, or of a law or treaty of the United States. Rev. St. § 753. The jurisdiction of this court to issue the writ and hear the case depends upon the truth of the averments in the petition, and therefore the jurisdiction of this court and the main question are so inseparably connected together that the determination of one must determine the other. It appears from the petition and the return to the writ that the petitioner is held in custody and imprisoned by the sheriff of Atchison county by virtue of a commitment issued to him by the county attorney, committing the petitioner to the county jail for refusing to obey a subpoena issued by said attorney, and refusing to be sworn and give testimony before him in proceedings under the eighth section of the act of the legislature of Kansas, approved March 7, 1885, being an act amendatory of the act prohibiting the manufacture and sale of intoxicating liquors, &c. It is admitted that the county attorney acted and proceeded in accordance with the provisions of the law; and the question is fairly presented whether a person imprisoned for refusing to appear or testify before the county attorney in such proceedings is restrained of his liberty without "due process of law," within the meaning of the constitution of the United States.

The first matter of inquiry is the meaning of the term "due process of law." If it has no broader meaning than process prescribed by act of the legislature, it is the end of the case. But such a construc-

¹ Reported by Robertson Howard, Esq., of the St. Paul bar.

tion would render the constitutional guaranty mere nonsense, for it would then mean no state shall deprive a person of life, liberty or property, unless the state shall choose to do so. It has repeatedly and uniformly been adjudicated that the terms "due process of law" and "law of the land" have a broad and comprehensive meaning, and have originated in that great bill of rights, *Magna Charta*, and operate as a restriction on each branch of civil government. *Murray's Lessee v. Hoboken Land Co.* 18 How. 272; *Davidson v. New Orleans*, 96 U. S. 107; *Ex parte Virginia*, 100 U. S. 346. In the last-cited case the court, speaking of these words in the constitution, says:

"They have reference to the actions of a political body denominated a state, or by whatever instruments or in whatever modes that action may be taken. A state acts by its legislative, its executive, or its judicial authorities. It cannot act in no other way. The constitutional provisions, therefore, must mean that no agency of a state, or of the officers or agents by whom its powers are executed, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever by virtue of a public position under a state government deprives another of property, life, or liberty, without due process of law, violates * * * the constitutional inhibition, and, as he acts in the name of and for the state, and is clothed with the state's power, his act is that of the state. This must be so, or the constitutional provision has no meaning."

These words in the constitution have been defined in various terms by different courts, but all the definitions tend to the same general idea. Mr. Justice EDWARDS has said in one case:

"Due process of law undoubtedly means in the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights." *Westervelt v. Gregg*, 12 N. Y. 209.

Mr. Justice JOHNSON, of the supreme court of the United States, says:

"As to the words from *Magna Charta*, incorporated in the constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at last settled down to this: That they were intended to secure the individual from the arbitrary exercise of the power of government, unrestrained by the established principles of private rights and distributive justice." *Bank of Columbia v. Okely*, 4 Wheat. 235.

This definition has been several times approved by that court. *S. v. Cruikshank*, 92 U. S. 554; *Hurtado v. California*, 110 U. S. 505; *S. C. 4 Sup. Ct. Rep.* 111.

Judge COOLEY says:

"Due process of law in each particular case means such an exertion of the powers of government as the settled maxims of law permit and sanction, under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs." *Cook v. United States*, 100 U. S. 572; *Const. Lim.* 356; *Wynehamer v. People*, 13 N. Y. 432; *Taylor v. Porter*, 145 U. S. 104.

With this general principle established, and the meaning of the words defined, the difficulty remains of applying the principle to the particular case. In the case of *Hurtado v. California*, *supra*, Justice MATTHEWS, in a very learned and exhaustive opinion, speaks of

for the court, (Mr. Justice HARLAN dissenting,) held that the words "due process of law," in this amendment, do not necessarily require an indictment by a grand jury in a prosecution by a state for murder; and in *Munn v. Illinois*, 94 U. S. 115, the chief justice says:

A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of the municipal law, and is no more sacred than any other. * * The law itself, as a rule of conduct, may be changed at the will or even the mere whim of the legislature, unless prevented by constitutional limitations."

And in *Walker v. Sauvinet*, 92 U. S. 90, the court held that this amendment did not guaranty the right of trial by jury in all cases in state courts. These cases tend to establish the doctrine that the rules and forms known to the common law, in judicial proceedings affecting the ultimate rights of the party, are not necessarily guaranteed to a person under the constitution, and it has long been established that the remedial process of the law may be altered at the will of the legislature, so it does not impair a vested right, or cut off a remedy altogether. The words "due process of law," then, must be directed at something deeper than the mere rules and forms by which courts administer the law. They evidently were intended to guarantee and protect some real and substantial right to life, liberty, and property as the ultimate result, and probably to prohibit any arbitrary and oppressive proceedings by which the individual is deprived of either. There are certain things that are manifestly obnoxious to this provision. For instance, the property of one person cannot be taken from him for private use and given to another, even though he is compensated for it, and is given every opportunity to be heard through all the forms and solemnity of judicial proceedings. *Taylor v. Porter*, 4 Hill, 149; *Cooley*, Const. Lim. 357. Nor can a person be condemned without an opportunity to be heard and make his defense, although he may be guilty. When we go beyond a few well-defined landmarks in this direction, we are upon a broad sea of uncertainty. In any case, we have to inquire if the person is imprisoned in violation of a due course of legal proceedings, according to those established maxims, rules, and forms established for the protection of private rights against the arbitrary exercise of power, unrestricted by established principles applicable to such rights, and to the administration of justice.

By section 1, art. 3, of the constitution of Kansas, the judicial power of the state shall be vested in certain courts therein named, and such other courts, inferior to the supreme court, as may be provided by law. Undoubtedly the legislature has the constitutional right to establish inferior courts, and define and limit their jurisdiction, powers, and proceedings. Judicial powers may be conferred without expressly naming the tribunal a court, and these powers may be confined to one or more subjects of adjudication. They may be very limited or very extensive in their scope, and I am not prepared

to say that a ministerial officer may not be selected to perform these judicial functions. The coroner of a county has both ministerial and judicial duties to perform. County commissioners have to some extent both duties imposed on them, and probably the same is true of a sheriff of a county. That the duties imposed on the county attorney under the eighth section of the act in controversy are judicial powers must be admitted. He is to hear and determine, compel the attendance of witnesses by subpoena and attachment, and to punish them for disobedience to his writs. The power of courts acting within their jurisdiction to punish witnesses for contempt is a necessary and admitted power. It goes with the judicial attribute, and without it a court is powerless to enforce its orders or protect its dignity. The serious objection urged to the law under consideration is that the county attorney is the public prosecutor for the state. He is the informer against offenders, and on his information parties charged with crime are put upon trial. The judicial powers conferred on him by this law are not to hear and determine matters in which he stands indifferent between the parties, but are given to aid and assist him in the performance of his ministerial duties, and have no other purpose, making the judicial powers auxiliary and subordinate to the ministerial duties, and are given to him as a means by which he can more successfully procure evidence to institute and carry on prosecutions; and in this respect the powers given him are very great, and in the hands of an unscrupulous man, stimulated by animosity or avarice, could be used as an instrument of sore oppression.

On the mere unsworn statement of any person, and without any case pending before him, it is made his duty, under severe penalties, to set this judicial machinery in motion, with no restriction as to whom he shall summon before him to testify, and no limitation but his own good will as to the scope of his investigation; fortified by a power to exact answers to any questions he sees proper to ask, almost despotic in its severity. The witness must answer the questions, or go to jail for contempt. It may be answered that such is the case in all trials, but there is this wide difference: In trials in open court on issues made up between the parties, the relevancy and competency of the question is submitted to the court, and argument of counsel is heard; the rights of the witness, as well as the party, are discussed, considered, and decided. And what makes the power given by this law still more dangerous and objectionable, is that the law makes it to the interest of the judge (county attorney) to find evidence of an offense committed. He is offered a reward to excite his vigilance and cupidity, and threatened with severe punishment if he fails or neglects to faithfully perform these duties. In some respects these duties are similar to those of a grand jury and court combined. The proceedings are preliminary, to ascertain if there is probable cause to charge the party with the offense. But a grand juror may be challenged on the ground that he is prosecutor or complainant or

a witness upon a charge coming before him for investigation. St. 1879, p. 842, § 79. Nor can a grand jury issue a subpoena for a witness, or decide the competency of a question asked, or punish for contempt. These matters rest with the court. Sections 85-88. This provision of the act of March 7, 1885, is a strange combination of judicial and ministerial duties, aided with rewards and penalties, and, so far as I have been able to ascertain, is an anomaly to all the judicial proceedings known to the land. It attempts to unite the judicial with the executive branch of civil government; and when the law-making power and the power which declares and applies, as well as that which executes and administers the law, are united and vested in one person or body, it becomes a despotic and not a constitutional government.

Are these objections sufficient to justify a court in the conclusion that a person restricted of his liberty under these proceedings is deprived of his liberty without "due process of law?" I am compelled to answer in the affirmative. I believe no precedent can be found for the application and use of judicial power in the manner and for the purpose contemplated by this act, and that it is a dangerous innovation on the fixed maxims and rules in the administration of justice, established for the protection of private rights. In this conclusion I am also sustained by a recent decision of Judge CROZIER, of the First judicial district of this state. *In re Beller*, 1 Kan. Law J. 229.

It is therefore ordered that the petitioner be discharged from custody.

STATE OF TENNESSEE v. HIBDOM.

(Circuit Court, M. D. Tennessee. April Term, 1885.)

COURT-MARTIAL—TRIAL OF SOLDIER FOR MURDER—JURISDICTION OF STATE COURT—ACT OF MARCH 3, 1863.

A state court in Tennessee has no jurisdiction to try a party for a murder alleged to have been committed on February 22, 1865, while the accused was a soldier in the United States army, as such offense is triable under the act of congress of March 3, 1863, by court-martial.

Habeas Corpus.

Andrew McClain, U. S. Dist. Atty., and *W. B. Stokes*, for petitioner.

J. A. Jones, for the State.

KEY, J. The petitioner, who is the defendant in this case, is under indictment, in the circuit court of Cannon county, Tennessee, for the murder of James Gibson. He has been arrested and imprisoned in the jail of Cannon county under the charge. He insists that he is not subject to the jurisdiction of the state court, because, at the time

the murder is alleged to have been committed, he was a soldier in the federal service, and that a court-martial had the sole and exclusive jurisdiction of his case.

The thirteenth section of the act of congress of March 3, 1863, enrolls and calls out the national forces, enacts "that in time of insurrection, or rebellion, murder, assault and battery with an intent to kill, manslaughter, mayhem, wounding by shooting or stabbing with an intent to commit rape; and larceny, shall be punishable by the sentence of a general court-martial or military commission, when committed by persons who are in the military service of the United States and subject to the articles of war; and the punishment for such offenses shall never be less than those inflicted by the laws of the state, territory, or district in which they may have been committed." 12 St. 736.

In the case of *Coleman v. Tennessee*, 97 U. S. 510-520, Justice FIELD, delivering the opinion of the court, says this section "does not make the jurisdiction of military tribunals exclusive of the state courts. It does not declare that soldiers committing the offenses named shall not be amenable to punishment by the state courts. It simply declares that the offenses shall be 'punishable,' not that they shall be punished by the military courts; and this is merely saying that they may be thus punished." 97 U. S. 513, 514. But, notwithstanding the principle thus enunciated, the court goes on to say:

"In denying to the military tribunals exclusive jurisdiction, under the provision in question, over the offenses mentioned, when committed by persons in the military service of the United States, and subject to the articles of war, we have reference to them when they were held in states occupying, as members of the Union, their normal and constitutional relations to the federal government, in which the supremacy of that government was recognized, the civil courts were open and in the undisturbed exercise of their jurisdiction. When the armies of the United States were in the territory of independent states banded together in hostility to the national government, making war against it,—in other words, when the armies of the United States were in the enemy's country,—the military tribunals mentioned, had, under the laws of war, and the authority conferred by the section named, exclusive jurisdiction to try and punish offenses of every grade, committed by persons in the military service. Officers and soldiers of the armies of the Union were not subject, during the war, to the laws of the enemy, or amenable to his tribunals for offenses committed by them. They were answerable only to their own government, and only by its laws, as enforced by its armies, could they be punished." 97 U. S. 515.

But it is insisted on behalf of the state that the state of Tennessee had been restored to its normal condition in the Union at the time the offense is charged to have been committed; that a military governor had been appointed by the president of the United States, and the machinery of the state government was friendly to and acknowledged the federal government and constitution as paramount to its authority. The case of *Coleman v. Tennessee* decides this point. The murder in *Coleman's Case* was alleged to have been committed

March 7, 1865. 97 U. S. 510. The murder with which the petitioner is charged, is alleged to have been committed on the twenty-second day of February, 1865. The supreme court of the United States say, in the *Coleman Case*:

"The fact that when the offense was committed for which the defendant is indicted, the state of Tennessee was in the military occupation of the United States, with a military governor at its head appointed by the President, cannot alter this conclusion. (That is that the state courts had no jurisdiction.) Tennessee was one of the insurgent states forming the organization known as the confederate states, against which the war was waged. Her territory was enemy's country, and its character in this respect was not changed until long afterwards."

I think the *Coleman Case* is decisive of all the points made in the case under consideration, and have come to the conclusion that the petition made on behalf of the state of Tennessee to quash or dismiss the writ of *habeas corpus*, because the facts stated in the petition are not sufficient to authorize its issuance, must be overruled.

NOTE.—Upon the hearing of the petition upon its merits, it appeared that the petitioner was a federal soldier at the date of the alleged murder. The judge thereupon ordered that he be released from his imprisonment, and the order was carried into execution.

WOONSOCKET RUBBER CO. v. CANDEE and others.

(Circuit Court, D. Connecticut. May 19, 1885.)

PATENTS FOR INVENTIONS—TAP FOR RUBBER BOOTS—NOVELTY.

Patent No. 103,594, granted May 31, 1870, to Francis Flynn, for an improved tap for rubber boots, held void for want of patentable novelty.

In Equity.

B. F. Thurston, Causten Browne, and Chas. E. Mitchell, for complainant.

J. S. Beach and C. R. Ingersoll, for defendant.

WALLACE, J. The complainant's bill in this suit alleges infringement of the patent granted May 31, 1870, to Francis Flynn, assignor complainant, for an improved tap for rubber boots. The answer sets up that the alleged invention was known to and used by others in this country prior to the invention of Flynn, and that there was no invention in the improvement in view of the prior state of the art. The patentee states in his specification that the improvement "consists in the construction of the double sole or tap," which on the rubber boots and shoes theretofore made "terminated abruptly where the heel begins, which is objectionable, because in walking the greatest strain comes directly across this point, so that after a few months'

wear the tap becomes started from the sole, making the boot useless. He proceeds:

"It is my object to remove this objectionable feature, which I accomplish by extending the tap, B, under the shank of the boot, A, and instead of narrowing the tap abruptly at the points, *b, b*, rounding gradually, narrowing down to the point, *b'*, as clearly shown in figure 2 of the drawing. The tap and main sole of the boot and shoe are united while in a plastic state, and then vulcanized together. By constructing the tap in this manner the strain brought upon it at the points, *b*, will be partly taken up by the extension and relieved to such an extent that it will be impossible to start off the tap; besides, it will make the boot just as serviceable as one with an entire double sole, though it can be made at less cost."

The claim is:

"A rubber tap sole for rubber boots, formed with a long and pointed shank extending under the shank of the boot or shoe, said tap sole being fastened to the main sole by vulcanization, substantially as and for the purpose described."

If the invention thus claimed is an extra rubber sole of the form shown and fastened to the main sole as described, without regard to the thickness of the extra sole, want of novelty is established by the prior art. Soles of this form, and fastened to the main sole in the manner described in the specification, were made by the Hayward Rubber Company at Colchester, Connecticut, in 1865, and by the New Brunswick Rubber Company at New Brunswick, New Jersey, in 1866.

The fact is not disputed that shoes like the Exhibit Hayward Game Shoe were made by the Hayward Rubber Company, in 1865, and the proofs show satisfactorily that shoes like the exhibits "New Brunswick, 1866," and "New Brunswick, 1860 to 1870," were made by the New Brunswick Rubber Company in 1866 and subsequently. The extra sole on the shoes of the first two of these exhibits is of the specified form of the tap sole of the patent, and that in the shoes of the last exhibit, although rounded under the shank instead of being brought to a sharp point as in the patent, is sufficiently pointed to perform the functions of the patented tap, and, for all practical purposes, is of the required form. The complainant insists, however, that these taps are not anticipations of the patented taps, because they are not of requisite thickness, and that nothing is a tap sole, within the meaning of the patent, which is not an extra sole having a definite degree of thickness, relatively, to the main sole. In the language of the complainant's counsel, "nothing is a tap sole, within the meaning of this patent, except an extra sole, which is so heavy or stiff, relatively, to the weight or stiffness of the main sole, that, if it terminate abruptly at about the place where the shank begins, the bending strain produced by walking will be localized there by reason of the difference of pliability between the part covered by the extra sole and the shank of the boot or shoe." In the language of complainant's expert: "Whenever in a rubber boot a difference in the thickness of the sole is such as to tend to separate the tap or break the sole, then the extension

the superimposed thickness on the sole to a point of rest under the shank is the invention of Flynn and covered by his patent."

There is nothing in the specification which, in terms or by inference, makes the thickness of the tap sole a constituent of the invention. It is there suggested that a tap is started from the main sole by the strain in walking, which comes across the place where the main sole joins the shank, and that one of the advantages of the improvement is that the tap will make the boot as serviceable as one with an entire double sole. As the strain in walking may be affected by the thickness of the main sole, as well as by that of the tap sole, and as, in any event, the thickness of the tap will only effect a difference in degree, the first of these suggestions throws no light upon the point. The other is equally indecisive, because a double sole is only an extra sole, and if it gives additional wearing capacity to the boot, may be of any degree of thickness.

The essence of the invention is in the form or shape of the tap sole, by which the objections to the old tap sole are obviated. When it is ascertained what is meant by a tap sole, as that term is addressed to those skilled in the art to which the invention appertains, only remains to consider whether, in other respects in form and mode of fastening, the anticipating article negatives the novelty of the invention. The expert for the complainant has given a satisfactory definition of the term "tap sole," and one which is supported by the testimony of other witnesses. He states, in substance, that while there are variations in thickness, absolutely or relatively to the main sole, the tap sole must always have "sufficient thickness to form a practical additional thickness to the main sole, which will endure practical wear and service," and "add to the wearing capacity of the main sole."

Applying this test to the exhibits introduced by the defendant, which have been referred to, they embody the tap sole of the patent. They are quite distinguishable from the "rough soles" cemented to the main sole, such as are shown by the exhibits known as "Carew's World's Fair." They are extra soles of sufficient thickness to impart a very sensible degree of stability to the main sole and add to the wearing capacity of the shoe. While these soles were adapted only to prevent slipping, that circumstance is not material, except to suggest a closer scrutiny of the articles in order to see if they really have features which were not designedly adopted. The exhibit "New Brunswick, 1860 to 1870," shows very clearly a practical extra sole of requisite thickness. The extra soles of the New Brunswick Rubber Company are as thick, absolutely and relatively to the main sole, as those shown in some of the boots of the complainant's manufacture, which are stamped by complainant as patented under the patent in suit. This circumstance is not controlling, but it is significant as tending to show the construction which the complainant, by its officers, has sometimes placed upon its own patent, and that the thin-

ness of the extra sole has not always been regarded by them as material.

As has been stated, there is nothing in the specification to indicate that the invention is for anything but a tap sole, without regard to thickness, absolutely or relatively, to the main sole. But the proofs show that the very thing the patentee designed to remedy—the tendency of the tap to start at the place where it joins the shank—the defect in thin soles as well as in thick, and existed in the thin extra soles which were in use, before the date of Flynn's improvement. These extra soles were no thicker than those of the "Hayward Man Shoe" and the "New Brunswick, 1866," according to the testimony of complainant's witness Mr. Jaquith. Some were probably thinner. The invention was as applicable to those thin soles as to the thick ones, though doubtless the defect to be remedied was more serious when thick soles were used.

Referring again to the statement of the complainant's expert that the invention is found "whenever the thickness of the sole is such as to tend to separate the tap or break the sole," (the form of the patent being adopted,) it follows that it is anticipated by the thin extra soles of the form and fastened to the main sole, as shown in the exhibits mentioned.

Finally, it may be said that, although Flynn's form is more advantageous when used in a thick extra sole than when it is used in a thin one, his improvement is one of degree only; and, in view of the fact that this form, as applied to thin extra soles, was old, the improvement is destitute of patentable novelty.

A decree is ordered for the defendant.

LALANCE & GROSJEAN MANUF'G CO. v. UNITED STATES STAMPING

(Circuit Court, D. Connecticut. May 19, 1885.)

PATENTS FOR INVENTIONS—NOVELTY—BISCUIT-PANS.

Patent No. 96,605, for "an improved mode of uniting small biscuit-pans together in clusters, consisting in providing the pans with horizontal flanges and riveting them," held void for want of novelty.

In Equity.

Charles E. Mitchell, for complainant.

Charles R. Ingersoll, for defendant.

WALLACE, J. The invention covered by the claim of the patent in suit as described in the specification "relates to an improved mode of uniting small biscuit pans together in clusters, and consists in providing the pans with horizontal flanges around the tops, and joining them together by lapping the flanges and riveting them." Bis

s assembled and united in clusters were old when the patentee made them. Several modes had been adopted for uniting them. was by assembling the pans on a sheet of tin in the desired continuity, each pan being riveted through the bottom to a sheet. Another mode was by riveting the pans to a strip or bar of metal instead of sheet, and uniting the several strips or bars. In other instances sheet and bar were dispensed with, and the pans were united by rivets through their sides near the rim; and in others still, the edge of one pan was lapped and seamed over the edge of the adjacent pan.

It is testified to, and seems probable, that single flat-flanged biscuit pans, made of tin, were old. The patent contemplates pans of sheet-metal. But if flanged pans were new when made of tin or sheet-metal they were old when made of cast-iron. As shown in the patent of Waterman, granted April 5, 1859, pans of cast-iron were united in clusters by a cast connection, which was substantially a flange and the rim of each pan, extending from the rim of each pan to the flange upon the rim of the adjacent pan. This being the prior state of the art, the defense of want of novelty is fatal to the patent. The ordinary skill and judgment of the mechanic, with the prior structure before him, would suggest that such pans could be made with flanges and united by rivets through the flanges, if he desired to avoid inserting a rivet through the body of the pans. The Waterman structure alone would suggest the mode of the patent. As the flanges of the structure were united in the process of casting and could not be separated when sheet-metal was to be used, the obvious way to unite pans in sheet-metal would be by lapping and riveting or soldering the flanges.

The bill is dismissed.

PATTEE PLOW CO. v. KINGMAN and others.¹

(Circuit Court, E. D. Missouri. March 2, 1885.)

PATENTS—NOVELTY.

Letters patent No. 187,899, issued to J. H. Pattee, February 27, 1877, for an improvement in cultivators' axles, are void for want of novelty.

CLAIM—UNDUE EXPANSION OF ORIGINAL CLAIM.

The second claim of J. H. Pattee's reissued patent No. 6,080, for an improvement in cultivators, expands the original patent beyond legal limits, and is void.

CLAIM—INFRINGEMENT.

Letters patent No. 174,684, issued to T. W. Kendall, March 14, 1876, for a pivoted runner attached to a cultivator, is not infringed by a jointed runner which cannot be kept out of contact with the ground by the draught of the team.

Reported by Benj. F. Rex, Esq., of the St. Louis bar.

v.23f,no.15—51

In Equity.

This is a suit for the alleged infringement of four patents owned by the complainants, viz.: Letters patent No. 138,148, issued to H. Pattee, January 21, 1873; reissue No. 6,080, dated October 6, 1880, and being a reissue of original patent No. 124,218, issued to J. H. Pattee, March 5, 1872; original patent No. 174,684, issued to T. Kendall, March 14, 1876; and original patent No. 187,899, issued to H. Pattee, February 27, 1877,—all for improvements in cultivated land. Patent No. 135,148 was left out in making up the proofs, so that the case stood for hearing on the other three.

Reissue No. 6,080 is for an improvement in tongueless cultivated land. The second claim, which is the only one here in question, is as follows:

"The axle, A, hinged to the wheel spindle or draught plate, B, B, so that the wheels are retained in the line of progression by the draught of the animal when one is in advance of the other, substantially as described, and for the purpose specified."

Complainant's counsel urged that this second claim is the same as the first claim of the original patent, which is as follows:

"The axle, A, having plates, B, hinged to the wheel spindle plates, C, so that the wheels are retained in the line of progression when one is in advance of the other, as set forth."

On the part of the defense it was insisted that this second claim had been enlarged by the omission of the plates, B, so as to make the peculiar axle, any axle, and that the operation stated in the claim was changed, if not defeated, by the insertion in the reissue specification of the words, "The draught animals may be attached *directly* by any suitable device," the direct hitch leaving either or both wheels to get out of the line of progression. In complainant's machine the beams are attached to the draught-plates, C, of the original patent, which became the draught-plates, B, of the reissue. The defendant's machine had the direct hitch, with the draught-plates at the extreme sides of the machine, and the plow-beams attached to the horizontal portions of the axle. The description in the reissue was more in accordance with the construction of the machine shown in the 1880 patent, which was dropped out, than it was in accordance with the original, so far as the devices of this claim are concerned, thus leaving, as was contended, the claim enlarged by omissions from the original claim, and by additions to the specification.

Infringement was also claimed as to the first and second claims of the Kendall patent, which were for runners pivoted to the wheel spindles or axle, so as to be held out of contact with the ground when the draught of the team when the machine was used for field operations, and to be held in contact with the ground when the plows were suspended from the axle for transportation. The defendant's machine was provided with hinged runners, which were folded up

and for field operations, and folded down and locked for transportation.

The Pattee patent, No. 187,899, is for a method of constructing the arch in parts, which construction was shown to be old in coupling-yokes for cultivator beams, in trusses, and various other devices.

John R. Bennett and George Harding, for complainant.

West & Bond, for defendants.

TREAT, J. Reissued patent 6,080 of 1874, second claim of which under consideration, has, as to that claim, expanded the original beyond legal limits. Therefore said reissued patent is void to the extent claimed, wherein the defendant is alleged to have infringed.

2. As to Kendall patent No. 174,684 there is no infringement.

3. As to Pattee patent of 1877, No. 187,899, said patent is void, there being no novelty of invention therein that is patentable.

Bill dismissed, with costs.

THE PROFESSOR MORSE.

(District Court, D. New Jersey. May 8, 1885.)

ADMIRALTY JURISDICTION—LOCALITY AS TEST.

In all cases of maritime torts the locality of the act is the test of admiralty cognizance; and whether the court has jurisdiction in any case depends upon whether the wrong and injury complained of was committed on the high seas, or navigable waters.

SAME—INJURY TO MARINE RAILWAY—LIBEL DISMISSED.

The marine railway claimed to have been injured in this case, as described in the libel, was not at the time of the injury a floating structure, and within the admiralty jurisdiction. *The Plymouth*, 3 Wall. 20, followed, and *The Arkansas*, 17 FED. REP. 383, distinguished.

In Admiralty.

Bedle, Muirheid & McGee, for libelants.

Goodrich, Deady & Platt, for respondents.

NIXON, J. This is a proceeding *in rem*. The defendant steamer has been libeled for an alleged maritime tort, to the damage of the libelants' marine railway. On the return of the monition the respondents appeared and took three exceptions to the libel filed in the case: (1) Because it did not state facts sufficient to constitute a maritime claim or lien against the vessel; (2) because the court has no jurisdiction to proceed against the vessel in the manner in which the same is sought to be proceeded against by libel; (3) because the alleged injury done to the marine railway and cradle, and the alleged damages resulting to the libelants by reason thereof, were not done, caused, or suffered upon the water and within the ebb and flow of the tide, but were alleged to be done upon the land; and that the court had no jurisdiction in the case.

The libel was filed by the owners of a marine railway at Clifton, Staten island, and state of New York, against the steam-ship Professor Morse, to recover damages sustained in a collision; it being alleged that the railway was injured by reason of the vessel dragging an anchor across the ground-ways thereof, to which anchor she had been fastened against the remonstrances of the libelants. The exception is reduced to their ultimate analysis, present simply the question of jurisdiction.

In all cases of maritime torts, the locality of the act is the test of admiralty cognizance, and whether the court has jurisdiction, in a particular case, depends upon whether the wrong and injury complained of were committed upon the high seas, or navigable waters. It was held by the supreme court in *The Plymouth*, 3 Wall. 20, that in ascertaining whether a tort was maritime or not, it was of no importance that the tort was committed by a vessel; the locality, and not the character of the instrument which perpetrated the wrongful act, determined the question of admiralty cognizance. Following this case, Judge BLATCHFORD in *The Maud Webster*, 8 Ben. 547, held that, in applying this criterion of jurisdiction, to-wit, the locality of the tort, we must ascertain the locality of the thing injured, and not of the agent by which the injury is done.

The thing injured, in the present case, was a marine railway. The offense was committed and consummated on the water, a maritime lien is held to exist, and can be enforced in the admiralty against the vessel; but if upon the land, the only remedy is a common-law action for the tort against the owners. *The Neil Cochran*, 1 Brown Adm. 162; *The Ottawa*, Id. 356; *The Rock Island Bridge Case*, 3 Wall. 213.

It is therefore necessary to inquire whether the marine railway (the property of the libelants) was, in fact or in law, at the time of the injury, a floating structure, or a part of the land. The libelants allege that it was a marine craft or vessel, and that it was altogether within and under the water of the bay of New York, and within the ebb and flow of the tide. Are there any other allegations which contradict this?

It is then stated that the railway consists of ground-ways laid on piles and loaded with ballasts, but not fastened by any fastening to the piles, and running from the engine-house of said marine railway down to and under the waters of the bay of New York, and out towards the channel of said bay and to the bottom thereof, to a distance of about 700 feet; that said ground-ways are about 13 feet and 6 inches wide,—the flooring thereof resting on the piles and constructed of heavy oak plank; that the track is made of Georgia pine, and runs the whole length of the ways, each track being about 14 inches wide and 12 inches high from the floor; that there are two iron plates on the top of each track, running its whole length, five inches wide and three quarters of an inch thick, and four inches apart,—making a groove

or the shoulder of each roller to fit in; that on these tracks are a series of rollers set in a roller-box each one being 19 inches long, and so cut as to have a journal 2 inches long at each end, which is set in holes in the roller-boxes; that on the roller-boxes rests a cradle, with heel-blocks and bilge-blocks, capable of removal and substitution at pleasure, on which a ship can be conducted from the water to the shore; that a sheave is fastened to the flooring of the ground-ways under water near the lower end; that an iron cable is attached at pleasure to the in-shore end of the cradle and carried up to a pulley on the shore, and then passed back around the pulley, under the water, to the said sheave on the floor of the ground-ways; that said cradle sits upon the rollers by its own weight, and can be moved back and forth at the will of the engineer; that the roller-boxes with the rollers rest upon the ground-ways by their own weight, and move backwards and forwards with the cradle, but at a rate of only one-half as fast; that the ground-ways, with the exception of one end, are under tide-water, and the cradle, roller-boxes, and rollers traverse and move from the extreme lower end of the ground-ways up through the water until they reach the shore, and that the whole railway is so arranged that the roller-boxes, with the rollers and cradle thereon, can be let down into and under the water in the bed of the bay, and while there a vessel can be floated on the cradle, and placed in position, by means of the keel and bilge-blocks, and pulled to the shore by the chain cable above referred to.

After such description of the railway mechanism, the libel proceeds to state the tort for which the suit is brought, as follows: That on the evening of July 22, 1884, the steam-ship Prof. Morse came to the dock of the libelants for the purpose of being hauled out on said railway to be repaired, and lay along-side of a pier on the north side of the ways, between the ways and the pier, and was made fast by lines in the following manner: one line from her bow to a pile; another line from the foremost chains to another pile, and a spring line from the after-part of the vessel to a pier. That in the water, at some distance north of the steam-ship, was a buoy attached to an anchor, which was used by the libelants to mark a distance from the location of the ways, and to this anchor she made fast another line from the afterpart of the vessel; that this was done between 6 and 7 o'clock in the evening, when the libelant John J. Lawler and his brother James were there, who at once remonstrated with the captain against making fast to said buoy or anchor, and told him that the anchor was not put there for any such purpose, but merely for marking an adjusting point for a vessel on the ways, and that if any of his lines parted, the steamer would drift and drag said anchor attached to the buoy down to and under the ways, and destroy them. That notwithstanding this protestation the captain persisted in making fast to said buoy. That at half-past 11 o'clock the same night libelants again went to the steam-ship, and urged the master to remove the line from

the buoy, offered to furnish him with a hawser, and showed him how he could fasten to the pier in such a way as to be safe; but the master declined to accept the hawser, and refused to remove the buoy from the pier, or to make fast in any other way. That libelant went there the next morning, and found that the vessel had drifted considerably to the south, and was lying in a quartering position, with her stern over the water, under which the ground-ways were located, and the buoy was on the south side of the vessel, over the ground-ways. That before libelants undertook to haul out the steam-ship, they inquired of the master whether the anchor of the buoy had dragged to the ground-ways, and stated that if it had, it would be unsafe to haul out the vessel, as the ground-ways were probably injured by the dragging of the anchor, and that the captain assured the libelants that the anchor had not touched or injured the ground-ways. Thereupon the cradle and roller-boxes were put in position under the vessel, which was floated upon them; the keel-blocks and bilge-blocks arranged, the engine started, and the cradle and rollers, with the vessel thereon, began the journey towards the shore; that when the prow was six or seven feet out of the water, and the stern was dragging about three feet of water, the vessel suddenly keeled over at the prow towards the north, and carried away the roller-boxes, and the tracks of the ground-ways, and bent the same out of plumb, so that it was impossible to move the rollers, cradle, or vessel either towards the shore or the water, and the whole usefulness of the machine was destroyed. That it required large expense, and 18 days of hard labor to get the steam-ship off the railway. That the railway was damaged to the amount of \$6,500; that the costs of removing the vessel exceeded \$2,000; that libelants should be paid demurrage at the rate of \$30 a day for at least 120 days; and that all of said damage was caused by the perverseness, negligence, and want of skill and good management of the captain and crew of the said steam-ship, and not from any want of care and diligence on the part of the libelants.

From this description of the structure it can hardly be doubted that it was not, in any proper sense, a craft or vessel intended to float on the water. The upper end was securely fastened to the land as much so as a wharf built out into the stream,—and its character is not changed because the ways ran down below the ebb and flow of the tide, to facilitate the transfer of vessels from the water to the shore. *The Maud Webster*, 8 Ben. 547, was a stronger case for libelants; but in that case Judge BLATCHFORD, after argument and reargument, dismissed the libel for the want of jurisdiction. That libel was there filed against a schooner for injuries to a derrick and tackle which libelant had erected in Long Island sound, to be used in the construction of a pier for a government light-house. He had built a circle of rip-rap about 70 feet in diameter. The interior was open down through the water to the soil at the bottom of the sea, except where a ring of stone was built up to a line above the surface

the water. At low water men could stand on the bottom inside of the ring. A temporary derrick was erected, consisting of an upright, the lower extremity of which rested on the soil inside of the rip-rap, and the upright rose through the water and was steadied above by four wire guys, which were extended to a distance, and were anchored to the soil at the bottom of the water outside of the rip-rap. The injury was caused by the schooner striking one of these guys. It was urged that the place where the accident occurred was on the high seas, and not within the limits of any state, and was therefore not on the land; that as it occurred in the midst of the water, it should be considered as having happened upon the water; that the derrick was only there temporarily, and was resting on the bottom of the high seas; that such bottom was not land; and that the property injured should be regarded as personal property upon the water. Judge BLATCHFORD, in his second opinion, after the reargument, said, page 555:

"I cannot regard the injury to the libelant's property as having occurred on the water in the sense of the decisions above cited, although, in one sense, it occurred in the water, because it occurred at a place in the midst of or surrounded by the waters. The property was not in use for purposes of navigation, and was none of it afloat, and was all of it supported by direct pressure on the soil of the earth."

The only case which seems to conflict with this view is the able and discriminating opinion of Judge LOVE in *The Arkansas*, 17 FED. REP. 83. Although not necessary for the decision of the case before him, he distinctly holds that where a structure, whether solid or floating, is lawfully erected in the navigable bed of a river, and is injured by collision caused by the negligent management of a vessel, the owner of such structure may proceed in an admiralty court by action *in personam* against the owner of the vessel, or *in rem* against the vessel itself. However much I might be inclined, if the question were an open one, to follow this *obiter dictum* of the learned judge, I am constrained, by the authority of *The Plymouth*, 3 Wall. 20, to hold, in the present case, that the libelants have mistaken their court, and that the remedy for the injury complained of is to be found only in the courts of common law. The libel must be dismissed.

THE ALBERTA.

(District Court, E. D. Michigan. February 23, 1885.)

COLLISION—NEGLIGENCE—EVIDENCE.

In attempting to gather the actual facts of a collision from the contradictory testimony of witnesses, the following rules of construction should be borne in mind: (1) The testimony of the crew of each vessel, with regard to her course, and the various orders given to and executed by the wheelsman and engineer, should be credited in preference to the testimony of an equal number of witnesses upon another vessel relating to her movements as they appeared to them;

(2) the probability that a vessel, bound from one headland to another, will the usual and direct course between them is so strong that a deviation such course, without adequate cause, ought to be established by the clearest ponderance of evidence.

2. **SAME—STEAMERS' SIGNALS—MUTUAL FAULT.**

Where two steamers were navigating the most frequented waters of Lake Superior by night and in a dense fog,—one running at the rate of 10 miles, and the other at the rate of 6 miles, per hour,—and each heard several signals from the other, indicating that they were approaching each other upon opposite or crossing courses, and a collision occurred between them, *held*, that both were at fault for excessive speed.

3. **SAME—DUTY TO STOP.**

Quære, whether it was not the duty of both steamers, under the circumstances to stop their engines until their relative positions were clearly ascertained; if not bound to stop, it was at least incumbent upon them to proceed at the slowest rate of speed compatible with the maintenance of steerage-way.

In Admiralty.

On libel and cross-libel for a collision between the steam-barge *J. M. Osborn* and the Canadian steam-ship *Alberta*, which occurred about half past 9 o'clock in the evening of July 27, 1884, from eight to ten miles to the northward of Whitefish Point light, in Lake Superior. The *Osborn* was bound on a trip from Marquette, in the state of Michigan, to Ashtabula, in the state of Ohio, laden with a cargo of 1,120 tons of iron ore, and had in tow, with the usual length of tow-line, the schooners *Thomas Gawn* and *George W. Davis*, in the order named, both laden with iron ore.

The libel averred that about 9 o'clock in the evening, while a dense fog was prevailing, and the *Osborn* was proceeding at a low rate of speed, blowing her steam-whistle, at intervals not exceeding one minute, and observing all proper precautions, a fog-signal was heard from a steamer, which proved to be the *Alberta*, about two points off the *Osborn's* starboard bow; "that immediately the fog-signal was sounded by the *Osborn*, and she continued her course, repeating her fog-signal at proper intervals; that while thus proceeding, and several minutes after the first, the *Osborn* heard a second fog-signal from the *Alberta*, which seemed to come from a point still broader off the starboard side of the *Osborn*, whereupon the *Osborn* starboarded one point, and sounded a distinct signal of two blasts of her whistle to indicate her new course to those in charge of the *Alberta*, and continued thereafter to repeat the fog-signal; that no response was made by the *Alberta* to said signal of two blasts, nor did the *Alberta* sound her fog-signal again except at long and unusual intervals; that the *Alberta's* fog-signal continued thereafter sounded, and seemed to come from a point still more to the starboard side of the *Osborn*, and the latter gave a distinct signal of two blast of her whistle, and continued her fog-signals as before; that no response was made by the *Alberta*, but the *Alberta*, having proceeded to a point well off on the *Osborn's* starboard beam, gave an imperfect, muffled sound of her whistle, and suddenly appeared through the fog close at hand; that she was then rapidly swinging her starboard across the course of the *Osborn*, coming at a very high

of speed; and, although the Osborn sounded again the signal of two blasts of her whistle, and ordered her wheel hard-a-starboard, to lessen, if possible, the effects of the collision which was then inevitable," before she had commenced to swing, the Alberta struck her with great force on the starboard side, just abaft the mizzen rigging, cutting half way through her, so that, in consequence of her injuries, the Osborn sank in about five minutes, with her cargo, and with three of her crew and a passenger of the Alberta, who was then on the Osborn, all of whom lost their lives.

The Alberta was bound on a voyage from Owen sound, on Georgian bay, to Port Arthur, on the north shore of Lake Superior, laden with passengers and a cargo of general merchandise. The case on her behalf, as set forth in the cross-libel, was that when some five or six miles to the northward and eastward of Whitefish point, and while she was proceeding slowly, and at about the hour of 10:15 p. m., there being a fog upon the water, and while she was sounding her proper fog-signals, the fog-whistle of another vessel was heard well off the port bow, and apparently at some distance; that in some four or five minutes afterwards the whistles were again heard, and also other whistles were heard apparently from another vessel. Both whistles were from vessels ahead, and apparently well off to port; that the Alberta was then, and for some time previously had been, running under a check in consequence of the fog, but on hearing the said whistles she immediately slowed down to not more than half speed, and was kept steadily and carefully on her course, her fog-signals continually sounding, and while she was so running the fog-signals were again heard, and broader off the port bow. Again, in three or four minutes, the whistles were heard, and almost instantly thereafter the head-light and the starboard side-light of a vessel, which proved to be the barge Osborn, were made near by, heading across the bows of the Alberta to starboard; that the engine of the Alberta was immediately reversed at full speed, but so short was the time and distance that the collision with the barge was then inevitable, and soon afterwards occurred, the Alberta striking the Osborn on her starboard side, well aft by the mizzen rigging, at something less than a right angle, etc.

H. H. Swan and H. D. Goulder, for libelant.

W. A. Moore and F. H. Canfield & Cramer, for cross-libelant.

Brown, J. This collision was evidently caused by a misapprehension upon the part of the officers of each vessel with regard to the course of the other. The officers of the Osborn, as well as those of her schooners in tow, and the officers of the steam-barge Hecla, which was following behind her, heard, or thought they heard, the first whistle of the Alberta, from one to two points off their starboard bow, the second and third whistles still broader off, and the last one, an imperfect, muffled sound, well upon the Osborn's starboard beam. These signals indicated to them that the Alberta was on a substantially par-

allel and opposite course, and would pass safely up the lake on the starboard hand. This theory, however, cannot be true, unless reject entirely the testimony of the officers and wheelsman of the Alberta, and believe that she was at least three points off her proper course, and bound to some port on the south shore of the lake instead of to Port Arthur, upon the north shore. Upon the other hand, the officers of the Alberta heard the whistles of the Osborn apparently from their port bow, and were so fully satisfied that each successive whistle was broader off the port side, that, as Capt. Anderson expressed "he expected to hear the next whistle abaft his beam." Yet the fact is not disputed that the Osborn was actually crossing his bow, but was learned too late to avoid the disaster. Without expressing a decided opinion upon the trustworthiness of the expert testimony, which tended to show that a practiced ear can determine within a point the bearing of a whistle in a fog, the facts of this case demonstrate that this is a very uncertain method of ascertaining the course of an approaching vessel, when the hearer is himself upon another vessel moving rapidly in a different direction.

In attempting to gather the actual facts of a collision from the contradictory testimony of witnesses it should be borne in mind: (1) That the testimony of the crew of each vessel, with regard to her course and the various orders given to and executed by the wheelsman and engineer, should be credited in preference to the testimony of an equal number of witnesses upon another vessel relating to her movements, as they appeared to them. (2) That the probability that a vessel, bound from one headland to another, will take the usual and direct course between them is so strong that a deviation from such course, without adequate cause, ought to be established by the clearest preponderance of testimony. Gauged by these rules, the angle at which these vessels approached each other is readily ascertained. The proper course from Marquette to Whitefish point is E. $\frac{1}{2}$ N., but on account of the fog that evening, and to give the headland a wide berth, the Osborn deviated half a point to the northward, making her actual course, as sworn to by her officers and wheelsman, E. by N. Upon the other hand, the compass course from Whitefish point to Port Arthur is N. W. by W. $\frac{1}{4}$ W., but to keep clear of vessels coming down the lake, Capt. Anderson ordered his wheelsman to pursue a course N. W. $\frac{1}{2}$ W. for one hour after passing Whitefish Point light. I have no doubt the collision occurred at or very near the intersection of these courses. As the two steamers were meeting at an angle only four and a half points, and the Alberta struck the Osborn at an angle of one point greater or less than a right angle, (and whether it was greater or less, the evidence is conflicting,) there is a difference of from three and a half to five and a half points to be accounted for. That the Osborn starboarded one point just before the collision is averred in her libel, and proved by her testimony; and I have a strong impression that the Alberta, at about the same time, ported her wheel.

two or three points to give the Osborn a wider berth. It is true, her officers made no mention of this, but it is indicated by the angle at which the vessels came in contact, and also by the testimony of the Osborn's crew that the Alberta seemed to be approaching them upon a swing to starboard. The testimony of the Osborn's crew, the shape of the cut, the appearance of the Alberta's bow as she lay in the dry-dock after the collision, and the fact that the Osborn's line was snapped by the collision, all indicate that the blow was delivered from behind rather than from forward, and such I am inclined to think was the fact, although there is considerable testimony to the contrary.

If the Alberta did port in ignorance of the actual position and course of the Osborn, it was a fault for which she ought to be condemned. It is one of the elementary rules of navigation that a vessel ought never to alter her helm in ignorance of the position and course of an approaching vessel. It is true that by such change she may escape a collision, but the chances are equal that she will bring it about. Instead of experimenting, it is her duty to stop, and sometimes to reverse. *The James Watt*, 2 W. Rob. 270, 277; *The Bougainville*, L. R. 5 P. C. 316; *The Franconia*, 4 Ben. 181, 185; *The Shakespeare*, 4 Ben. 128; *The Lorne*, 2 Stuart, Vice Adm. 177; *The Scotia*, 5 Blatchf. 227. I do not find it necessary, however, to express a decided opinion as to the guilt of the Alberta in this particular, since she was so clearly at fault for maintaining an excessive speed that her case is hardly susceptible of argument. She was navigating the most frequented waters of Lake Superior. Almost the entire commerce of the lake takes its course to or from Whitefish Point light. It was night, and there was a fog prevailing so dense that the headlight of a vessel could be but dimly seen at a distance of 600 feet. The fog-signals of at least two steamers were in plain hearing, and bearing somewhat ahead. These signals indicated, in language well understood on the lake, that both steamers were incumbered by tows. All her surroundings called for the utmost caution; yet she was proceeding at such a speed that the force of the collision drove her stern about half way through the Osborn, making a wedge-shaped hole 16 feet in depth, by 12 feet in width. Under these circumstances it is useless to argue that the testimony of the master and engineer of the Alberta shows that she was proceeding under a slow check. The wound itself is the one fact which outweighs all the other evidence. It cannot be argued or explained away. I am satisfied from the testimony of the experts as to the weight and momentum of the respective vessels that she must have been proceeding at a speed of at least 10 miles an hour. It is hardly necessary to say that this is not the moderate rate of speed which the rule requires.

There was an equal obligation on the part of the Osborn to maintain a moderate rate of speed. She was not only encompassed by similar perils, and warned by like signals of the approach of another steamer, but these signals indicated that the Alberta was upon her starboard

bow, and hence that if the two steamers should turn out to be upon crossing courses, it would be incumbent upon her, under the nineteenth rule, to avoid the Alberta from the moment she became visible, except, perhaps, so far as this obligation might be modified by the fact that the Osborn had two vessels in tow. It is true that she assumed that the Alberta was upon a course substantially parallel to her own, but she had no right to act upon such an assumption in disregard of the settled rules of navigation, or to the extent she might have done had the Alberta been visible and exhibiting her green light. Her running time from Marquette shows her general speed that day to have been about seven miles per hour. No order was given to run under a check when the fog arose or when the signals were first heard; and the only evidence that she was not proceeding at her usual rate is contained in the statements of the master and engineer, that the latter was instructed to let his fires run down a little, as they would necessarily be delayed until daylight in Waiska bay. This probably reduced her speed from one to two miles an hour, so that we are safe in assuming that she must have been running at from five to six miles per hour. A like rate of speed was condemned in the case of *The Colorado*, 91 U. S. 692, in which the supreme court adopted the language used by the privy council in the case of *The Batavier*, 9 Moore, P. C. 286. Indeed, the law seems to be now well settled that that is only a moderate rate of speed which will enable a steamer to be kept under ready control, and to be stopped in time to prevent a collision with other vessels, provided such vessels themselves make use of proper signals to notify other vessels of their proximity. *The Western Metropolis*, 7 Blatchf. 214; *The D. S. Gregory*, 2 Ben. 166; *The Louisiana*, 2 Ben. 371; *The Monticello*, 1 Holmes, 7. At first blush, I had some doubt whether the fault of the Osborn in this particular could be said to have contributed to the collision. The presumption is that it did. It is true that the blow was delivered by the Alberta, but this was a mere accident. If both were running at an excessive speed, the speed of both must have contributed to the collision, since if either had been proceeding at a lower rate the collision in all probability would not have occurred. While I should be unwilling to say that rule 21 absolutely demands a moderation of speed at all times and under all circumstances whenever a fog arises, the obligation unquestionably attaches whenever the signals of an approaching vessel are heard from a point where, whatever the course of such vessel may be, there is any risk of collision. It is possible that the fact that the Osborn had two vessels in tow might have relieved her of the duty of giving way to the Alberta, but it certainly did not relieve her of the necessity of so moderating her speed as to keep herself under complete control. I think she must be adjudged guilty of contributory negligence in this particular.

Indeed, I am strongly inclined to think that both these vessels were in fault for not stopping altogether and drifting until their respect-

ve signals indicated clearly that they had passed each other. In the recent case of *The John McIntyre*, 5 Asp. Mar. L. C. 278, it was held by the English court of appeal that where the officers of a steamship, in a dense fog, hear the whistles of another vessel more than once on either bow, and in the vicinity, from such a direction as to indicate that the other vessel is nearing them, it is their duty at once to stop and reverse her engines, so as to bring their vessel to a standstill in the water. This was a collision between the steamships *Monica* and *John McIntyre*, in the North sea. The *Monica* was conceded to have been in fault. It was alleged on behalf of the *McIntyre* that the whistle of the *Monica* was heard about four points on the port bow, and then heard twice again, and thereupon the engines of the *McIntyre* were reversed full speed astern. The court found that this was not done with sufficient promptness, and that, from the character of the blow delivered by her, the *McIntyre* must have been going at a considerable rate of speed at the moment of collision. The court held it to have been the duty of the *McIntyre*, under the circumstances, not merely to slacken her speed, but also to stop and reverse. In delivering the judgment of the court, the master of the rolls observed:

"If a steamer in a thick fog—so thick that she can hardly see before her—sees another vessel in her neighborhood on either bow, not being able to see her, and she herself not going at her slowest pace, the question is whether, under those circumstances, the officer in charge of the steamer ought not to conclude that it is necessary, in order to avoid risk of collision, that he should stop and reverse? I do not hesitate to lay down the rule, not strictly as a matter of law, but as a matter of conduct, that the moment such circumstances as these happen, it is necessary, under the article, to stop and reverse. * * * However difficult it may be for persons in command of steamers to do what the law directs, in my opinion, we must hold strictly that in a dense fog the moment another vessel is found on the bow, or in near vicinity on either bow, and she herself is going at any speed, it has then become necessary, under the eighteenth rule, not merely to slacken speed, but instantly to stop and reverse."

In this case the court appears to have taken a decided step in advance of prior decisions, and I am not prepared to say that the rule herein laid down, in so far as it demands not only a stoppage, but reversal of the engines, should be rigidly applied to every case of steamers meeting under the circumstances stated. At the same time, it seems to me entirely proper and reasonable to hold that when steamers are approaching each other in a fog so dense that a vessel can be seen only a few hundred feet, there is a "risk of collision" which makes its obligatory upon both to stop their engines and drift, until such risk is determined.

The case of *The McIntyre* differs from the one under consideration, if at all, only in the fact that the officers of the *Osborn* thought, from the signals of the *Alberta*, that she was upon an opposite and parallel course and would pass in safety. This, however, was a mere conjecture. The officers of each vessel must have known that the other

was upon an opposite or upon a crossing course, and that there was risk of collision, until they were fully assured by the signals that each was astern of the other. So long as there was any doubt upon this subject; so long as the whistles of the other continued to be heard forward of the beam, it was their duty to act upon the supposition that there was still risk of collision, under the twenty-first rule. The following comments of the court in the *McIntyre Case* are pertinent in this connection:

"It was the whistle of the other vessel which told him, not exactly where she was, but about where she was, and that she was in a position in which he could not consider her an absolutely safe vessel in regard to him; *i. e.*, he could not consider that he had passed her or that she had passed him either ahead or astern. While he was not at once bound the moment he heard the whistle, wherever it might be, to stop and reverse his engine; but having heard the first whistle, which was about four points on the port bow, he heard another and another whistle; and I cannot help thinking that the evidence shows that it was something like three or four whistles that he heard."

Now, without expressing a decided opinion in this case, whether under the circumstances, it was the duty of these vessels to stop and reverse, I am clearly of the opinion that it was incumbent upon them either to stop, or to proceed at the lowest rate of speed compatible with the maintenance of steerage-way.

Neither of these steamers was provided with such a lookout as the exigencies of the case required. Both of them were under charge of the master and second mate, who stood together, on the bridge in the one case, and in front of the pilot-house in the other. Neither vessel had a lookout forward or aloft, or in other position where his opportunities of observation were better than those of the officer of the deck. It was held in the case of *The Colorado*, above cited, that steamers, while navigating in dense fogs, should carry at least two lookouts, and if there had been any evidence that a want of this precaution had contributed to this collision, I should have felt bound to condemn the steamers for this omission. But as each appears to have discovered the other as soon as it was possible to do so, I am not prepared to say that either should be condemned on that account.

A decree will be entered adjudging both vessels in fault for excessive speed, dividing the damages, and referring the case to a commissioner to assess and report the same.

THE ALPIN. (Nine Cases.)

(District Court, E. D. New York. December 30, 1884.)

1. STRANDING OF VESSEL—NON-PRODUCTION OF WITNESSES—PRESUMPTION.

The steam-ship A., while on a voyage from Inagua, Bahama islands, to New York, was stranded on the coast of Maryland. In actions brought on her bills of lading to recover for the loss and damage to cargo resulting, *held*, that the non-production, without sufficient excuse, of any one of the numerous persons who were on board as crew and passengers at the time of the stranding, as witnesses, to explain the circumstances of the stranding, except the chief engineer, who was below at the time, warrants a presumption that, if they had been produced, they would have shown the stranding to have been the result of negligence in the navigation of the ship.

2. SAME—NEGLIGENT NAVIGATION—FAILURE TO SOUND.

That when it appeared that on January 19th the master supposed himself to be in latitude 36 deg. 40 min., longitude 74 deg. 10 min., and the next day, at 1:25 A. M., was on a bar four miles north of Green Run inlet, the weather being thick, and no explanation was given of the vessel's course meantime, *held*, that if her course was directly between those two points, it was clearly negligence; and that if the master supposed himself on the 19th to be in that latitude and longitude, it was his duty to verify his supposition by sounding; and that the failure of the ship to deliver her cargo was caused by this negligence.

3. LEX LOCI CONTRACTUS.

Where the *lex loci contractus* is neither pleaded nor proven, it is presumed to be the same as the law of the United States.

4. AVERAGE ADJUSTMENT—ARBITRATION.

The making of an average statement by average adjusters is not an award by arbitrators.

In Admiralty.

Scudder & Carter (Lewis Cass Ledyard) and Sidney Chubb, for libellants.

Wheeler & Souther, (Everett P. Wheeler,) for claimants.

BENEDICT, J. These actions, tried together, are brought upon bills of lading to recover damages for the failure to deliver, in like good order, at the port of New York, cargo, in the bills of lading mentioned, shipped on board the steam-ship Alpin. On January 15, 1883, the steamer above mentioned, bound for New York, left the port of Inagua, having on board a cargo of assorted merchandise, consisting in large part of coffee and hides. On the morning of January 20, 1883, a few minutes after 1 o'clock, she stranded some four miles north of Green Run inlet, on the coast of Maryland, upon a bar running along about 300 yards from the beach. As soon as the vessel struck, some cargo was thrown overboard, and an effort to work the vessel off the bar by running her engines full speed astern having failed, all on board left her and went on shore. The following night the steamer came in over the bar, and on Sunday morning was lying in an easy position, so high up on the beach that her officers walked to her, and her mails were landed from her into an ox-cart backed up to her side for that purpose. On Monday an agent of the owners arrived and took

¹ Reported by R. D. & Wyllys Benedict, Esqs., of the New York bar.

charge of the steamer and her cargo. The sea continuing smooth under his direction all the cargo, except about 150 tons, was put over the side and carted up on the beach, and on the 24th the steamer was hauled off the beach by tugs and proceeded to New York. The loss and damage to the cargo amounted to \$82,000. The value of the steamer was \$48,000.

To recover for the loss and damage to the portion of the cargo owned by the above-named libelants these actions are brought upon their several bills of lading, similar in legal effect. They claim to recover upon two grounds: *First*, that the stranding of the steamer was caused by negligence on the part of those engaged in her navigation; *second*, that after the stranding, unnecessary loss and damage to their merchandise was caused by the neglect and wrongful conduct of the agent of the owners, under whose directions the cargo was taken out of the vessel, after she had grounded on the beach.

By far the greater part of the testimony is directed to the action of this agent in respect to the cargo, and this testimony certainly presents some remarkable facts. But I find it unnecessary to consider that branch of the case to which the testimony referred to applies, for the reason that I am satisfied that it is my duty to hold the vessel liable for the loss and damage sustained by the cargo in question upon the ground that the stranding of the steamer was caused by the negligence of those at the time in control of her navigation.

The condition of the testimony upon this branch of the case is extraordinary. On the voyage in question, and at the time of the stranding, there were on board the steamer, officers and crew, 29 persons, besides two passengers. Of these, the chief engineer, who was below when the vessel stranded, is the only witness called by the claimants; and this, notwithstanding it appears that the captain and the chief officer of the steamer have been in New York, and in communication with the owners since the commencement of these actions. The only excuse offered for this important omission to call these officers to explain their navigation of the steamer is that the libels do not charge that the stranding was caused by negligence, and the claimants were therefore justified in assuming that the circumstances attending the stranding would not be the subject of inquiry, and so allowed the master and crew to depart without taking their testimony. But the claimants knew that the stranding of their vessel was to be their defense; and their course in relying for proof of the stranding upon the admissions in the libels and the testimony of witnesses who, while knowing of the stranding, could not know how it was caused, when the testimony of those who would be the natural witnesses to prove such a defense was at command, indicates the existence of a reason other than that of surprise for the non-production of these witnesses, and warrants a presumption that if the officers of the steamer had been called, they would have shown the stranding to have been the result of negligence in the navigation of the ship.

It is to be also noticed that some of the libels do not admit the stranding, and that the libels in which a stranding is admitted couple the admission with the statement that it arose "from causes to your libellant at present unknown," while the answers deny negligence. Moreover, after the libellants' testimony showing negligence was put in, no application was ever made for time to procure the testimony of the officers of the steamer. Little room is therefore left to contend that the failure to produce any of the crew of the steamer is to be excused on the ground of surprise.

The inquiry in regard to the cause of the stranding opens, therefore, with the presumption that the testimony of the officers of the steamer would show that the stranding was caused by their negligence, in addition to which there are facts proved from which negligence must be inferred without the aid of this presumption. The captain's protest is put in evidence by the libellants, and manifestly contains the entries in the steamer's log-book for several days prior and up to the stranding. The log-book itself, although called for by the libellants, is not produced, but it was conceded that the protest showed the entries in the log on the days mentioned.

From this protest it appears that for several days prior to the stranding the vessel had been run by dead reckoning; that the weather had been thick, and, for some hours before the stranding, so thick that the engines were slowed and the whistles blown; and that at no time was the lead thrown. It is true, the protest does not say that the lead was not thrown, but it omits to state that it was thrown, and this omission, under the circumstances, compels the inference that it was not thrown; and this inference is confirmed by the fact that the chief engineer does not state that his engine was stopped at any time until the stranding.

The protest also shows that on the nineteenth of January the master supposed his position to be, latitude 36 deg. 40 min.; longitude 74 deg. 10 min. It is also evident that some time before the stranding the vessel had passed out of the Gulf Stream. In regard to the course upon which the vessel was sailing when she stranded, or indeed at any other time, there is no testimony. No courses whatever are given by the protest, or stated by the chief engineer. According to the protest, however, on January 19th, the vessel was in latitude 36 deg. 40 min., longitude 74 deg. 10 min., and on the next day at 1:25 A. M. she was on a bar four miles north of Green Run inlet. If a line between these two points shows the course of the steamer at the time she ran ashore, a clear case of negligence is made out; for such a course was directly on the land, and to hold such a course in thick weather, without sounding, until the vessel struck, would be gross negligence.

If, then, the inquiry were rested at this point, I know not that the claimant would have cause to complain; for, according to the protest, such was the vessel's course, and no officer of the steamer is called to

say that the steamer was upon a different course, or that she was supposed to be upon a different course, or to say that the location of the vessel on January 19th, as given by the log, is an estimated position, arrived at by dead reckoning, and not the actual position of the vessel on that day.

But, giving to the claimant the benefit of a presumption that the master would not knowingly put his vessel upon such a course, and considering the statements of the protest in regard to the weather, coupled with the evidence as to where the steamer actually struck the shore, to be sufficient to warrant a conclusion that the vessel was sailing by dead reckoning, and that the location of the vessel on the 19th, as given by the log, represents no more than a mistaken conclusion of the master that such was his position, when, in fact, he was close in upon the coast; still it must be held that the cause of the stranding was the omission to throw the lead, and that such an omission, under the circumstances, was negligence. For if the master, on the 19th, supposed himself to be in the locality stated in his protest, and knew, as he must be presumed to have known, that he had already crossed the Gulf Stream, when on the afternoon of the 19th the weather grew so thick as to make it prudent to slow the engines and blow his whistle, it became the duty of the master to verify his supposition as to his location by sounding. He knew land was under his lee. He knew that the wind, as it was, would carry him towards the land. He also knew, or ought to have known, that he might be under the influence of a current running towards the land. Moreover, the weather was thick, and he knew that he did not know his position, and that an approach to the land would be indicated by the soundings. Under such circumstances common prudence required him to sound. Had he observed this common and, under the circumstances, necessary precaution, the lead would have informed him that he had been mistaken as to his position, and was sailing close to the lee shore; and with this knowledge he could have prevented the accident that shortly occurred.

It is said that the master was not bound to sound because he had passed Hatteras 50 miles off, and on that course soundings would be useless. If it be conceded that the steamer in fact passed Hatteras 50 miles off, it is not seen how the vessel could have stranded where she did without a negligent change of course. But the truth is that the steamer did not pass Hatteras at a distance of 50 miles, and instead of being well off shore was sailing so close that the wind and sea carried her sufficiently to leeward to bring her on the bar, the question, therefore, is not whether the master supposed, from his dead reckoning, that he was at a safe distance from the land, but whether he was justified in proceeding, in thick weather, upon that supposition alone, with means at hand to test the accuracy of his supposition. I think he was not justified, and was guilty of negligence in so doing.

It is suggested that the master may have been misled in regard

to his position by a deviation of his compass. There is proof that no ordinary deviation of the compass will account for the stranding, and there is no evidence of any deviation whatever. If there was a deviation of the compass, it would have been easy to prove it; and if the master's reliance upon his compass was the cause of the stranding, that too might have been easily proved. Surely such things cannot be presumed in the absence of the master's testimony.

The conclusion I have now stated is supported by the opinion of several master mariners of large experience on this coast, who concur in saying that it was negligence in this master not to use his lead under the circumstances stated in his protest. My determination upon this branch of the case, therefore, is that the failure of the claimants to deliver the libelants' goods was caused by negligence on the part of those navigating the steamer.

I pass now to consider the position taken by the claimants that the libelants cannot recover the damage resulting from this negligence, because liability arising from the negligence of the captain, or the agent of the owner, is excepted by the terms of the bill of lading, and that this exception is valid according to the law of the place where the contracts were made. The answer to this position, sufficient for this case, is that the *lex loci contractus* is neither pleaded nor proven; and the presumption is that it is the same as the law of the United States, which is adverse to the validity of such an exception in bills of lading.

Lastly is to be noticed the contention of the claimants that the action of the average adjusters in making up an average statement, pursuant to average bonds executed by the libelants, was an award made upon a submission to arbitrators, and finally determined the present controversy. This contention is based upon what appears to me to be a novel idea respecting the effect of an average bond. No case is cited where an average bond has been treated as a submission to arbitration, and the adjustment as the award of arbitrators; nor am I able to discover any reason for giving such an effect to these commercial acts. Average bonds and average adjustments are not new, and it is late now to discover that the adjustment by average adjusters is an award by arbitrators pursuant to a submission to arbitrators, and conclusive as such upon all who have signed the average bond. In my opinion, such a view of the transaction is wholly untenable. It would seem to be contrary to the decision of the supreme court in the case of *The Niagara*, 21 How. 9, in which the answer set up "an agreement not only to share the damage, but that the goods should be charged with, and pay their proportion of, a general average of the losses thus occasioned."

The views I have already expressed render it unnecessary to consider the interesting question whether the method pursued in lightening this vessel when on the beach, resulting, as it did, in a loss of cargo nearly double the total value of the vessel, was justified by the

surrounding circumstances. Upon that question, therefore, I intimate no opinion, but rest my determination upon the ground that the stranding of the vessel was caused by negligence on the part of the person in charge of the vessel at the time.

Let decrees be entered in favor of the various libelants, with order of reference to ascertain the amount.

THE PERSIAN MONARCH.¹

GOLDSMITH v. NORTH GERMAN LLOYD, etc.¹

(District Court, E. D. New York. September 17, 1884.)

SALVAGE—OWNER OF CARGO ON SALVING VESSEL AND CARE-TAKERS OF CARGO NOT ENTITLED TO SALVAGE OR DAMAGES—PUBLIC POLICY.

The owner of cargo shipped on board a vessel which, by reason of rendering a salvage service to another vessel on the voyage, is delayed, and whose cargo is thereby damaged and deteriorated, is not by that mere fact made entitled to a salvage remuneration from the vessel to which the service was rendered. Such an allowance would be against public policy. Nor is he entitled to cover damages from the salvaged vessel, either for a tort or for a breach of contract. Men employed by the shipper as care-takers of such cargo (which consisted in this case of live-stock) are not entitled to a salvage award, when they took no part in the actual salvage service, but merely were compelled to perform the duties for which they had been hired during the time the voyage was delayed.

In Admiralty.

Butler, Stillman & Hubbard, for libelants.

Shipman, Barlow, Larocque & Choate, for defendant.

BENEDICT, J. This action is brought by Meyer Goldsmith, the owner, and Dan Kalahr, Eugene Kalahr, and John H. Topham, the care-takers of certain cattle and sheep shipped by Goldsmith on board the steam-ship *Persian Monarch*, to be transported therein from New York to London. The defendant is the owner of the steam-ship *Hannover*, which vessel, when disabled at sea, was fallen in with by the *Persian Monarch* during the voyage aforesaid, and by her towed in to a port of safety.

The libel sets forth the bill of lading under which the cattle and sheep were shipped, containing the following clause:

"The steamer has liberty to sail with or without pilots, to make deviation to call at any port or ports for any purpose, and to tow and assist vessels in all situations."

It then describes the services rendered the *Hannover*, and avers that the rendition of those services necessarily put in peril the sheep and cattle shipped, and subjected their owner to expense in maintaining

¹ Reported by R. D. & Wyllys Benedict, Esqs., of the New York bar.

them for a longer period than otherwise would have been required, and to loss by reason of the death of some, and the depreciation in value of the remainder, owing partly to their being kept for so long a time in confined space, and partly to their being fed reduced rations, as well as to loss by reason of losing a market by the delay.

The libel also avers that Dan Kalahr and Eugene Kalahr were employed by Goldsmith to take care of the said sheep and cattle during the voyage, and by reason of the rendition of the salvage services aforesaid, they were compelled to give the cattle and sheep greater care and attention than otherwise would have been required of them. John H. Topham sets forth the same by way of petition to be made a co-libelant. The prayer of the libel is that the court would "decree to the libelant Meyer Goldsmith the sum of \$15,000, or such other sum as this court deems proper and reasonable, and to the libelants Dan Kalahr and Eugene Kalahr such sum as is proper and reasonable in the premises," and for such other relief, etc.

The view I take of the case renders it unnecessary to say more in regard to the proofs offered in support of the libel than that they show that while performing the voyage in the libelants' bill of lading described, the Persian Monarch fell in with the steam-ship Hannover disabled at sea, and at her request took her in tow and brought her in safety to the port of Falmouth, whence the Persian Monarch proceeded to London, where she arrived some five days later than she would if the voyage had been performed in the ordinary time of a voyage from New York to London. The length of the voyage caused a deterioration of the sheep and cattle, owing to a lack of full rations of food, and to a crowding of the cattle and sheep, rendered necessary in order to make room to attend to the cables by which the Hannover was towed, and 15 of the sheep died. The libelants Dan Kalahr and Eugene Kalahr and the petitioner, John H. Topham, were 3 of 15 men put on board the Persian Monarch by the shipper of the cattle and sheep to feed and care for them during the voyage. These men were hired by the run, and the length of the voyage entailed upon them additional labor in caring for and feeding the cattle and sheep. The libelant Goldsmith was not on board the Persian Monarch, and had nothing personally to do with the towing of the Hannover. His cattle and sheep in no way contributed to the successful performance of the services rendered the Hannover. On the contrary, they were, if anything, a hindrance.

These facts show that beyond all question a salvage service of importance was rendered by the Persian Monarch to the Hannover on the occasion referred to, and the first question to be considered is whether the shipper and owner of the cattle and sheep on board the Persian Monarch was one of the salvors on that occasion, and as such entitled to recover of the owner of the Hannover a salvage reward.

In behalf of the shipper, it has not been contended that the bare fact of ownership on board a salving ship gives a right to share in

salvage when awarded, but it is contended that the owner of cargo on a salving ship, who consents to the rendition of the salvage service, is entitled to share in the salvage, when he, by consenting, assumes a risk which, in the absence of his consent, would be borne by the salving ship; and, it is claimed in the libelant's behalf that the clause already quoted from the bill of lading given for the cattle and sheep was a consent by him that the Persian Monarch should tow the Hannover as she did, and that such consent put the sheep and cattle at the shipper's risk, and so entitles the shipper to recover salvage. In support of this position two decisions are cited. They are the case of *The Blaireau*, 2 Cranch, 240, decided by the supreme court, and the case of *The Colon and her Cargo*, 10 Ben. 60, decided by the district court of the southern district of New York. Reference is also made to the case of *The Nathaniel Hooper*, 3 Sum. 542.

The case of *The Blaireau* was a case where the owner of a cargo of salt on the salving vessel, the Firm, was allowed to share in the salvage awarded. This allowance Judge PETERS (*The Ship Cato*, 1 Pet. Adm. 67) speaks of as "a remuneration not common, if ever made before;" and whether the decision was "for general direction or only as it respects that particular case," he considers open for determination. The case of *The Blaireau* had this peculiar feature that one of the owners of the cargo, whose acts were held to bind the other owner of the cargo, was on board the Firm at the time she saved the Blaireau, and this owner not only took an active part in the labor attendant upon the service, but, as the opinion indicates, was called on to consider, and did consider, and assent to, the measures taken by the master of the Firm to effect the salvage. Moreover, I gather from the case that the salvage service would not have been undertaken by the master of the Firm if the owner of the cargo on board had not approved the measures intended to be adopted to save the Blaireau. This act on the part of the owner of the cargo was something more than a mere waiver of any right of action against the Firm because of a deviation. It was an express assent to measures intended to be taken to save the Blaireau, given under circumstances that rendered the assent an essential prerequisite to the service. Such I understand the case of *The Blaireau* to have been, and so understood, it furnishes no authority for the decision of this case. Neither can authority for the decision in this case be found in the opinion delivered by Judge STORY in the case of *The Nathaniel Hooper*. In that case it was found that no consent was given by the owner of the cargo. The nature of a consent which would, in the opinion of that learned judge, afford ground for the owner of the cargo to share in salvage was not determined, except that the consent must be an express consent to the deviation made, and a consequent release of the shipowner from his responsibility therefor.

If, in the case at bar, there had been an express consent by the shipper of the cattle and sheep that the master of the Persian Mon-

arch do what he did to save the Hannover, the remarks of Judge STORY in the case of *The Nathaniel Hooper* would have been more in point. The decision in the case of *The Nathaniel Hooper* does, however, point out that the mere fact of owning property put at risk is not sufficient to confer the right to share in salvage, and shows that the owner of the ship is allowed to share in the salvage upon grounds of public policy, as well as upon the ground that the cargo has been put at his risk. Another ground is stated by Judge BETTS, (*The Waterloo*, Blatchf. & H. 114,) namely, that the property of the ship-owner is the instrumentality by which the salvage is effected. None of these auxiliary grounds for an award exist in the libellant's case. The libellant was not on board the Persian Monarch, knew nothing of the Hannover's application for assistance, and was not impelled by her distress to relinquish any right or to assume any additional risk. The form of his bill of lading is not shown to have been known by the master of the Persian Monarch, nor did it in any way conduce to his determination to assist the Hannover. The master, as it must be presumed, arrived at the determination to assist the Hannover from a sense of the duty owing by him to the distressed vessel,—a duty created by the circumstances, and which would have been the same if the libellant's bill of lading had contained an agreement on the part of the ship never to render assistance to a vessel in distress.

The consent given in the case of *The Blaireau*, as well as the consent referred to in the case of *The Nathaniel Hooper*, is, in my opinion, to be considered as a consent given at the time of the rendition of the salvage service, and under circumstances showing that without such consent the salvage service would not have been undertaken. The case at bar discloses no such consent.

As to the other decision relied on by the libellant, (the case of *The Colon*,) that is a decision directly adverse to the libellant's claim, considered as a claim for salvage, for although there was in that case a bill of lading containing a clause similar to that in the libellant's bill of lading, the claim for salvage was rejected. In that case the clause in the bill of lading was held to have no effect upon the shipper's right to salvage, because the bill of lading was a contract between the shipper and his ship alone. To this extent I agree with the decision in the case of *The Colon*. The libellant's bill of lading is, as I conceive, nothing more than his contract with the owner of the Persian Monarch. In it he gave to the Persian Monarch liberty to assist any vessel in distress, and for this waiver he received a consideration in the rate of freight paid by him. It is a mere waiver, and nothing more.

If, then, the form of the libellant's contract with the Persian Monarch has no effect upon the liability of the owner of the Hannover, the libellant's claim for salvage is left to rest upon the bare fact that the rendition of the salvage service to the Hannover increased the libellant's risk in the cattle and sheep on board the Persian Monarch.

Such a fact standing alone has never, so far as I know, been held to be foundation for a claim for salvage, and, indeed, has not been held to be sufficient.

A second ground upon which salvage has been claimed in behalf of the libellant is the co-operation in the salvage service of the cattle-men employed by him to take care of the cattle and sheep during the voyage. But the salvage service consisted in the towing of the steamship *Hannover* by the steamship *Persian Monarch*. The libellant does not aver that the cattle-men took part in that service. These men took care of the cattle and sheep as they had agreed with the shipowner to do. The rendition of the salvage service by the *Persian Monarch* did not entitle them to demand extra wages of the libellant, and, so far as appears, they have asked no extra compensation of him. In fact they are here claiming on their own behalf as salvors compensation for their services in caring for the cattle and sheep. Their labor performed under such circumstances can have no effect upon his right to claim salvage of the *Hannover*.

In what has been said the effort has been to show a distinction in principle between the shipper's consent, proved in the case of *The Blaireau*, and alluded to in the case of *The Nathaniel Hooper*, and the waiver embodied in the libellant's bill of lading. But if there be no distinction in principle between the case of *The Blaireau* and the case at bar, then a distinction must be made upon the ground of public policy. Public policy, which is the sole and the good ground upon which salvage is awarded in any case, requires that salvage should not be awarded in a case like this, for the reason that to award it is to sow the seed of death to the law. It would open a door to every shipper of cargo, and every passenger as well, to claim a share in any salvage award that might be earned by their ship. If, in former times, when ships were small and cargoes of little value, it was possible to allow shippers of cargo to share in the division of salvage, such allowance is no longer possible. The vast steamers of the present day carry cargoes valued by millions, and their passengers are numbered by thousands. If all these are to share in the distribution of salvage, the amount coming to the master, who alone decides whether a salvage service is to be rendered, and to the mariner whose personal exertions are in general necessary to success in a salvage adventure, will be so small as to furnish no inducement to undertake the service, and so the reason for awarding salvage will fail. The same considerations of public policy which impel to the allowance of salvage therefore require that in the distribution of salvage neither shippers of cargo, nor passengers on board the salvaging ship, can be allowed to participate.

Thus far this case has been treated as a cause of salvage, civil and maritime. But the averments of the libel perhaps require that the cause be only considered as not one of salvage, but an action for damages. The decision in the case of *The Colon*, already referred to, is

favor of such an action, but I am by no means able to follow that decision. If the shipper of these cattle and sheep has a right of action against the owner of the Hannover to recover damages for the detention of his property, such right must arise out of a tort or the violation of an agreement. Surely the owner of the disabled Hannover committed no tort when he accepted the services of the Persian Monarch to bring him to a place of safety. And what contract did he make with the libelant when he accepted those services? It is said that a contract between the libelant and defendant to pay the resulting damages is to be implied from the detention of the libelant's cattle and sheep in their voyage. But the defendant knew nothing of the libelant, or that he had cattle and sheep on board the Persian Monarch. He knew the Persian Monarch carried cattle and sheep, but, for aught that he knew, they were the property of the master with whom he was dealing. It was the master of the Persian Monarch who detained the Persian Monarch and her cargo in the voyage, not an agent of the owner of the Hannover, nor yet the mere bailee of the libelant's property, but the master of the ship; "not an ordinary agent, but one of a special kind—*sui generis*," (*The Thetis*, 22 Law T. Rep. 276;) "a known and public officer," (2 Pet. Adm. appendix, 75,) charged with important duties, not the least important of which are those attaching upon the meeting a vessel in distress at sea. He it was who delayed his ship in order to rescue the Hannover, and he must answer to the libelant if he invaded any right of the libelant by so doing. His answer has been made easy by the form of the libelant's bill of lading, but it is not easier than the answer of the owner of the Hannover, who can truly say to the libelant: "I had no control over the Persian Monarch or her voyage. I never dealt with you nor with your property."

The decision in the case of *The Colon* has sometimes been treated as if in that case salvage had been awarded under the name of damages. But the law is not evaded by a change in name, nor was there an attempt in the case of *The Colon* to evade it in that way. The decision was that salvage could not be recovered, but there could be a recovery of damages for the violation of an implied promise to pay the owner of the cargo of the sailing vessel the damages resulting from their detention. I am unable to agree to such a conclusion. It seems to me that it is adding a new horror to shipwreck to hold that when the master of a vessel in distress accepts the services of another vessel for his rescue, he binds his owners to the owners of the cargo of such other vessel,—and not only to the owners of the cargo, but to the passengers as well,—by a contract to pay them all damages resulting from the rendition of the salvage service. Such cannot be the law.

I have now stated reasons which, to my mind, are sufficient to compel a dismissal of the claim of the libelant Goldsmith, and it is therefore unnecessary to consider the other and weighty matters set up in

defense. What has been said in regard to the claim of the owner of the sheep and cattle refers with equal force to the men employed by him to care for his cattle during the voyage. These men hired out to the shipper by the run, taking the risk of the master of the Persian Monarch's determining to run his vessel slow or fast during the voyage. The fact that the Persian Monarch ran slow during part of the voyage, in order to assist the Hannover, gives to these men no right to claim of the owner of the Hannover compensation for a service which they do not claim in their libel to have taken any part. The libel is dismissed, and with costs.

THE CITY OF ALEXANDRIA.¹

(District Court, S. D. New York. March 20, 1885.)

DAMAGE TO CARGO ON LIGHTER—NEGLIGENCE—CUSTOM IN STOWAGE—PERIL OF THE SEA.

A lighter was loaded at Havana with bales of tobacco, to be taken to the steamer lying out in the harbor. The bales were piled three high above the gunwale, and were not secured in any manner. On the way a sudden gust of wind caused the lighter to careen, and some of the bales fell into the sea. Though damaged by water, they were afterwards received on board the steamer, and a clean bill of lading given for them, reciting them to have been received in good order and condition, both parties having knowledge of the facts. On the arrival of the ship in the port of New York, suit was brought against the lighter for the damage to the bales. *Held*, that assuming, but without deciding, that the goods taken by the lighter were in the possession of the ship, it was incumbent on the libelants, under the exception of "perils of the sea" in the bill of lading, to show negligence on the part of the lighter; that the evidence showed that the cargo was stowed in conformity with the established usage of the port, and that the bales slid off in consequence of a sudden gust of wind, which was extremely rare; and that, therefore, the loss was by a peril of the sea, and negligence upon the evidence could be imputed to the lighter, and consequently none to the steamer, even though the lighter were in the steamer's employ, and the loss must be set down to the exceptions in the bill of lading.

In Admiralty.

Butler, Stillman & Hubbard and *Stillman & Mynderse*, for libelants;
A. O. Salter & R. D. Benedict, for claimants.

BROWN, J. The libel, in this case, was filed to recover \$5,120. damages for the non-delivery in good order and condition of 399 bales of tobacco, brought from Havana to New York, by the steamer City of Alexandria, in March, 1883. Eighty-six of the bales were damaged by falling into the water, while in course of transportation on a lighter from the pier in Havana to the steamer, about half a mile distant. The bales weighed about 100 pounds each, and were three feet square. The lighter was without deck. There were three tiers piled below the gunwale, and three above. While the lighter was crossing to the

¹ Reported by R. D. and Edward Benedict, Esqs., of the New York bar.

steamer, a strong gust of wind from the hills, according to the testimony, caused the lighter to careen, so that some of the upper bales, which were very dry and slippery and not secured, slid off into the water. They were picked up and put on board the steamer the following day, and a clean bill of lading given for them by the agents of the ship, reciting them to have been all received on board ship in good order, both parties having knowledge of the facts.

To entitle the libelants to recover, inasmuch as the damage to the tobacco was not done after it was received on the ship's deck, and as the bill of lading also excepts perils of the seas, it is incumbent on the libelants to show that the injury arose from negligence of the lighter, and also that the possession of the lighter was the constructive possession of the steamer; in other words, that the transportation by the steamer in legal effect commenced at the wharf.

In most of its features the case of *Bulkley v. Naumkeag Steam Cotton Co.* 24 How. 386, is very similar to the present. There the vessel was held liable for injury to cotton while on board the lighter. In that case the lighter was unquestionably employed by the master of the ship, and at the ship's expense. The court say:

"Both parties understood that the cotton was to be delivered to the carrier for shipment at the wharf in Mobile, and to be transported thence to the port of discharge. After the delivery and acceptance at the place of shipment the shipper had no longer any control over the property, except as subject to the stipulated freight."

The court, accordingly, held "that the vessel was bound from the time of the delivery to the captain by the shipper at the city of Mobile and its acceptance by the master; and that the delivery to the lighterman was a delivery to the master, and that the transportation by the lighter to the vessel was the commencement of the voyage, the same, in judgment of law, as if the hundred bales had been placed on board of the vessel at the city instead of the lighter; and that the lighter was simply a substitute for the bark for this portion of the service." Page 391.

In the present case the questions chiefly litigated were, who employed the lighter, and in whose legal possession was the tobacco when on board the lighter? On the part of the ship, it is contended that the lighter was not employed by the steamer, her master, or agents; and that the tobacco was not in the possession or control of the ship, actual or constructive, until actually delivered on board by the lighter.

There is no direct evidence as to what was the actual arrangement or understanding, between this steam-ship line and the lighterers in Havana. The lighterage was a separate charge of six cents per bale, and entered in the margin of the bill of lading as a distinct charge, to be collected in addition to the freight *eo nomine*. But it is clear that there must have been some understanding, or arrangement, between the owners of the steam-ship line and the lighterers, from the fact, which clearly appeared in proof, that, by the well-established

usage and understanding at the pier, all light cargo, such as this, destined for the line to which this steamer belonged, was to be lightered at certain established tariff rates by the lighters of Mendez & Co., to whom this lighter belonged, unless the shipper arranged specially for lighterage in a different manner; which, it is said, he had the option to do, although that option appears not to have been generally understood.

The evidence taken at the trial is, in the main, circumstantial evidence bearing upon the question whether the lighter was to be deemed employed by the ship, or by the shipper. I shall not pursue this part of the case further, because the other question of negligence on the part of the lighter lies at the threshold of the libelants' case; and upon this question, as the evidence stands, I do not feel warranted in decreeing for the libelants. *Prima facie* it would seem to be negligence, and gross negligence, that bales, very dry and slippery, should be piled three tiers high above the gunwale, and have no protection by lashing, when they are liable to slide off into the water if the lighter is tipped a little by a gust of wind. But the testimony on the part of the lightermen is explicit that these goods were lightered in the usual way; that the cargo was of the customary amount; that it is not usual in Havana to lash or secure the bales; that the bales were no more slippery than usual; and that such accidents were extremely rare, as he had only known three or four such in a long experience.

I confess, indeed, to much doubt of the entire accuracy of this testimony. A custom not to secure slippery bales piled above the gunwale would seem to be merely customary negligence. But how can this court, at this distance, and without further proof of the circumstances, and in the absence of any contradiction of the respondents' testimony, affirm that such an established custom is *ipso facto* negligence, and therefore void as a defense? The harbor, except in extremely rare instances, may be smooth and quiet; the lighters may be built so stiff as to have very great stability in the water; and the amount of sail used may be so slight, as possibly to make reasonable and justifiable the alleged usage of dispensing with any lashing or fastening of bales piled a certain distance above the gunwale. The reasonable sufficiency of the alleged customary mode of loading must therefore depend upon the circumstances of the port and the country, of which this court certainly has no judicial knowledge, and which the evidence does not disclose. If, as appears from the respondents' evidence, the lighter was in this case loaded in the usual manner, and none of the customary precautions were omitted on their part for the safe lightering of the tobacco, and the bales under such circumstances slid off in consequence of a sudden gust of wind, which was extremely rare, (see *Wardsworth v. Pacific Ins. Co.* 4 Wend. 33, 38,) then the loss was by a peril of the seas, and no negligence can be imputed to the lighter, and consequently none to the steamer, even though the lighter were in the steamer's employ; and the loss must

be set down to the exceptions in the bill of lading. It is sufficient to rebut the charge of negligence to show that the stowing was in conformity with the established usage of the port. *Shear. Neg.* § 6; *Baxter v. Leland*, 1 Blatchf. 526; *Lamb v. Parkman*, 1 Spr. 343, 351; *The Titania*, 19 FED. REP. 101, 107, 108; *The Geo. Heaton*, 20 FED. REP. 323; *The Chasca*, ante, 156.

If I were to hold the steamer in this case, she ought to have a remedy over against the lighter in Havana. It would be unjust to charge the steamer upon evidence that would exempt the lighter in a suit there. Much as I may doubt the accuracy of the evidence given concerning the alleged custom of Havana, or, if some such custom exists, whether this lighter was loaded in conformity with it, I cannot feel warranted in disregarding the positive evidence given, in the absence of all other proof to the contrary. I am reluctantly constrained, therefore, to dismiss the libel, leaving the libelants to their remedy against the lightermen in Havana, or to such further proof as they may make upon appeal in the circuit.

THE MARY R. MCKILLOP.¹

(District Court, E. D. New York. October 3, 1884.)

TOWAGE—NEGLIGENCE—BREACH OF CONTRACT—DEVIATION.

A canal-boat sprang a leak while in tow of a tug, and thereafter sank. *Held* that, although the leak was probably caused by the boat's coming into contact with a floating piece of ice, still, as the proofs did not show a failure on the part of the tug to use due care and skill, the tug could not be held liable for the boat's sinking. It was not a breach of the towing contract for the tug to take another barge in tow, and land her at another place, during the same voyage, since it appeared from the circumstances that this was in accordance with the parties' understanding of the contract, and was, therefore, not a deviation. The libel against the tug for the sinking of the boat was therefore dismissed.

In Admiralty.

Carpenter & Mosher, for libellant.

Hyland & Zabriskie, for claimant.

BENEDICT, J. The master of the canal-boat Robert Henry agreed with the master of the tug Mary R. McKillop to be towed by the tug from Newtown creek to Hoboken. The towage was agreed to be seven dollars, because of ice in the rivers. The tug took the canal-boat along-side, and afterwards took a barge astern, to be landed at the Cunard wharf in the North river, and also a lighter to be landed in the North river. After the lighter had been landed in the North river, and when proceeding in the East river, ice was met. The tug proceeded up in the clearest part of the river until she approached

¹Reported by R. D. & Wylls Benedict, Esqs., of the New York bar.

the Cunard dock. Then she hauled in towards the New York piers, and on reaching the Cunard dock landed the barge. Thence she proceeded to Hoboken with the libelant's canal-boat.

Before the landing of the barge at the Cunard dock the libelant's canal-boat sprang a leak, from what her master supposed, and no doubt correctly, to have been contact with a piece of ice. The leak increased, and finally after the boat had been landed at Hoboken she sank.

Assuming that the cause of the boat's sinking was coming in contact with ice while the tug was hauling towards the New York docks in order to land the barge, it is still necessary, in order to charge the tug with the sinking of the boat, that it be proved that the canal-boat was brought in contact with the cake of ice by some negligence on the part of the tug. The proofs show no such negligence. There is no evidence of any failure on the part of the tug to exercise due care and skill throughout the voyage. If, then, any liability on the part of the tug exists, it must arise from a breach of the towing contract. The libelant contends that the towing contract was for a voyage from Newtown creek to Hoboken direct; that the tug deviated from this voyage to land the barge at the Cunard wharf; and that the sinking of the boat was owing to injuries received by her in the course of this deviation, for which the tug is consequently responsible. But I am unable to hold that to take the barge in tow and land her at the Cunard wharf was a breach of the towing contract made with the libelant. When the contract to tow the canal-boat to Hoboken was made, nothing was said about going direct, nor about taking other boats in tow at the same time, and although the barge, as well as a lighter, were taken on immediately after the canal-boat was alongside, no objection was made by the captain of the canal-boat to the taking of these boats. From these circumstances I infer that the taking of the barge in tow was in accordance with the parties' understanding of the contract made to tow the libelant's boat, and if so, it was not a deviation to land the barge at the Cunard dock.

The libel must therefore be dismissed, and with costs.

THE WISCONSIN.¹

(District Court, E. D. New York. January 6, 1885.)

COLLISION—STEAMER AND BARK—MISTAKE AS TO LIGHTS—FLARE-UP—BLUE LIGHT—PILOT SIGNAL.

Where a steamer was approaching a bark in the night, and the bark exhibited a flare-up light, which was seen on the steamer, and those on the steamer supposed the other vessel to be a pilot-boat desiring to put a pilot on board, and the steamer showed a blue light, to which the bark replied by a flare-up, and the steamer did not discover her mistake until too late to avoid a collision, *held*, that, besides the fact that the green light of the bark was proved to be so dim as to render it invisible to the steamer at a distance sufficient to enable her to avoid the bark, which of itself was sufficient to prevent a recovery by the bark, it was also a fault on the part of the bark to exhibit the flare-up after the steamer had burned the blue light; and as there was no fault proved on the part of the steamer, the bark's libel against the steamer was dismissed.

In Admiralty.

Scudder & Carter and Owen & Gray, for libelants.

Beebe & Wilcox, for claimants.

BENEDICT, J. The cause of the collision which gave rise to these actions was the opinion formed by those in command of the steamer that the lights exhibited by the bark were the lights of a pilot-boat desiring to put a pilot on board the steamer, when in fact the lights were those of a bark holding her course. The night was dark, but good for seeing lights. The bark exhibited a flare-up light, which was seen by those in charge of the steamer in abundant time to avoid the bark, and from that time the lights of the bark were watched with the aid of glasses as well as with the naked eye by several competent persons on board the steamer, including the master, and all supposed the light to be the flare-up of a pilot-boat until the bark was too near to enable the steamer to avoid the collision.

The case is not one of an inattentive lookout on the steamer, but one where the lookout saw the light, and was misled by it; and the question of the case is whether the opinion that the approaching vessel was a pilot-boat, which was formed and acted upon by those in charge of the steam-ship, was justified by the circumstances. If so, the steam-ship cannot be held in fault.

In addition to the flare-up light shown, the bark carried a green side light. This light was seen by those on board the steamer, but not until it was too late to correct their mistake in regard to the character of the approaching vessel, and when collision was inevitable. The testimony in regard to the green light of the bark, in connection with evidence of the lantern itself, warrants the conclusion that the light was so dim as to render it invisible to the steamer at a distance sufficient to enable the steamer to avoid the bark. This condition of the bark's green light is of itself sufficient to prevent a recovery by the bark.

¹Reported by R. D. & Wylls Benedict, Esqs., of the New York bar.

But another fault on the part of the bark also appears. It is proved, and not disputed, that when the bark displayed her flare-up light to the steamer, the steamer burned a blue light. This blue light was seen on board the bark, and replied to by a flare-up. It was not a fault in the bark to display the flare-up that was displayed before the blue light was burned, but it was a fault to display a flare-up after the blue light of the steamer was seen, for the blue light was notice to the bark that her flare-up had been taken by the steam-ship to be the flare-up of a pilot. It was also notice to the bark that she was seen by the steamer. There was no need, therefore, for the bark exhibiting the flare-up a second time, and the action of the bark in answering the steamer's blue light with a flare-up was, under the circumstances, equivalent to notice from the bark to the steam-ship that the approaching vessel was a pilot-boat, intending to put a pilot on board the steamer. In this way the mistaken opinion of those on board the steam-ship was confirmed by the bark, when, as I cannot doubt, the absence of a reply to the steamer's blue light would have corrected the mistake and prevented the collision.

It is said that the steam-ship, even if she supposed the approaching vessel to be a pilot-boat, had no right to run her down; but, the steam-ship, led by the bark to believe that she was a pilot-boat desiring to put a pilot on board, had the right to come close to the supposed pilot-boat, and to believe that the pilot-boat would also draw near to her, and to assume that any one of that active class of vessels would co-operate with her in the effort to bring the vessels close to each other in safety. When, therefore, the steam-ship burned a blue light and slowed down, and changed her course nearer to the supposed pilot-boat, and stopped her engines and backed on discovering her mistake, she did all that it was possible for her to do under the circumstances to avoid running down the bark, and was guilty of no fault.

My conclusion therefore is that the collision in question was caused by fault on the part of the bark, and not by fault on the part of the steamer.

Let the libels be dismissed, and with costs.

FULLER, Assignee, etc., v. WRIGHT.

(Circuit Court, W. D. Pennsylvania. May 20, 1885.)

REMOVAL OF CAUSE—ASSIGNMENT FOR BENEFIT OF CREDITORS—FEIGNED ISSUE TO TRY VALIDITY OF JUDGMENT—PENNSYLVANIA STATUTE—CITIZENSHIP.

A feigned issue granted at the instance of an assignee for the benefit of creditors in Pennsylvania to try the validity of a judgment recovered by a creditor, which it is claimed was fraudulent as to the other creditors, is removable into the circuit court when such judgment creditor is a citizen of another state.

On Motion to Remand Cause to Common Pleas of McKean County. Before BRADLEY, Justice, and McKENNAN, J.

BRADLEY, Justice. This is a feigned issue, granted at the instance of an assignee for the benefit of creditors of J. W. Humphrey and J. W. Humphrey & Co., to try the validity of a judgment recovered by Wright, the defendant in the issue, against the assignor, J. W. Humphrey. We have before us only the award of the feigned issue and the proceedings thereon and the docket entries relating thereto. The record of the proceedings under the assignment by virtue of which Fuller, as assignee, acquired a *status* in the case, and his petition for a feigned issue, have not been certified to this court. Without these proceedings we cannot see his authority to represent the creditors, and to apply for the feigned issue. Sufficient appears, however, by implication in the record before us to show that such previous proceedings were had; and if upon this hypothesis it appears that the defendant, Wright, would be entitled to remove the cause arising on the feigned issue, we should not be disposed to turn him out of court for a defective record, but would allow him to supply the defect by a supplemental return.

Looking at the case, then, as we suppose it to be, the question presented to us is whether it is one which, in its nature, is removable into the United States court. This is the only question before us at present. The objection as to the time of the application has been waived, inasmuch as the ground assigned for removal was local prejudice, on which a removal may be applied for at any time before the trial or final hearing of the suit. It is objected, however, that a feigned issue, in such a case as this, is not a distinct controversy of such a character as to be removable from the state to the federal court; but that it is a proceeding merely incidental to the principal proceeding under the assignment in the state court, instituted to inform the conscience of the court, and to enable it to administer the property of the insolvent assignors. But we are of opinion that this objection cannot be sustained. Creditors whose rights are infringed by a fraudulent judgment against their debtor have always had relief in the courts of Pennsylvania. Troub. & H. Pr. §§ 803-805. It is obtained in one of two ways: they may move to open the judgment and may be let in to make defense by showing the fact that it was

collusively obtained, or entered with intent to defraud them; or they may apply for a feigned issue for the purpose of determining the question of fraud or collusion. The latter proceeding is the more usual one, and is equivalent to a bill in equity to set aside a fraudulent judgment and to restrain its execution. It is, in effect, a regular suit in equity, involving a distinct controversy, which may well be removed to the United States court if a good ground for removal exists. The decision of the jury is binding and final, unless the verdict be set aside for irregularity, or reversed on writ of error. It is not like an issue framed by a court of equity for the purpose of informing the conscience of the court, which may be disregarded; but is more like the suit in equity itself, in which the decision has the force and effect of a judgment or decree as between the parties. The issue referred to in *Wible v. Wible*, 1 Grant, 406, was of the former kind, like an issue framed by a court of chancery, to inform the conscience of the court. There an issue had been framed by the orphans' court of Westmoreland county, in a case of partition, to determine whether the entire land had been given to one of the parties. This was held to be an issue to inform the conscience of the court, and the verdict was held to be not binding. The reason is not given, but is obvious. Partition could not be made unless the land was held in common, or jointly; and whether it was so or not was one of the questions to be determined by the orphans' court. If the court wished to have the advice of a jury on that point, it might frame an issue, and in such case the verdict would be, as the supreme court said, merely for the purpose of informing the conscience of the court, and would not be conclusive. But when creditors apply for and obtain an issue to determine whether a judgment against their debtors is or is not fraudulent as against them, it is a new and original proceeding instituted as of right, and the decision of the issue is binding upon the court; and the party in whose favor it is made has a vested interest in it, the same as in a judgment or decree.

These views are decisive of this case. Here the assignee, Fuller, the plaintiff in the feigned issue, represents creditors of Humphrey, the judgment debtor, who complain that the judgment recovered by Wright, the defendant in the feigned issue, was fraudulent as against them, or that it was part and parcel of the assignment for benefit of creditors, operating as a preference, and therefore void by the laws of Pennsylvania. The case, therefore, is precisely one of the kind referred to, in which creditors seek, by means of a feigned issue, to set aside a judgment fraudulent as against them.

The motion to remand the case is denied, and the defendant in the feigned issue is allowed to supply the defect in the record by filing an exemplification of the proceedings under the assignment, including the petition upon which the feigned issue was granted. No costs are allowed against the assignee on this motion.

HARTOG v. MEMORY.

(Circuit Court, N. D. Illinois. May 11, 1885.)

CIRCUIT COURT—JURISDICTION—ACT OF MARCH 3, 1875, CH. 137, § 5—DISMISSAL OF SUIT.

When, during the trial of a case in the circuit court, it appears from the testimony that the controversy in the suit is not one between a citizen of a state of the United States and a citizen of a foreign state, as alleged in the declaration, but one between two aliens, and no question arising under the constitution or laws of the United States is involved, a motion, after verdict, to dismiss for want of jurisdiction will be granted.

Motion to Dismiss.

Rosenthal & Pence, for plaintiff.

Austin Bierbower and W. P. Black, for defendant.

BUNN, J. This action was brought by the plaintiff, a citizen of Rotterdam, Holland, against the defendant, upon a contract for the delivery of pork, made at Rotterdam. In the declaration it is alleged that the defendant is a citizen of the state of Illinois. The defendant pleaded the general issue, and the case was tried, and a verdict rendered for the plaintiff for \$2,497. Upon the trial, the defendant, at the close of his testimony, testified that he had, for eight or ten years, resided, and been doing business, at Chicago; but was not a citizen of the United States, but was a citizen of Great Britain; from which testimony it appeared, for the first time to the court, near the close of the trial, that the controversy in the suit was not one between a citizen of a state of the United States and a citizen of a foreign state, but was one between two aliens, of which this court has no jurisdiction, under the laws and constitution of the United States. After verdict, the defendant moved to dismiss the suit for want of jurisdiction.

It seems clear to me, under the act of March 3, 1875, that the motion must prevail. Under the practice as it stood before the passage of that act, if the defendant did not plead specially to the want of jurisdiction, and there were proper allegations in the declaration showing the jurisdiction, or it otherwise appeared of record in the case, the defendant could not take advantage of any defect in the jurisdiction, appearing upon the trial or during the progress of the cause. The matter of jurisdiction, to a certain extent, was made a question of pleading. If the requisite diverse citizenship appeared of record, the defendant, if he wished to dispute it, must do so by special plea in abatement, the purpose of which rule was to keep the issue upon jurisdiction and the issue upon the merits separate and distinct. And the order of pleading was that pleas to the jurisdiction should be put in and tried first. And if there was a plea to the merits, the right to plead to the jurisdiction was waived, although the court might allow the defendant to withdraw his plea to the merits for the purpose of pleading to the jurisdiction. This was the natural and proper order of

pleading. But the result was that the court frequently found itself engaged in the hearing of controversies which it was never intended should be litigated in the federal courts, and over which it had in fact no jurisdiction under the constitution.

All that was necessary to bring about this state of things was to have a collusive understanding between the parties, whereby the question of diverse citizenship should not be raised. In that way, by putting the proper allegations into the record, which it was not necessary should be sworn to, and the defendant failing to plead to the jurisdiction, any controversy between two aliens, or between two citizens of the same state, might be litigated in the federal courts. The court, by its own rules and decisions, was powerless to remedy the evil, and it was not remedied until by the act of March 3, 1875. Section 5 of that act provides—

"That if, in any suit commenced in a circuit court, or removed from a state court to a circuit court of the United States, it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said circuit court shall proceed no further therein, but shall dismiss the suit, or remand it to the court from which it was removed, as justice may require. * * *

This provision wholly changes the rule that, in order to take advantage of the want of jurisdiction, the matter must be specially pleaded. It makes it the duty of the court at any stage of the proceedings to dismiss the case when this want appears. And this is as it should be. The court ought not to have its hands tied, and be required to hear and determine controversies over which the constitution gives it no jurisdiction, simply because one party has made false allegations of citizenship, and the other has failed purposely or otherwise to plead the facts within its own knowledge to show the want of jurisdiction.

But it is contended by plaintiff's counsel that the above provision applies only to two classes of cases, namely: *First*, where jurisdiction is sought to be maintained on account of the controversy being one arising under the constitution and laws of the United States; and, *second*, where the parties have been collusively made or joined for the purpose of creating a case cognizable under the act; and that it has no application to a case where the want of jurisdiction comes from the lack of the proper diverse citizenship of the parties, when that fact is relied upon; and that in this last case the old rule still holds that such want of citizenship must be pleaded specially, or the court cannot take notice of it. But such an interpretation seems too narrow, and I think is not warranted either from a consideration of the language employed or the mischief intended to be remedied. A very large majority of the cases, perhaps more than four-fifths of the cases

brought in the circuit courts of the United States, are cases at common law or in equity between citizens of different states or citizens of a state and aliens, and where the sole ground of jurisdiction is such diverse citizenship of the parties.

It would have been hardly expected that congress should have undertaken to provide for the small number of cases where jurisdiction comes from the fact that there is a controversy arising under the laws or constitution of the United States, and leave unprovided for that much larger class where jurisdiction comes from citizenship. Besides, there was no need to provide for the former class as it was always the rule in a suit between citizens of the same state claiming under grants from different states, or where the controversy was alleged to be one arising under the laws of the United States; that if it appeared upon the trial or hearing that the court had not jurisdiction of the subject-matter of the controversy, it should dismiss the cause.

In my judgment the first clause of section 5, "that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court," covers all classes of cases, whatever the claimed source, or ground of jurisdiction may be. It is said that this clause is only intended to apply to cases where the court gets jurisdiction by virtue of the subject-matter, and that these are only cases arising under the constitution or laws of the United States. But all questions of jurisdiction, as a ground of jurisdiction in the federal courts, are questions of jurisdiction of the subject-matter. The circuit court has not jurisdiction of the subject-matter of controversies at common law or in equity, unless the proper diverse citizenship exists. If it were merely a question of jurisdiction of the person, as in case of defective service, a general appearance would waive it. But it is well settled that neither a general appearance nor express consent can confer jurisdiction upon the circuit court of an ordinary controversy at common law or in equity between citizens of the same state. The parties must be citizens of different states, to give the court jurisdiction of the dispute or controversy. If, in the course of the proceedings, it shall appear that the case is one of which the court has not jurisdiction, as that it involves a dispute or controversy at common law between citizens of the same state, or between aliens, it becomes the duty of the court to dismiss the case. The cases of *Williams v. Nottawa*, 104 U. S. 209, and *Farmington v. Pillsbury*, 114 U. S. 138, S. C. 5 Sup. Ct. Rep. 807, arising under this section, were both cases where parties had been collusively made or joined; but the language and decisions of the court cover every case where it appears to the satisfaction of the court that it is one where it has no jurisdiction, and, in my judgment, should rule the case at bar. In the latter case, on page 144, the court, speaking by Chief Justice WAITE, say:

"The old rule, established by the decisions which required all objections to the citizenship of the parties, unless shown on the face of the record, to be

taken by plea in abatement, before pleading to the merits, was changed, and the courts were given full authority to protect themselves against the false pretenses of apparent parties. This is a statutory provision which ought not to be neglected. It was intended to promote the ends of justice, and is equivalent to an express enactment by congress that the circuit court shall not have jurisdiction of suits which do not really and substantially involve a dispute or controversy of which they have cognizance, nor of suits in which parties have been improperly or collusively made or joined for the purpose of creating a case cognizable under the act."

See, also, *Rae v. Grand Trunk Ry. Co.* 14 FED. REP. 401, which was a case, like this, between two aliens, and *Ryan v. Young*, 9 Biss. 63, by Mr. Justice HARLAN. Both these cases, I think, are authority for the ruling here.

The case will be dismissed for want of jurisdiction.

BOSTON ELECTRIC CO. v. ELECTRIC GAS LIGHTING CO.

SAME v. NEW ENGLAND ELECTRIC MANUF'G CO.

(Circuit Court, D. Massachusetts. May 20, 1885.)

JURISDICTION OF CIRCUIT COURT—FOREIGN CORPORATIONS—ATTACHMENT—PUB. ST. MASS. CH. 105, § 28.

Defendant corporations, organized under the laws of Maine, but having their principal place of business in Massachusetts, where a majority of their officers and directors resided, were sued in the circuit court for the district of Massachusetts; the writs being served by attachment of corporate property within the latter state, and by service on the corporate officers. *Add*, on pleas to the jurisdiction, that the court had no jurisdiction.

Plea to Jurisdiction.

J. E. Abbott, for plaintiffs.

E. P. Payson and *A. Eastman*, for defendants.

COLT, J. The defendants' pleas, in both these cases, raise a question of jurisdiction. The defendant corporations, organized under the laws of Maine, have been sued in the circuit court for the district of Massachusetts. The writs were served by attachments of corporate property within this state, and by service upon the proper officers here, if such service could be legally made. It is agreed that the defendant corporations have a usual and principal place of business in Boston; that the president, treasurer, and a majority of the directors of each corporation reside in the state; and that the infringements for which these actions are brought were committed here.

The act of 1875, (18 St. 470,) following the eleventh section of the judiciary act of 1789, provides that no civil suit shall be brought against any person in any other district than that whereof he is an inhabitant, or shall be found at the time of serving the writ. Courts

of the United States cannot acquire jurisdiction by an attachment of property merely, but there must be a personal service of the writ or process upon the defendant, or a voluntary appearance. *Pennoyer v. Neff*, 95 U. S. 714; *Ex parte Railway Co.* 103 U. S. 794; *Nazro v. Cragin*, 3 Dill. 474; *Parsons v. Howard*, 2 Woods, 1; *Anderson v. Shaffer*, 10 FED. REP. 266; *Mohr & Mohr Distilling Co. v. Insurance Co.* 12 FED. REP. 474; *Saddler v. Hudson*, 2 Curt. 7. It is evident, therefore, that the court could not acquire jurisdiction simply by the attachment of the property of the defendant corporations under the provisions of the Massachusetts statute. Pub. St. c. 105, § 28.

The general rule is that a corporation cannot migrate beyond the state by whose laws it is created. *Day v. India Rubber Co.* 1 Blatchf. 628. But this rule has been modified, and it is now held that a corporation may be found in a foreign state, within the meaning of the federal law, when it exercises its powers by express consent of the legislature of such state, (*Railroad Co. v. Harris*, 12 Wall. 65;) or when it is required by a general law of the state to appoint an agent for the service of process, as a condition to the transaction of business within the state, (*Lafayette Ins. Co. v. French*, 18 How. 404; *Ex parte Schollenberger*, 96 U. S. 369;) or when, under a general law of the state, foreign corporations are made liable to suit without the appointment of an agent for that particular purpose. *Williams v. Empire Transp. Co.* 14 O. G. 523; *Wilson Packing Co. v. Hunter*, 7 Reporter, 455; *St. Clair v. Cox*, 106 U. S. 350; S. C. 1 Sup. Ct. Rep. 354.

A corporation of one state cannot do business in another state without the latter's consent, express or implied; and that consent may be accompanied with such conditions as it may think proper to impose. *St. Clair v. Cox*, *supra*. When the state, by local law, provides that foreign corporations doing business in the state shall be amenable to suit, such foreign corporations thereafter carrying on business in the state are liable to suit. But clearly, by the great weight of authority, this rule has not been extended so as to permit a corporation to be sued in a foreign state because it carries on business there, in the absence of a state law authorizing such suit. The supreme court say, in *Lafayette Ins. Co. v. French*:

"We limit our decision to the case of a corporation acting in a state foreign to its existence under a law of that state, which recognized its existence for the purposes of making contracts, and being sued on them through notice to its contracting agents."

In *Railroad Co. v. Harris*, the court said:

"It [the corporation] cannot migrate, but may exercise its authority in a foreign territory upon such conditions as may be prescribed by the law of the place. One of these conditions may be that it shall consent to be sued there. If it do business there, it will be presumed to have assented."

Chief Justice WAITE thus defines the rule in *Railroad Co. v. Koontz*, 104 U. S. 5:

"It is well settled that a corporation of one state doing business in another is suable where its business is done, if the laws make provision to that effect."

Perhaps the latest expression of the supreme court on this subject is in *New England Mut. L. Ins. Co. v. Woodworth*, 111 U. S. 138, S. C. 4 Sup. Ct. Rep. 364, where Mr. Justice BLATCHFORD says:

"In the courts of the United States, it is held that a corporation of one state, doing business in another, is suable in the courts of the United States established in the latter state, if the laws of that state so provide, and in the manner provided by those laws."

See, also, *Eaton v. St. Louis Shakspear Min. & S. Co.* 7 FED. REP. 139; *West v. Home Ins. Co.* 18 FED. REP. 622. At the time these suits were brought, Massachusetts had no local law making foreign corporations doing business in the state amenable to suits, except foreign insurance companies, and except the provisions in relation to attachment, which, under a well-settled rule, could not give this court jurisdiction. Recently, however, feeling the necessity for such a law, a statute has been passed requiring all foreign corporations doing business in the state to appoint an agent, upon whom service can be made. Acts 1884, c. 330.

The plaintiffs rely upon the case of *Hayden v. Androscoggin Mills*, 1 FED. REP. 93. A similar question of jurisdiction there arose on a motion to dismiss, and the decision was based primarily on the impropriety of the motion. Judge LOWELL, however, goes on to discuss the merits of the question, and while he intimates, at the close, that if the question was brought up in some new form, his decision might be different, yet he gives it as his opinion that a foreign trading corporation doing business in the state of Massachusetts may be sued in the circuit court, by summons duly served upon an officer of the company, the fact of attachment being immaterial. We cannot adopt this view in the light of what we believe to be the great weight of authority on this question. The pleas to the jurisdiction of the court are sustained.

NORTON, Chief Supervisor, v. BREWSTER, State Supervisor of Registration.¹

(Circuit Court, E. D. Louisiana. November 1, 1884.)

1. FEDERAL ELECTIONS—JURISDICTION.

The jurisdiction of the United States courts must appear of record, and be derived from congressional enactments.

2. SAME—REV. ST. TIT. 26.

Under title 26 of the Revised Statutes of the United States the circuit court is given jurisdiction at certain elections to appoint supervisors to scrutinize the election, and under title 70, Crimes, to try criminal violations of the laws

¹Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

of the United States relating to the elections of members of congress, but it nowhere appears that congress has adopted the election and registration laws of any state.

On twenty-seventh October, 1884, the plaintiffs presented to the court a petition, in which they represent themselves to be the chief supervisor of elections for this district, appointed by this court under title 26 of the Revised Statutes of the United States; several of the ward supervisors of election in the city of New Orleans, appointed at the request of the Democratic party; and a number of canvassers appointed by the Democratic party,—for that part of the parish of Orleans within the First congressional district of the state of Louisiana. They allege that a general election is pending, and to take place on fourth November, 1884, for the offices of president and vice-president of the United States, and for members of congress, under the laws of the United States and of the state of Louisiana; that part of the city of New Orleans is in said First congressional district by the laws of Louisiana; that the federal government, through its proper officers, has all of the right of control, inspection, and direction set forth in title 26 of the Revised Statutes of the United States; that under said statutes the law relating to the registration of the voters of Louisiana became and is a part of the law of the United States relating to the registration of voters for said election; that the act No. 123 of the legislature of Louisiana, of 1880, is the said registration law, which provides for the appointment of a supervisor of election for the parish of Orleans, (the parish of Orleans and city of New Orleans have the same geographical boundaries,) and defines his duties, among which he is required to register such persons as are entitled to vote, and to expunge from the list of registered voters all persons who have been committed to prisons as convicts, who have died subsequent to registration, who have departed the state or district, or who have become insane; that he is also required, upon the affidavit of any two *bona fide* citizens who have been appointed by any political party and have been duly sworn to perform their duty as canvassers, and who present to him an affidavit that certain names are fraudulently and illegally registered and should be erased, to investigate the same, and after due proceedings, cause said names to be erased from the registration; that said act further provides that, in case of the failure of the supervisor to so investigate and erase, an appeal may be made to any court of competent jurisdiction, to be tried in the most summary way, etc.; that the circuit court of the United States for the Eastern district of Louisiana, now sitting in special session, is the only court of competent jurisdiction in session within said First congressional district; that Robert Brewster is now the supervisor under the said act, and that the plaintiffs have, under oath, as such officers and canvassers as aforesaid, caused to be made an exact canvass of all that part of the city of New Orleans within the First congressional district, and all the inhabitants thereof, and have ascertained that all of the persons named in the lists herewith presented and filed are contained and exist

upon the books of registration in said parish of Orleans wrongfully and fraudulently, and that said persons have no right to vote; and that these plaintiffs have caused the said lists of names, with the requisite affidavits concerning each name made and sworn to by two officers, and have in all things done every act and given every notice and proof required by law to compel said Brewster to strike said names from the books and lists of registration, but said Brewster refuses to take any steps or proceedings to erase said names, and will, in no manner, investigate the truth of the matter so presented to him; wherefore plaintiffs pray that said Brewster be ordered to show cause why he should not erase the said names from the books of registration.

The court granted a motion on the same day ordering Robert Brewster to show cause, on thirty-first October, 1884, why the relief prayed for should not be granted. On the thirty-first October, 1884, the cause was heard, defendant having filed an exception, on the grounds (1) that the court had no jurisdiction in the premises, as there is no delegation of authority by congressional enactment; (2) that the court had no jurisdiction to proceed by rule, or in a summary manner; (3) that the proceeding discloses no cause of action.

James R. Beckwith, for plaintiffs.

M. J. Cunningham, Atty. Gen., *James B. Eustis* and *L. O'Donnell*, for defendants.

PARDEE, J. The jurisdiction of this court must appear of record, and be derived from congressional enactments. There is no statute conferring jurisdiction in a matter or controversy of the kind now before me. Under title 26, Rev. St., relating to the elective franchise, the circuit court is given jurisdiction in certain elections to appoint supervisors to scrutinize the election. Under the title of "Crimes" the circuit court is given jurisdiction to try criminal violations of the laws of the United States relating to the elections of members of congress. Further than as given by these two titles, the circuit court has no jurisdiction in the matter of elections.

A plausible argument in favor of the jurisdiction might perhaps be made if congress had adopted the state statutes in relation to elections, and then a controversy involving over \$500 as to private rights appeared, arising under the state law, and inferentially under the laws of the United States. In such a case the act of March 3, 1875, giving original jurisdiction to the circuit courts of the United States of all suits of a civil nature at common law or in equity where the matter in dispute exceeds the sum or value of \$500, and arising under the constitution or laws of the United States, etc., might, perhaps, be successfully invoked. But we have no such case here; for it nowhere appears that congress has adopted the election and registration laws of any state, and in the present case no sum or value is suggested.

It is clear that the court is without jurisdiction, and the petition for relief is therefore refused and dismissed.

THE LIBERTY BELL.¹BAYLE and others v. CITY OF NEW ORLEANS.¹

(Circuit Court, E. D. Louisiana. June 4, 1885.)

1. MUNICIPAL LAW—MISAPPROPRIATION OF FUNDS.

An ordinance making an appropriation of the funds of a city, derived from taxation, for purposes wholly beyond the purview of municipal government, is a wrongful appropriation of the funds held in trust for the tax-payers and people to pay the alimony and legitimate expenses of the city, and is, in short, *ultra vires*, illegal, null, and void.

2. JURISDICTION—INJUNCTION.

Resident tax-payers have the right to invoke the interposition of a court of equity to prevent an illegal disposition of the moneys of a municipal corporation or the illegal creation of a debt which they, in common with other property holders, may otherwise be compelled to pay. *Crumpton v. Zabriskie*, 101 U. S. 609.

In Chancery. Rule for an injunction.

Edgar H. Farrar, E. B. Kouttschnitt, Charles B. Singleton, Richard H. Browne, Benj. F. Choate, Edward D. White, Eugene D. Saunders, John H. Kennard, W. W. Howe, S. S. Prentiss, and Charles E. Schmidt, for complainants.

Walter H. Rogers, City Atty., for defendants.

PARDEE, J. An injunction, *pendente lite*, is asked on the following bill:

"Joseph Bayle, a resident of the city of New Orleans and state of Louisiana, and a citizen of the French Republic, brings this bill of complaint against the city of New Orleans, a municipal corporation organized under the laws of the state of Louisiana, and as such a resident of said state, and against Isaac W. Patton, treasurer, and John N. Hardy, comptroller, of the city of New Orleans, both citizens of the state of Louisiana, and residing in this district.

"And thereupon your orator complains and says: That your orator is a resident tax-payer of the city of New Orleans, who pays annually into the city treasury municipal taxes exceeding \$500 in amount; that some time in the year 1884, the city of Philadelphia was applied to by the World's Industrial and Cotton Centennial Exposition to allow a certain bell, well known as the 'Liberty Bell,' to be sent to New Orleans and put upon exhibition on the grounds of the said exposition company; that the said bell was transmitted to New Orleans by the city of Philadelphia, and placed upon exhibition in the exposition grounds, with some agreement or understanding that the said bell should be considered as in the custody of the corporation of the city of New Orleans, and that it should be returned to the city of Philadelphia at the close of the exposition, on or about the thirty-first of May, 1885; and that said bell was, as your orator is informed and believes, and so charges, brought to the city of New Orleans by rail, and without charge, and that the committee or persons in charge of said bell were also brought to the city of New Orleans free of transportation expenses.

"Your orator is informed and believes, and so charges, that any of the rail-

¹ Reported by Joseph P. Horner, Esq., of the New Orleans bar.

roads leading out of the city of New Orleans are now willing and anxious to haul the said bell back to Philadelphia free of charge, and also to transport to and from Philadelphia such reasonable committee of persons as may be appointed to take charge of it; that the council of the city of New Orleans have organized a junketing expedition to go to Philadelphia, ostensibly in charge of the said bell, and did, on the twenty-seventh day of April, 1885, by ordinance No. 1,214, council series, make an appropriation of \$5,000 out of the public treasury of the city of New Orleans, stating that the same was for the purpose of defraying all expenses which might accrue by the return of the liberty bell from the exposition grounds to the city of Philadelphia at the close of the exposition, and directing by the said ordinance that the comptroller should warrant upon the treasurer whenever there were funds in the treasury to pay this appropriation.

"Now, your orator avers that this appropriation under ordinance 1,214 is absolutely null, void, and of no effect or validity; that the removal of the said liberty bell, and the contract, agreements, and understandings with reference thereto are beyond the corporate authority of the city of New Orleans, and that the city council has no power to expend any money for any of the purposes mentioned in said ordinance No. 1,214.

"Further complaining, your orator avers that he is informed and believes and so charges, that the said city of New Orleans, through some of its officials, have agreed with the Northeastern Railroad Company to take the said bell back to Philadelphia free of cost of transportation, and that the said Northeastern Railroad Company has agreed to give free passes to a sufficient number of persons as a committee in charge of said bell; the same not being, from any point of view, legitimate municipal expenditures within the power of the city of New Orleans; that your orator, in company with all other taxpayers of the city of New Orleans, will receive irreparable injury and damage from this unlawful appropriation of public money, and that they are entitled to the protection of a court of equity to enjoin and restrain this void act, as they and your orator are entirely without remedy in a court of law."

The allegations of fact in the bill are substantially shown by affidavit and are not denied. The counter-affidavits show that the board of two policemen of Philadelphia, in charge of the liberty bell, has been paid for the last two months by the city, and that the city has paid for the symbolical decoration of said bell, which expenses are expected to be met by the appropriation under the said ordinance. There is no doubt that the said ordinance makes an appropriation of the funds of the city of New Orleans derived from taxation for purposes wholly beyond the purview of municipal government; is a wrongful appropriation of the funds held in trust for the tax-payers and people of New Orleans to pay the alimony and legitimate expenses of the city; and is, in short, *ultra vires*, illegal, null, and void. See acts La. 1882, No. 20, pp. 20, 21, §§ 7, 8; 1 Dill. Corp. § 52 *et seq.*; *Hood v. Lynn*, 1 Allen, 103; *Tash v. Adams*, 10 Cush. 252; *Clafin v. Hopkinton*, 4 Gray, 502; *Murphy v. Jacksonville*, 18 Fla. 318; *Grant Co. v. Bradford*, 72 Ind. 455; *Henderson v. Covington*, 14 Bush, 312; *Cornell v. Guilford*, 1 Denio, 510; *Hodges v. Buffalo*, 2 Denio, 110; *Halstead v. Mayor, etc., of New York*, 3 N. Y. 433; *New London v. Brainard*, 22 Conn. 552.

The principle that a municipal corporation can have no other power than those derived from constitutional or legislative grants, expressly

or by necessary implication, is well settled in Louisiana, and is settled for the city of New Orleans in *Guillotte v. New Orleans*, 12 La. Ann. 432.

The illegality and nullity of the ordinance being clear, the question remaining for decision is as to the jurisdiction and propriety of an injunction in this particular case. "In this country, the right of property holders or taxable inhabitants to resort to equity to restrain municipal corporations and their officers from transcending their lawful powers, or violating their legal duties, in any mode which will injuriously affect the tax-payers,—such as making an unauthorized appropriation of the corporate funds, or an illegal disposition of the corporate property, or levying and collecting void and illegal taxes and assessments upon real property, under circumstances presently to be explained,—has been affirmed or recognized in numerous cases in many of the states. It is the prevailing doctrine on this subject." Dill. Mun. Corp. § 731.

In *New London v. Brainard*, 22 Conn. 552, which was a case of injunction to restrain appropriation to celebrate the fourth of July, the supreme court of Connecticut, in holding that a citizen and taxpayer is entitled to an injunction to restrain an illegal appropriation of the money of the city, said, in substance, that it is so because the city corporation holds its moneys for the corporators, to be expended for legitimate corporate purposes; and a misappropriation of these funds is an injury to the tax-payer, for which no other remedy is so effectual or appropriate. See Dill. § 732 *et seq.*, for the many cases sustaining this doctrine.

And in *Crampton v. Zabriskie*, the supreme court of the United States seem to indorse fully the position of Dillon, for that court says:

"Of the right of resident tax-payers to invoke the interposition of a court of equity to prevent an illegal disposition of the moneys of the county, or the illegal creation of a debt which they, in common with other property holders of a county may otherwise be compelled to pay, there is at this day no serious question. The right has been recognized by the state courts in numerous cases; and from the nature of the powers exercised by municipal corporations, the great danger of their abuse, and the necessity for prompt action to prevent irremediable injuries, it would seem eminently proper for the courts of equity to interfere upon the application of the tax-payers of a county to prevent the consummation of a wrong, when the officers of those corporations assume, in excess of their powers, to create burdens upon property holders. Certainly, in the absence of legislation restricting the right to interfere in such cases to public officers of the state or county, there would seem to be no substantial reason why a bill by or on behalf of individual tax-payers should not be entertained to prevent the misuse of corporate powers. The courts may be safely trusted to prevent the abuse of their process in such cases. Those who desire to consult the leading authorities on this subject will find them stated or referred to in Mr. Dillon's excellent treatise on the Law of Municipal Corporation." *Crampton v. Zabriskie*, 101 U. S. 609.

There being no doubt as to the illegality of the ordinance and the appropriation, and no reasonable doubt as to the appropriateness of

the remedy sought, nor as to the jurisdiction of the court, the patriotic phase of the case is not potent enough to affect the action of the court. If, in Massachusetts, Connecticut, New York, Virginia, and other states, municipal corporations are not permitted to encourage and disseminate patriotism and the love of liberty by celebrations, at municipal expense, of the fourth of July, the surrender of Cornwallis, and other stirring epochs in the history of the country, there would seem to be no reason why this court should hold its hand, and not prevent the city of New Orleans, at the expense of her tax-payers, from advertising the patriotism of her mayor, council, and citizens by appropriate ceremonies and enthusiasm and decoration, in the return of the famous and honored liberty bell to the city of Philadelphia.

As was aptly suggested by counsel in argument, municipal corporations *per se* exhibit the highest patriotism in obeying the laws made for their government.

Under the circumstances and law of this case it seems the plain duty of the court to grant the injunction as prayed for; and it is so ordered.

CENTRAL TRUST CO. *v.* TEXAS & ST. L. RY. CO.¹

(Circuit Court, E. D. Missouri. June 1, 1885.)

1. EQUITY PRACTICE—DELAY IN FILING ANSWER.

A foreclosure suit having been instituted against a railroad company upon a mortgage given to secure its bonds, the company appeared and consented to the appointment of a receiver, and assented to all steps thereafter taken in the case without filing any answer for about a year and a half, and then asked leave to file an answer. *Held*, that if the defendant had a meritorious defense, an answer stating it, under oath, might be submitted, provided it was shown to the satisfaction of the court by explanatory affidavits that there was a good excuse for the delay.

2. MORTGAGE—DEFAULT IN PAYMENT OF INTEREST—CLAUSE AS TO PRINCIPAL—FORECLOSURE.

Semble, that where a mortgage is given by a railroad company to secure the payment of bonds and interest coupons thereto attached, the trustee may institute foreclosure proceedings immediately upon default in the payment of interest, and that the right so to do is not affected where the mortgage provides that in case the mortgagor "fail to pay the interest on any of the said bonds at any time when the same may become due and payable according to the tenor thereof, and shall continue in default for six months after such payment has been demanded, * * * then and thereupon the principal of all the bonds hereby secured shall become immediately due and payable, provided, etc.; and that in such case * * * the trustee * * * may take, with or without entry or foreclosure, actual possession of said road;" and fails to provide expressly for immediate foreclosure upon such default.

In Equity. Foreclosure suit. Motion for leave to file an answer. A receiver was appointed in this case, with the consent of the de-

¹ Reported by Benj. F. Rex, Esq., of the St. Louis bar.

fendant, January 12, 1884, and all succeeding steps in the case have been taken without any opposition on the defendant's part. No answer has been filed, nor was leave to file answer asked, until May 4, 1885, when the defendant, by its attorney, asked leave to file an answer, claiming that this suit was not instituted by the trustee for the purpose of carrying out and executing the conditions of the mortgage in good faith, but to promote a certain scheme, which parties holding 51 per cent. of the company's bonds had entered into, to foreclose the mortgage for the purpose of depriving a minority of their rights in the company, and that the knowledge of this scheme had not reached the defendant until April 25, 1885. The defendant claimed in the argument, moreover, that the complainant had no right to foreclose until six months after default in the payment of interest, and that the suit had been instituted before that period had elapsed. The mortgage contains the following among other clauses, viz.:

"That so long as the party of the first part, or its successors or assigns, shall well and truly perform all and singular the stipulations of the said bonds and coupons and the covenants of this indenture, the said party of the first part, its successors and assigns, shall be suffered and permitted to possess and enjoy the said mortgaged premises," etc. * * *

"That in case the party of the first part, its successors or assigns, shall fail to pay the interest on any of the said bonds, at any time when the same may become due and payable, according to the tenor thereof, and shall continue in such default for six months after such payment has been demanded at its or their agency, in the city of St. Louis or New York, then and thereupon the principal of all the bonds hereby secured, shall be and become immediately due and payable: provided, the said trustee gives written notice to the party of the first part, its successors or assigns, of its option to that effect while such default continues; which notice it may give of its own motion, but shall be bound to give, if required, in writing, to do so by the holders of fifty per centum of said bonds then outstanding; and that in such case * * * the said trustee, or its successors in this trust, may, in its discretion, and shall upon the request in writing, of the holder of fifty per centum of said bonds then outstanding, etc., take, with or without entry or foreclosure, actual possession of said road."

"Nothing herein contained shall be construed as limiting the right of the said trustee to apply to the courts for judgment or decree of foreclosure and sale under this indenture."

Elencious Smith, for complainant.

Jeff. Chandler and Dyer, Lee & Ellis, for defendant.

TREAT, J., (orally.) There is an application to the court for leave to file an answer in the case of the Central Trust Company against the Texas & St. Louis Railway Company. I have noted the points to be considered in the case. The first order in this case was made by Judge McCrary, and recited the express consent of the defendant. This application now before the court is by the defendant itself, which seeks, after this lapse of time, to be permitted to come in to dispute what it expressly assented to and agreed should be recited in the original decree. The question of laches is apparent. No answer was filed within the time prescribed, and now this effort is made

so to do. In the mean while this court, under the consent of all the parties, through its receiver, has been administering this property. The thought, in the proposed answer suggested, is that there was no right on the part of the plaintiff in this case to proceed for default of interest until the expiration of six months after the default first occurred. The court does not so read the mortgages. The party plaintiff had the power to proceed for default of interest in September when the default occurred. The provisions of the mortgage are that if said default continues for six months, the trustee may declare the principal due; and if he does not at his own discretion so do, a majority of the bondholders may compel him so to do. Therefore the six months' clause in the mortgage has nothing to do with the default of interest, on which the right of the trustee to proceed is based. It merely relates to the making of the principal also due. That is but one of the allegations. In the original bill there is a second allegation which is of the same nature as this court has been acting upon in the *Wabash Case*, to-wit, that this company, with the consent of all concerned, had stated that its condition was such that, without the aid of the court, all parties in interest would be seriously damaged. Hence there are two grounds to the bill: (1) The default of the September interest; (2) the wrecked condition of the road.

Experience has shown, in the course of this administration, that the second allegation, unfortunately, is too true; for this court has been occupied for a long period of time in trying to save the rights of the parties by issuing receivers' certificates in some instances, and by controlling the property generally, which was in the most unfortunate condition when the court took possession of it. And it is one of the few cases, so far as my experience goes, in which a receiver has been enabled to rescue a property that was comparatively worthless at the time he took charge of it. Now, if the defendant were a natural person instead of an artificial person, evidently he would be estopped. It has not only expressly consented to all that has been done, but a great deal that has been done, has been done at its instance. It waits for the great length of time, and then, by reason of some outside wrangling between parties, it seeks to upset the whole action of the court, and all that it itself has caused to be done, or that has been done at its express request and instance.

But it is stated in the argument that a minority of the bondholders and of the stockholders, to-wit, 10 per cent., did not enter into that corporate action; to which the ready reply is, "Why, then, have they waited all this length of time, knowing all these facts?" They have their rights, though in a minority interest, to make their application to the court in due time to prevent any wrong being done to them, if any was contemplated. It must be remarked that the plaintiff in this case is a trustee under two mortgages: the first and the second. It therefore became it, as such trustee, to take such action as would preserve the interests, not of the bondholders under the first

mortgage alone, but of all. It has so attempted to do. The result is, in order that the party may become of record, and have his alleged right adjudicated formally, instead of having in the exercise of discretion his right to become of record refused, that leave will be granted to him to submit an answer under oath, with explanatory affidavits, showing why this long delay while this course of proceeding has been going on. That answer will have to be presented within 10 days; and if allowed to be filed, the plaintiff will have leave to file a replication forthwith, so that this proceeding shall not be indefinitely prolonged in this court. If defendant has any meritorious defense, it can present it within that time. That answer, however, will have to be submitted to the court in order that the court may see whether it is confined to the real issues of the case, instead of being filled with immaterial issues, as the proposed answer is. The court has nothing to determine but the real controversy here, and the wranglings among outside parties are utterly immaterial to the question whether this mortgage shall be foreclosed and the property sold. Of course, when the order of foreclosure is made, if it ever shall be, the court will take care that the minority are as thoroughly protected as the majority; but in this stage of the controversy, where only the rights of the parties are to be determined in reference to the foreclosure, the court has nothing to do with that incidental question. Therefore the application as now made, that is, the answer submitted to the court, is denied; but leave is given on the terms expressed to submit a proper answer under oath, with affidavits showing why these parties have for some 15 months or more lain by and assented to everything, and now come in and wish to go back on their own express assents before the court.

SIMMONS, Successor, etc., v. TAYLOR, Successor, etc., and others.
(Cross-Bill.)¹

(Circuit Court, S. D. Iowa, C. D. May 12, 1885.)

1. RAILROAD MORTGAGES—FORECLOSURE PROCEEDING—EQUIPMENT AND INCOME MORTGAGE—BURLINGTON, CEDAR RAPIDS & MINNESOTA RAILROAD COMPANY.
On examination of the proceedings heretofore had in this case, *held*, that the second, or income and equipment, mortgage was not foreclosed, and the rights of the holders of bonds secured thereby cut off by the decrees and sales, and that the bondholders were not estopped from asserting their rights under such second mortgage.
2. SAME—ESTOPPEL.
A party is not estopped for remaining silent or inactive when he is under no obligation, legal or moral, to speak or act.

In Equity.

Prior to 1875 the Burlington, Cedar Rapids & Minnesota Railroad Company had constructed a main line and three branches, the latter known, respectively, as the Milwaukee Division, the Muscatine Divis-

¹ See 8 Sup. Ct. Rep. 58, *Sub nom* Burlington, C. R. & N. Ry. Co. v. Simmons.

ion, and the Pacific Division. Upon the main line and upon each of its branches, separately, it had placed a first mortgage. The trustee in the mortgage on the Pacific branch was the Farmers' Loan & Trust Company. All these mortgages were executed prior to the first of June, 1874. On that day it executed to said Farmers' Loan & Trust Company, as trustee, a second mortgage covering the road and all its branches, and given to secure what it denominated income, equipment, and convertible bonds. This mortgage purported to be a first lien upon the entire net income, upon 130 box cars, including those numbered by all even numbers from 882 to 1,140, and upon engines numbered 30 and 31, as well as a second lien upon all the property covered by the various first mortgages herein before referred to.

Defaulting in the payment of interest on these several mortgages on the fifteenth of May, 1875, a bill of foreclosure of the first mortgage on the main line was filed in the circuit court of the United States for the district of Iowa. At first the only party defendant was the Burlington, Cedar Rapids & Minnesota Railway Company, but on July 5, 1875, by amendment, the Farmers' Loan & Trust Company, trustee in the second, the income and equipment, mortgage was also made a party defendant. A demurrer to this bill was filed by the defendants. Similar bills of foreclosure were filed to foreclose the mortgages on the several divisions. In that to foreclose the mortgage on the Pacific Division the Farmers' Loan & Trust Company, trustee, set up not merely its first mortgage on that division but its income and equipment mortgage, or second mortgage, upon all the divisions.

Matters stood in this condition until the thirtieth day of October, 1875. On that day decrees were entered. In the Pacific Division case, the decree, after finding the amount due on the bonds and coupons secured by the first mortgage to the Farmers' Loan & Trust Company, ordered the payment of that amount within 10 days by the railway company to the mortgagee, and in default thereof that the property described in and conveyed by said mortgage be sold by special master, "appointed to execute this decree, and make such sale as herein directed to satisfy said bonds, coupons, costs, fees, and expenses of this suit remaining unpaid," and that, after approval of the sale, the master executed a deed to the purchaser, and also awarded a general execution against the railway company for any deficiency which might exist after such sale. The only reference in the decree to the income and equipment mortgage is found in these words:

"That portion of complainant's bill relating to the income and equipment mortgage, so called, is ordered to be consolidated with the causes pending in this court against some respondents, wherein said Frost, Taylor, and others are, respectively, complainants."

The three other first mortgage cases were consolidated and a general decree entered. That decree contains the order of consolidation.

tion; then, after reciting that the defendant, the railway company, withdraws its demurrers, pleas, etc., and urges nothing in bar of the relief sought by the several complainants, goes on to find the amounts due upon said three first mortgages, directs the payment of such several amounts by the railway company within 10 days; "or, in default thereof, that its equity of redemption is barred," and, in further default thereof, orders sale of the respective properties mortgaged. It provides for a report of the sales, confirmation, and deeds by the master. In reference to the Farmers' Loan & Trust Company, and its income and equipment mortgage, and after the order made in respect to each first mortgage, appears this language:

"And this decree is made subject to the rights of any intervening creditors now before this court. And the claim of the Farmers' Loan & Trust Company on the income and equipment mortgage to any of the cars or machinery named in the same is to be submitted to this court in term time, or vacation, as soon as counsel can agree on the facts in relation thereto. Any dispute among the holders of the four mortgages foreclosed, including the Pacific Division, as to cars and machinery, if not settled by themselves, is to be determined by the court at the next term. And the receiver now in possession is required to operate and preserve said property for the benefit of the bondholders seeking to foreclose this mortgage; and he is required to make a report, and adjust his accounts of receipts, expenditures, and contracts made by him up to the date of said sale; and any residue in his hands is to be paid to the master and credited to the mortgage debt up to that date; and if said property shall not sell for sufficient to pay said debt, interest, and costs, the said plaintiff may have a general execution for the residue against the said Burlington, Cedar Rapids & Minnesota Railway Company."

And at the close of the decree is this general reservation:

"The court reserves the power to make further orders and directions; and no sale under this decree is to be binding until reported to the court for its approval."

This is the entire reference made in this decree to this income and equipment mortgage and to the claim of the Farmers' Loan & Trust Company, and the only language therein which can bear upon or affect the questions to be hereafter considered.

In this consolidated case, on the day of the decree, October 30, 1875, there was filed an answer and cross-bill by the Farmers' Loan & Trust Company, and on November 22, 1875, the complainants filed a replication to such answer, and an answer to such cross-bill. In these pleadings of the Farmers' Loan & Trust Company, the execution of the second mortgage above referred to is set forth, and it is alleged that \$1,200 of the bonds secured thereby have been sold and disposed of, that the interest thereon has not been paid, and that the entire sum, principal and interest, is declared to be due. It does not appear that there was ever any agreement of counsel, any submission to the court, or any action taken by the court as to the specific matter reserved in the decree in the consolidated cases as to the claim of the Farmers' Loan & Trust Company to cars or machinery. Nor

was there any order or decree ever entered upon the cross-bill, and the answer thereto, or any action appearing of record taken by the court in respect to these later pleadings, or the issues presented by them.

In pursuance of those decrees in the summer of 1876, the masters, after due advertisement, sold the main line and the several branches to a committee of the bondholders. Those sales were reported to the court with a proposed plan of reorganization, which sales were confirmed and deeds made in pursuance thereof. The proposed plan of reorganization contemplated a distribution of the stock and the bonds of a new company, to be known as the "Burlington, Cedar Rapids & Northern Railway Company," according to certain specified proportions, to the holders of the first mortgage bonds on the main line and several divisions. No reference was made in this plan to the income and equipment mortgage, or the bonds secured thereby. All of that matter was simply ignored. The sales having been confirmed and the deeds passed, the reorganization was perfected, the stock and bonds issued, distributed according to the proposed plan, and put upon the market for sale. This was in the year 1876. It further appears that most, if not all, the holders of these income and equipment bonds, secured by the second mortgage, were owners and holders of first mortgage bonds, and participated in the reorganization to the extent of surrendering such first mortgage bonds and taking bonds in the new company. The trustee in the mortgage issued by the new company was the Farmers' Loan & Trust Company, the trustee in this income and equipment mortgage. It accepted the trust conferred by this new mortgage, and took no further action in reference to the income and equipment mortgage, or in enforcing the rights, if any there were remaining to the holders of the bonds secured thereby.

Matters remained in this condition until April, 1883, when certain holders of those bonds presented in this court a petition for the appointment of Charles E. Simmons as trustee in said mortgage, in place of the Farmers' Loan & Trust Company, which petition was granted, and thereupon the said trustee filed his amended cross-bill setting forth the various proceedings heretofore stated, and praying for the finding of the amount due upon the income and equipment mortgage, and the redemption of the property from said master's sales. It further appears that all of said income and equipment mortgage bonds, or at least nearly all, were issued to the various holders thereof simply as collateral security for debts owing by the mortgagor company.

Hubbard & Clark, for complainants in cross-bill.

Ransom, Bral & Withrow, for defendants in cross-bill.

BREWER, J. The first question is whether this second mortgage, this income and equipment mortgage, was foreclosed, and the rights of the holders of bonds secured thereby, cut off by the decrees and sales. Obviously not. In the Pacific Division mortgage case, the

claim of the second mortgage was, by the term of the decree, transferred to the consolidated cases. While the Farmers' Loan & Trust Company was the trustee in both the second mortgage and the first mortgage on the Pacific Division, yet, so far as that decree is concerned, it stands as though there were not only two separate mortgages, but two separate trustees. The first mortgage was foreclosed; the second mortgage, and all claims thereunder, transferred to another case. There was no decree barring the claim of the second mortgagee; there was no finding of the amount due on such second mortgage; there was no order of sale to satisfy said mortgage. In brief, the only reference to such second mortgage was the transfer of it, and all claims thereunder, to another suit. Upon what, then, can it be pretended that so far as this income and equipment mortgage was a second lien upon the Pacific Division, it was foreclosed, and the rights of the holders of the bonds secured thereby cut off by this decree?

Turning now to the decree in the consolidated cases, there affirmatively appears a waiver by the railroad company, the mortgagor, of all defenses, and a decree barring its equity of redemption in default of the payment of the mortgaged sum within 10 days after the decree, a finding of the amount due under these three first mortgages, an order requiring the payment of such sums within 10 days, and an order for a general execution for any balance of such sums not realized upon the sales ordered; in short, everything to show a foreclosure of those prior mortgages, and an omission of all of those matters in respect to this second mortgage. There is no finding of the amount due under this second mortgage; no order that the mortgagor pay any such amount; no order for an execution for any balance of such amount not realized upon sale; no order barring the second mortgage of its equities in the matter; no decree of foreclosure against it; in fact, no other reference to this second mortgage than in the simple reservation for future determination by the court of so much of its claim as asserted a first lien upon certain specific personal property. Now, at the time of this decree there was pending before the court an answer and cross-bill of this second mortgagee by which all its rights were presented. The decree ignores them except as to a little matter of alleged priority in respect to some personal property. Did the parties understand that this second mortgage was foreclosed, that the rights of such second mortgagee were cut off by this decree? Obviously not. Beyond the silence of the decree itself is the fact that within a month the complainants filed answer to its cross-bill and replication to its answer. Obviously they understood that there was pending for adjudication the claim of a second mortgage.

Counsel in this case has argued strongly that there is such a difference between the old proceedings for strict foreclosure and the ordinary proceedings of to-day for foreclosure by sale that a sale cuts off all rights of every party to the suit. That proposition is too broad.

I agree that every right presented and adjudicated for or against any mortgagee or mortgagor is determined by the decree, but I cannot agree that a right presented by bill or cross-bill and unnoticed in the decree, and not absolutely necessary for determination in the decree, is determined by the simple fact that the party presenting it is in court. The rights of the various parties to a foreclosure suit are determined by the nature of the decree entered. And nothing is determined which is not expressly determined, or which is not impliedly settled by the terms of the decree in fact entered. Other matters emphasize this conclusion. A certain minor claim in this second mortgage was reserved for consideration upon facts to be thereafter found or agreed upon. This indicates that the existence of this second mortgage was known to the court at the time, and that the cross-bill setting it up was also known, and that by the rules of equity pleadings no determination of this claim could be had at that time without consent, and that the parties, not consenting, in respect to the general claim, had arranged in reference to this specific minor matter. Obviously, then, all parties understood that the general claim for a second lien was open for further consideration.

Again, its claim is stated along-side of the claims of intervenors, as though in respect to priority its claim to certain engines and cars stood upon the same footing as that of an intervenor, and that its second mortgage lien was not intended to be settled by this decree. Further, in the title of the cases in this consolidated case, no reference is made to the complainant in the cross-bill; nothing to indicate that such cross-bill was by consent, or otherwise, before the court for hearing and decree.

If I am at liberty to go outside of the record and turn to the oral testimony which is presented, it is equally obvious that at the time of this decree all parties interested regarded the second mortgage as of little moment. All thought that the first mortgages were so large as to sweep the entire property and leave large balances for general execution, and that hence a foreclosure of the second mortgage was a matter of little or no moment. The only thing deemed worth noticing was this claim to a priority as to a few cars and engines. Hence, testing the question by either the record itself alone, or also by the extrinsic facts, I am clear in the opinion that this second mortgage was not in fact foreclosed, and was not intended to be foreclosed at the time of and by this decree. Doubtless there was gross carelessness on the part of counsel for complainants in not having the second mortgage and the claims thereunder adjudicated, determined, and foreclosed, but their obvious carelessness does not change the fact as to what was done or intended to be done at the time.

Now, if the decrees themselves contain no foreclosure of this second mortgage, how can the sales, and the confirmation of such sales, cut off such second mortgage, or the rights of the bondholders thereunder? The sale goes not beyond the decree. It takes nothing and

carries no rights which the decree does not determine and prescribe; so I have little doubt that when the sale was consummated all that was accomplished was a foreclosure of the first mortgage, leaving all rights secured by the second mortgage undetermined and unenclosed.

The second question presented is this: Conceding that, as a matter of strict law, this second mortgage was not foreclosed, nor the rights of the holders of bonds secured thereby cut off, yet it is claimed that there is an equitable estoppel against any present assertion by such bondholders. A most elaborate and able argument has been presented by counsel upon this matter of estoppel. I think these propositions answer his argument:

First, a party is not estopped by remaining silent when he is under no legal or moral obligations to speak. Estoppel implies that the party has done, or omitted to do, that which, under the circumstances, he was legally or morally bound to do, or omit doing. If the party is under no obligations to speak, no estoppel can spring from his silence. If he is under no obligations to act, his failure to act concludes none of his rights. Now, I understand it to be accepted law that a second mortgagee is not bound to insist upon a foreclosure of his mortgage. It matters not whether the first mortgagee forecloses or not. The second mortgagee owes no duty to anybody to act. If the first mortgagee wishes to cut off his equity of redemption, it is the duty of such first mortgagee to make him a party and to take a decree against him; and if he fails to do that the second mortgagee is not concluded. The mere fact that he is made a party casts no obligations upon him. He may remain silent, and if no decree is taken against him, his rights remain as though he had not been made a party. No one would pretend that if not made a party his rights are cut off by his mere failure to come into court and ask to be made a party. In other words, in all proceedings by the first mortgagee, the second mortgagee stands on the defensive. His rights are perfect unless at the instance of the first mortgagee they are affirmatively cut off, or lost through the running of the statute of limitations.

Now, in this case the second mortgagee is a party. He sets up his mortgage. The first mortgagee takes a decree for the sale of the property to satisfy his mortgage, a decree barring the mortgagor, but not barring the second mortgagee; takes no foreclosure of such second mortgage; no finding of the amount due under such mortgage, and no order for the sale of the property to satisfy such second mortgage. Is the second mortgagee guilty of any wrong in not insisting upon a foreclosure of his mortgage? Is it not time enough for him to act when the first mortgagee demands some adjudication against him? May he not remain silent until such prior mortgagee asks foreclosure? That seems a clear statement of his rights, and I do not understand that any of the many cases cited by the learned counsel go so far as to hold that a party is estopped for remaining silent or in-

active where he is under no obligations, legal or moral, to speak or act.

Again, counsel spoke in argument, and have in brief, about the ambiguity of this decree, and of the consequent obligation on the second mortgage arising from such ambiguity. The entire record is a matter of public knowledge. Taking such record in its entirety, and I cannot doubt as to what is disclosed thereby, I cannot see that that ambiguity exists of which counsel speak. Neither mortgagor nor mortgagee, first or second, had any peculiar means of knowledge. The record was there and spoke for itself, and everybody was bound to take notice of what it disclosed. It did not show a foreclosure of this second mortgage. It does not purport to do so. It disclosed a cross-bill filed on the day of the decree with an answer thereto filed nearly a month thereafter. Who examining such a record can say that he was misled? The other matter of estoppel is this. The holders of some of these second mortgage bonds, as appears, were also holders of first mortgage bonds, surrendered such first mortgage bonds, and received bonds and stock in the reorganized company. But upon this, what estoppel arises? It is not pretended that they represented to anybody that they did not have these second mortgage bonds, or that they waived any claim by reason thereof, when they surrendered the first mortgage bonds. They may have thought, as others seem to have thought, that the property was worth so much less than the first mortgage bonds that nobody would ever think of the second mortgage. They had a legal right to surrender the first mortgage bonds, and take their interest in the new company; and when they said nothing, or did nothing, and exercised a plain legal right, how can it be said that some other legal right which they possessed, they abandoned? How does estoppel arise under these facts?

I am clearly of the opinion that all this trouble has arisen from the gross negligence of counsel, Messrs. Grant & Smith, and much as I should like to sustain this claim of an estoppel, I am unable to see any legal grounds therefor, and must hold that this second mortgage stands to-day unencumbered, and the bondholders not estopped from asserting their rights.

The question then arises whether this second mortgagee has an absolute right of redemption, and that is what is prayed. I think not. Neither a first or second mortgagee holds title or has absolute right of redemption as against the other mortgagee. The mortgagor alone has that right. When it makes a voluntary conveyance, or when its title is conveyed by judicial sale, the purchaser may succeed to such right of redemption. Regarding the foreclosure proceedings as completing mere execution sales, it would seem that the present holders have succeeded to the redemption right of the mortgagor. Whether that be universally and absolutely true or not, I think the right of redemption is one which a court of equity may award. It cannot be that the sec-

ond mortgagee has a settled legal and indisputable right thereto. , Under the modern idea of mortgages, the mortgagee takes no title,—simply a lien. If he gets his money, all that he has a legal right to is secured. In this case it would seem that equity requires that the present holders of the title obtained by this foreclosure sale should have the right of redeeming from the lien of this second mortgage; and so the order should be that when the amount due under this second mortgage is ascertained, it is to be declared a lien upon the properties mortgaged, and that if not paid within a certain time the properties be sold to satisfy such lien. Such a decree would preserve the rights of the first mortgagees, as well as all rights secured by any parties subsequently obtaining interest in the property.

One further question requires notice. Obviously most, if not all, of the bonds secured by this second mortgage were issued as collateral security for certain debts of the mortgagor. Should such bonds today be treated as valid obligations for their face and interest, or as binding only to the extent of the debts secured thereby? I think the latter. Take the bonds held by the Lackawanna Iron Company, for instance. They were given as a collateral security only, and the present holder took them under such circumstances as to charge him with notice. Instead of being a debt for their face, all that the present property should be held liable for is the amount of the debt due to the iron company secured by these bonds. So in respect to others.

The order therefore should be that the matters be referred to the master of this court, to state—*First*, which of those bonds secured by this second mortgage were issued simply as collateral security for debts of the mortgagor; *second*, the present value of the debts secured thereby; and, *third*, if any of those bonds have been transferred from the holders of such debts, under what circumstances, and for what consideration they passed to the present holders. Upon the coming in of such report of the master, and finding of the amount which is properly secured by this second mortgage, a decree will be entered directing the sale of the mortgaged property within 60 days to pay such amount.

Costs will follow this cross-bill, and be charged upon the property.

CENTRAL TRUST Co. and another v. WABASH, St. L. & P. R. Co.
and others.¹

WABASH, St. L. & P. R. Co. v. CENTRAL TRUST Co. and others.¹

(Circuit Court, E. D. Missouri. April 28, 1885.)

1. EQUITY PRACTICE—INTERVENTION—SUIT TO HAVE GUARANTY ANNULLED.

A., a railroad company, having joined in the execution of a mortgage from B. to C., to secure the payment of bonds issued by B., and having guarantied the payment of said bonds, and 2,700 of said bonds being in the hands of a special receiver of this court appointed in the above-entitled case, and A. being under the control of the parties by whose privity said mortgage and guaranty were procured, D., a stockholder in A., asks leave to intervene here, or sue, in some other court having jurisdiction, said receiver, and the parties by whose privity said mortgage and guaranty were procured to be executed, for the purpose of having said guaranty, etc., annulled, and the further negotiation of said bonds enjoined, etc., on the ground that the execution of said mortgage and guaranty by A. was *ultra vires* and illegal, and authorized by a board of directors not legally elected. *Held*, (1) that said receiver is a proper party to a suit for the purposes aforesaid, to the extent, and only to the extent, of his interest in said bonds; (2) that this court will not permit said receiver to be sued outside of its jurisdiction; (3) that the petitioner may intervene upon showing that A. will not move in the matter.

2. CORPORATIONS—ACTS OF DE FACTO BOARD.

Semle, that the acts of a *de facto* board of directors are valid, whether all the members of the board are eligible and have been legally elected or not.

Consolidated Cases. In equity.

Application of Henry B. Plant for leave to sue the receiver.

The petitioner states that he is a stockholder in the St. Louis, Iron Mountain & Southern Railroad Company, and has lately been advised of the terms and conditions of a lease by the Wabash, St. Louis & Pacific Railroad Company of its property to the St. Louis, Iron Mountain & Southern Railroad Company, and of the existence, terms, and conditions of a certain paper purporting to be a mortgage of the Wabash Company's property to the Mercantile Trust Company, and to be executed by the said St. Louis, Iron Mountain & Southern Railroad Company, as party of the third part, to secure \$10,000,000 of bonds executed by said mortgagor, and the payment of the principal and interest of which purport to be guarantied by the said St. Louis, Iron Mountain & Southern Railroad Company; that as such shareholder he desires to institute the proper legal proceedings in this court, by intervening herein, or in some other court having jurisdiction of the subject-matter and the parties, against all the parties to said lease, mortgage, and guaranty, and against the persons by whose privity the same were procured to be executed, for the purpose of having the same and each thereof judicially annulled, and further proceedings thereunder or any negotiations thereof enjoined, and to recover from such persons individually the moneys which your petitioner believes were by them mis-

¹ Reported by Benj. F. Rex, Esq., of the St. Louis bar.

appropriated thereunder; and that said persons are some of them citizens of New York, one of Massachusetts, and one of Missouri, and were all directors of both said Wabash Railway and the said St. Louis, Iron Mountain & Southern Railroad Company at the time said instruments were executed; and that the grounds for such proposed proceedings are that the board of directors of the St. Louis, Iron Mountain & Southern Railroad Company, by which such proceedings purport to have been authorized, executed, and delivered, were never legally elected by the stockholders thereof; and that several of the directors were not eligible, under the laws of Missouri, to the offices which they assumed to occupy; and that said lease, and the said guaranty are voidable, because attempts to secure the consolidation of the two railways aforesaid, were contrary to the laws of Missouri; that said guaranty was *ultra vires*; and that the said St. Louis, Iron Mountain & Southern Railroad Company is now under the absolute control and in the sole possession of the parties whom the petitioner desires to sue, and others acting in concert with them.

Dyer, Lee & Ellis, J. B. Henderson, James M. Lewis, and T. K. S. Skinner, for petitioner.

Wager Swayne, Henry T. Kent, and Greene, Burnett & Humphrey, for the Wabash.

Phillip & Stewart, for the Central Trust Company.

Wells H. Blodgett, for receiver.

TREAT, J., (*orally*.) An application was made by Henry B. Plant some time ago to permit the receivers of the Wabash system to be made parties to one or more suits that he desired to institute in some other judicial tribunal. At the time the matter was presented to me, being here alone, I suggested that it should be heard before a full bench. The difficulties presented originally occurred to my brother judge and myself. Mr. Plant is an individual stockholder in the Iron Mountain road. He asks, as an individual stockholder, to institute a suit, instead of the corporation's attending to its own business, without conforming to the rule which I recognize as the original equity rule, and which has been emphasized by a written rule of the supreme court of the United States. Why should one stockholder undertake to perform the functions of a corporation? There may be reasons for his so doing. Possibly there were in this case. But whether so or not, it is unnecessary now to determine.

The original application has been so far modified as to ask permission to sue the special receiver, who has in custody 2,700 collateral bonds as a guaranty for certain indorsements made to help out this concern before the appointment of a receiver. There are a great many matters stated in that application with which this court has nothing to do; certainly not in the present aspect of the case, and probably in no conceivable aspect of the case. The enforcement by the state of its prerogatives by ousters and forfeitures belong to it, and not to this tribunal. We treat the corporation named, to-wit, the

Iron Mountain Railroad corporation, as an existing corporation. We treat its action through its duly-constituted officers as the action of a *de facto* board, and it does not become this court to go into an inquiry as to the validity of those matters which are before us for consideration by an attempted exercise of mere state authority. The charter is good until the state chooses to forfeit it, and these directors are duly elected unless in consequence of some provision of the statute they should be ousted. Behind all that, however, is the important question here.

Of course, this court will not permit its receiver, he not being a necessary party, nor even a proper party, to any such proceeding, elsewhere to be involved in that litigation with which he has nothing to do, and thus tie up this whole receivership for an indefinite period of time. Yet there is one, and only one, aspect of the case in which the special receiver should be a party, to-wit: Are the guaranties made by the Iron Mountain Company on the 2,700 bonds, now in the hands of the special receiver, valid? To that extent, and to that alone, would the receiver be a proper party to the proceeding. It might originally have been supposed that the lease made to the Iron Mountain Company, this party stockholder wished to invalidate. But that lease has ceased to exist. One of the original orders of this court in respect thereto was that the Iron Mountain Railroad Company should surrender that lease, and it has done it. Hence all that Mr. Plant wants in that direction has been accomplished by this court. Now he asks that our receivers shall go into other courts to have the question determined whether the guaranty of those bonds is valid or invalid. This court considers itself perfectly competent to pass upon that question. It is a necessary part of the controversy before this court. This court will determine it, and will not remit it to other tribunals; for if other tribunals should happen to decide differently from what this court might think correct, a strange question would be presented as to conflicting authority.

It suffices as far as Mr. Plant is concerned, if he wishes to raise that question he can intervene here, on showing that the corporation will not do what he wants; but why send the corporation to New York or to California to do the work which this court ought to do?

The motion will be denied.

McLEAN v. CLARK.

(Circuit Court, E. D. Michigan. May 25, 1885.)

EQUITY PRACTICE—DOCKET FEE—OVERRULING DEMURRER.

Where a demurrer to a bill in equity is overruled, and defendant has leave to answer, the plaintiff is not entitled to tax a docket fee of \$20, as upon a final hearing.

NAME—DOCKET FEE, WHEN TAXABLE.

Such docket fee can only be taxed upon a hearing which is final in fact, and results in a disposition of the merits of the case.

In Equity.

On application to tax a docket fee of \$20, in favor of the plaintiff. Defendant demurred to the bill, and the demurrer was overruled. Leave was given to answer over, and an answer was filed. Plaintiff then applied for the taxation of a docket fee of \$20, upon overruling demurrer, as upon a final hearing.

Mr. Angell, for plaintiff.

BROWN, J. By general equity rule 34 the defendant has a legal right to answer the bill, upon the overruling of his demurrer, upon payment of costs up to that period. Under such circumstances it seems to me that the hearing upon the demurrer is not a "final hearing" within the meaning of Rev. St. § 824. It is true that in the cases of *Alley v. Nott*, 111 U. S. 472, S. C. 4 Sup. Ct. Rep. 495, and *Scharff v. Levy*, 112 U. S. 711, S. C. 5 Sup. Ct. Rep. 360, it was held that a hearing upon a general demurrer to a complaint, upon the ground that it did not state facts sufficient to constitute a cause of action, was "a trial" within the meaning of the removal act of March 3, 1875. We apprehend, however, that this principle does not necessarily control the question before us. In determining what *shall be* considered as a trial of the action, before which the petition for removal must be filed, the court naturally treats that hearing as a trial, which *may*, although it will not necessarily, dispose of the whole case. A different construction would enable a party to speculate upon the result of his demurrer in the state court,—accepting its decision if favorable, and removing the case if adverse to him. But in determining what *has been* "a trial or final hearing" which will authorize the taxation of a docket fee, we think that regard should be had to the result of such hearing or trial, and that we should treat that only as a final hearing in law which is a final hearing in fact. Hence, if, in the case, the demurrer had been sustained, and the bill dismissed, a hearing of such demurrer would undoubtedly have been a final hearing, within the meaning of section 824. This I understand to have been the ruling in *Price v. Coleman*, 22 FED. REP. 694; although the facts of the case are not fully stated in the report. But if, upon a hearing, the demurrer is overruled, and leave is given to answer, the hearing is not final and does not dispose of the case.

That the words "final hearing" do not always receive the same construction is apparent from a reference to those cases wherein the question, what is an appealable decree, is considered. The practice in this connection is well settled that it is only such decrees as decide and dispose of the whole merits of the case, and reserve no further questions or directions for the future judgment of the court that are final decrees from which an appeal will lie to the supreme court. *Beebe v. Russell*, 19 How. 283.

In *The Palmyra*, 10 Wheat. 502, upon a libel for a tortious seizure, an appeal was taken from a decree restoring the vessel, with costs and damages, but the damages had not been assessed, and it was held that the decree was not final. See, also, *Chace v. Vasquez*, 11 Wheat. 429; *Pulliam v. Christian*, 6 How. 209. So, also, in the case of *The Mary Eddy*, (*Mordecai v. Lindsay*,) 19 How. 199, it was held that a decree in favor of the libellant upon the merits, with a reference to a commissioner to report the damages, was not a final decree from which an appeal could be taken. In *Coy v. Perkins*, 13 FED. REP. 111, Mr. Justice GRAY and Judge LOWELL, held that upon the face of this statute the intention of the legislature was manifest that it was only where some question of law or fact, involved in or leading to the final disposition actually made of the case, has been submitted, or at least presented, to the consideration of the court that there can be said to have been a final hearing which warrants the taxation of a docket fee. See, also, *Huntress v. Epsom*, 15 FED. REP. 732.

A different rule has apparently been adopted in one or two of the more recent decisions in New York. In these cases the definition of the words "trial" and "final hearing" used in the removal cases was treated as controlling; but for the reasons before stated it seems to me that where the question arises upon proceedings taken *after the hearing*, that can only be treated as a final hearing or decree which disposes of the merits of the case, and virtually puts an end to the litigation.

I am authorized to say that the circuit judge concurs in this opinion.

CENTRAL TRUST Co. and another v. WABASH, ST. L. & P. RY. Co.
and others.¹

WABASH, ST. L. & P. RY. CO. v. CENTRAL TRUST Co. and others.¹

(Circuit Court, E. D. Missouri. April 16, 1885.)

RECEIVERS—RAILROADS—MORTGAGOR AND MORTGAGEE—LESSOR AND LESSEE—
MANAGEMENT OF NON-PAYING BRANCHES AND LEASED LINES.

The Wabash, etc., Railway Company is composed of a number of consolidated railroad companies, and has in its system a number of leased lines. Before entering the consolidation, the different companies composing it had mortgaged their respective properties to secure issues of bonds. After the consolidation was formed, the consolidated company issued bonds and gave a general mortgage to secure their payment. Subsequently, becoming unable to pay the interest on its bonded indebtedness, it applied for the appointment of receivers for the benefit of all concerned. Receivers were appointed, and ordered to keep the system in the condition of a going concern, but to keep the accounts of the different lines separately. The court authorized them to issue their certificates in order to pay lien claims, and the certificates so authorized were made a first lien upon the entire system. Some of the branches earned more than enough to pay expenses, and the receivers, without the sanction of the court, used this surplus in the payment of lien claims, and general running expenses instead of issuing certificates. Some of the branches belonging to the company and some of the leased lines were found to fall far short of paying running expenses. This state of facts having been brought to the notice of the court by a report of the receivers, and instructions asked for concerning the future management of the system, and it having been suggested that the leases on non-paying lines should be canceled, and all parties in interest having been heard, it was *held*: (1) That where any subdivision earns a surplus over expenses, the rental or subdivisional interest should be paid to the extent, and only to the extent, of that surplus. (2) That where any surplus earned by a subdivision has been diverted by the receivers for general expenses, it should be made good at once. (3) That where a subdivision earns no more than its operating expenses, no rent or subdivisional interest should be paid. (4) That where a lessor or subdivisional mortgagee desires possession or foreclosure, he should have liberty to assert his rights. (5) That the entire system should be kept in the condition of a going concern while it remains in the receivers' hands. (6) That where a subdivision fails to pay operating expenses, they should, if possible, be reduced until they do not exceed its income. (7) That where it is necessary, in order to keep a subdivision in the condition of a going concern, the receivers shall issue certificates which shall be a first lien on the system, for the purpose of raising necessary funds, and all equities respecting such certificates should be adjusted in the final decree.

NOTE.
After the appointment of receivers in the suit instituted by the Wabash road, the trustees in the general mortgage brought suit to foreclose, and the two cases were consolidated. After the consolidation the complainants in the foreclosure suit moved that the receivers who had been appointed be reappointed as their receivers; but the order asked for contemplated a seizure of part only of the properties then in the receivers' possession. *Held*, that the receivers who had been appointed, acted neither for the mortgagor nor the mortgagee, but for the court, and for that reason, and because the court had taken possession of the system, with the intention of preserving it in its integrity, the motion must be overruled.

Consolidated Cause. In equity.

Reported by Benj. F. Rex, Esq., of the St. Louis bar.

On the twentieth of March, 1885, the report of Solon Humphreys and Thomas E. Tutt, receivers of the Wabash, St. Louis & Pacific Railway Company, was filed herein. It showed among other things the earnings and expenses of the leased and branch lines of said company for the period commencing on the twenty-ninth day of May and terminating on the thirtieth day of November, 1884, and that some of the branch and leased lines were being operated at a very heavy loss which in one instance had amounted to \$167,000, during the period named. In closing their report the receivers prayed for order with respect to the future operation of said lines, and concerning the payment of interest, and the respective rentals agreed to be paid by said company in the several leases and agreements set forth in their report, and it was suggested by the attorney for the receivers, that the report was presented, that the best course to pursue under the circumstances would perhaps be to cancel the leases on those lines which were not paying expenses. The court thereupon instructed the receivers to send a copy of their report to each of the lessors and other parties in interest, and notify them that on April 10th following, application would be made by the receivers for some action of the court as to the future retention and operation of the leased lines. On the tenth of April the matter came up for hearing, and after a full discussion the following opinion was delivered, and ordered by the court to be spread upon the records as its order in the premises. The motion concerning the reappointment of receivers, referred to in the opinion, was made in the case of *Central Trust Co. v. Wabash, St. Louis & P. Ry. Co.*; and asked in substance that the receivership exist in the suit of the Wabash, St. Louis & Pacific Railway Company be extended to that cause, and receivers be appointed under the bill of foreclosure theretofore filed by the said complainants, the Central Trust Company and James Cheney.

The motion of Mr. Hagerman referred to was oral and informal. He said to the court, in the course of the discussion concerning the application of the receivers, that he represented certain bondholders of the Toledo, Peoria & Western Railway Company, one of the branch lines, and that his clients wanted either the interest due them on the bonds or the road, etc. For a history of this case see 22 FED. 272.

Wells H. Blodgett, for receivers.

Wager Swayne, Burnett & Humphreys, and *H. T. Kent*, for the Wabash.

Butler, Stillman & Hubbard and *Philips & Stewart*, for the Central Trust Co.

James Tausig, Pattison & Crane, J. E. McKeighan, C. B. Adams, Hough, Overall & Judson, John D. Davis, W. H. Bliss, James H. Homan, W. B. Sheldon, Foster & Thompson, McDonald, Butler & Motter & Judson, and D. H. Chamberlain, for lessors, bondholders,

Brewer, J., (orally). Several questions have been presented

last few days, concerning which we have come to a conclusion, and perhaps we had better dispose of those before proceeding with the trying of other matters. * * *

Now, recurring to the general questions that are presented, we name the half dozen matters, which, we think, should be passed in the form of an order or orders; and let me preface them with a brief statement.

This Wabash road is composed of many subdivisions. While it is a single corporation to-day, yet into it have passed many corporations, many separate railroad properties. In administering such a consolidated property the court must look at, not merely the interest of the mortgagee in this general mortgage, or of the mortgagor as a legal entity or corporation, but also the separate and sometimes conflicting interests of the various subdivisions and their respective franchises; and, back of all that, the duty which every railroad corporation owes to the public. For underlying the rule which the supreme court has laid down in respect to the payment, by receivers, when they take possession of railroad property, of prior unsecured claims recently accrued, runs the thought, as expressed by the supreme court, that a railroad corporation owes a duty to the public which has given it its franchise and enabled it to construct its road; the duty of operating that road for the benefit of the public. While it may not be what you may call an absolute duty, enforceable under all circumstances, it is still a duty to be regarded and enforced by the courts when they take possession of railroads through their receivers. And that duty is not limited to the operation of merely that particular fragment of a road which is pecuniarily profitable in its operations, but it extends to the road as an entirety, and to all its branches—all its parts; differing in that particular from the duty which would rest upon the court if it had simply taken possession of property used for private purposes, manufacturing or otherwise, where the single question might well be said to be one of pecuniary benefit. This Wabash road, as a system, was in operation, a going concern, from one end to the other; as such, discharging its duties as it could to its various creditors. This court, at the instance of the corporation, and to preserve the integrity of this system, took possession of it by its receivers. It took possession of it as a going concern, and, so far as is reasonable and practicable, it should continue it as a going concern until it surrenders it to whoever may be the purchasers or future holders of it.

With that preface, and calling these separate branches which have been added into this consolidated road, subdivisions, since some have been added in by way of lease and others by way of consolidation, subject to separate mortgages, we pass orders substantially as follows:

The first is one which has already been entered, and we simply emphasize by repeating it, that subdivisional accounts must be kept separately. That was an order passed by Brother TREAT at the

very outset of this receivership, in order that the particular equities of each one of these divisions, as between themselves, might be ascertained.

2. Where any subdivision earns a surplus over expenses, the rental or subdivisional interest will be paid to the extent of the surplus, and only to the extent of the surplus. Any past diversion of such surplus for general operating expenses will be made good at once, and, if need be, by the issue of receivers' certificates. Thus, for illustration, this Toledo, Peoria & Western Railroad appears by the report to have been earning a surplus over its operating expenses. That surplus is not the full rental price, yet even that has not been paid to the lessor, having been used for general operating expenses. Any net earnings should be paid over to the lessor, or, if there be a subdivisional mortgage, to the mortgagee, and any such diversion as that should be made good, and good at once. At the inception of this receivership an order was passed authorizing the issue of \$2,000,000 receivers' certificates for the payment of such amount of prior debts for labor and material. Those have been partially paid, and without the issue of all of the certificates authorized, only a half a million having been issued. The receivers, hoping, doubtless, that the business of the road would continue to be such that they need not issue more than half a million receivers' certificates, have diverted funds, which should be applied to the payment of these rents, to the payment partially of this past indebtedness. To that extent the diversion should be restored.

3. Where a subdivision earns no surplus, simply pays operating expenses, no rental or subdivisional interest will be paid. If the lessor or the subdivisional mortgagee desires possession or foreclosure, he may proceed at once to assert his rights. While the court will continue to operate such subdivision until some application be made, yet the right of a lessor or mortgagee whose rent or interest is unpaid to insist upon possession or foreclosure will be promptly recognized. That, it is true, may work a disruption of the system, as evidenced by the movement just made in respect to this Cairo division; but the proceeding for disruption will come from the subdivisions. The court is not sloughing off branches, tearing the system in two; but the disruption, if it comes, will come from those who seek separation, and have a legal right so to do.

4. Where a subdivision not only earns no surplus, but fails to pay operating expenses, as in the St. Joseph & St. Louis branch, the operation of the subdivision will be continued, but the extent of that operation will be reduced with an unsparing though a discriminating hand; that is, if a subdivision does not earn operating expenses, and the receivers are running two trains a day, then lop one of them off. If they are running one train a day, and still it does not pay, then run one train in two days. While the court will endeavor to keep that subdivision in operation, it will make the burden of it to

consolidated corporation, and to all the other interests put into a consolidated corporation, a minimum. We have used the term, "with an unsparing but a discriminating hand." By this we mean that certain things must be left to the discretion of the receivers. It may be that running one mixed train, proffering slight accommodation to the traveling public, would work a greater deficit than two trains,—one furnishing the conveniences of a passenger train, and the other purely a freight train. That must be left to the discretion of the receivers. The court is not in a position to determine as to what, in any particular case, will be most likely to work out a minimum deficit. If there is any controversy hereafter arising under the management of the receivers respecting any reduction, why all the parties interested can apply to the court. Some of these branches across the river seem, upon the map at least, to be so situated in respect to connections that a limited number of trains would answer the real demands of the public, and that they would be operated with a very slight expense. Suppose, as of course it may be expected, that there will continue to be a deficiency in the operating expenses of such subdivisions, such deficiency will be paid out of the general earnings of the consolidated road, or, if need be, by the issue of receivers' certificates.

While we are both of us loath to go into the receivers' certificate business, and do as little of it as is reasonably possible for a court having such large properties in its hands, yet in such a case we think the emergency arises. Suppose we take possession of a single short line, (and we have in one or two other cases,) the continuance of that as a going concern is emphasized more than once by the supreme court as a duty, as a reason for paying prior indebtedness, and also as a reason for issuing receivers' certificates. Stop operating it, and it becomes a dead concern; its connections are broken up, and its value impaired. Therefore, to preserve that value, the courts have said that it is right in a limited degree to issue receivers' certificates, and that be true where the court has but a single line, it is equally true where it has a road with various branches, and as to all of those branches. The value of any branch abandoned is diminished; and the court may not consider simply the interests of the consolidated company, the mortgagor, and the trust company, the mortgagee. It is bound to regard the interests of each one of these subdivisions that go into the consolidated company, and thus into the receivers' hands; and if the court may and ought to issue receivers' certificates, in order to keep a single line a going concern, so, having possession of this system, with its various branches, for the same reason, and by the same means, it should keep each one of them in operation.

There will be no modification of the order heretofore entered concerning receivers' certificates, but all equities respecting them as between the various subdivisions will be adjusted in the final decree. There may be, as counsel strenuously urged yesterday, a great many

equities as between the various subdivisions in respect to the burden of these receivers' certificates; but they have been authorized for only such claims as if no receivers' certificates had been issued and the road, not taken possession of by the court, could have been cast into liens prior to all mortgages upon the road and all branches; any single labor or material claim could have been cast into a lien which would have been a first lien on the North Mississippi road,—a lien antecedent to all its mortgages,—and there is no impropriety in substituting receivers' certificates for that kind of claim. It simply puts it on the same basis as the claim stood before the certificate was issued. When it comes to a sale of the road or other final disposition of the matter, it may be there will be such equities as will justify the casting of the burden of these certificates upon one subdivision rather than another. If the road goes into a single sale as an entirety, the purchaser has got to take the burden of these receivers' certificates, and before the court passes the road out of its hands the receivers' certificates will be paid.

Application also is made for the reappointment of receivers; or, stated in the language of the motion, for extending the receivership to the trust company—the mortgagee in the general mortgage. I confess that I do not wholly understand why such an order as that is asked, and I cannot appreciate what counsel mean when they say, "Make the receivers receivers for the trust company,—the mortgagee." As we look upon it the receivers are not receivers for either party. They are simply the hand of the court. In the process of the litigation the court has taken possession of the property, and holds it neither for the mortgagor nor the mortgagee, and it matters not, in the ultimate determination of the suit, at whose instance the receivers were appointed. They act for neither party. They represent neither party. They stand here simply as the hand of the court, holding the property for disposition at the end of the litigation, for the benefit of all. So I cannot see what can be gained as a legal proposition by a new order of appointment extending the receivership, as counsel suggest, to the trust company, the mortgagee. The receivers will have no greater power,—no different power,—would owe no different duty, and would be no more and no less subject to the orders of this court than they are now, and certainly they would have no right in the operation of their trust to extend favors to the one side or the other. Furthermore, as receivers appointed at the instance of the mortgagor at the first instance, they took possession of the entire properties within this order, as tendered, contemplates a seizure of part only of the properties, not all. Having taken possession of the road under the idea in the first instance that the integrity of the system had a value and should be preserved, it seems to us the receivership should continue right along in that line. There will be no reappointment of receivers.

The motion of Mr. Hagerman, representing certain bondholders

Toledo, Peoria & Western Railroad Company, must be overruled. cannot turn the road over to the bondholders or force it upon stees if they do not come here and ask for it. Partially, of course, motion accomplishes its purpose, in that the order will pass, as ted above, for paying over the surplus earnings as rent to the cor- ation.

believe that minutes all the matters concerning which we have ne to a conclusion. My brother TREAT may wish to emphasize ne portions of it.

TREAT, J. I think you have covered all the points.

HOLT and others v. MENENDEZ and others.

(Circuit Court, S. D. New York. 1885.)

TRADE-MARK—ARTICLE NOT MANUFACTURED BY OWNER OF MARK.

The word "La Favorita," as applied to flour, may be a valid trade-mark although the flour is not made by the party using the trade-mark, but is selected and classified by him, such selection requiring skill, judgment, and expert knowledge.

SAME—LACHES—INJUNCTION—ACCOUNTING.

When a complainant has allowed a party to go on for 14 years using his trade-mark without taking any proceedings to protect his rights, an injunction to prevent further infringement may be granted, but an accounting will not be decreed.

SAME—"LA FAVORITA" FLOUR.

The right of complainants to the use of "La Favorita" as a trade-mark applied to flour sustained.

In Equity.

S. St. J. McCutchin and Rowland Cox, for complainants.

John Henry Hull, for defendants.

COXE, J. This is an action to restrain the infringement of a trade-mark. The complainants are engaged in the flour and commission business in the city of New York, under the firm name of Holt & Co. The firm was organized 40 years ago, and, with the inevitable changes brought by time, has continued in the same business ever since. In 1861 they commenced to use, and have since continuously used, to distinguish a certain flour prepared by them, the trade-mark in question, "La Favorita." The trade-mark was registered in the patent-office, February 28, 1882.

The defendants, admitting the use of the name "La Favorita," contend that they are privileged to use it for the reason that the flour sold by them was procured from one S. Oscar Ryder, who, from 1861 to 1869, was a member of the firm of Holt & Co., and thus acquired the right to the trade-mark, which, in the absence of an express re-

linquishment, he retained after his withdrawal from the firm. The defendants insist, also, that the use of the words "La Favorita," as a brand for flour, did not originate with the complainants; that as they use it to distinguish flour manufactured by others, and merely selected by them, there can be nothing to support a trade-mark; and, finally, that whatever rights the complainants once had have been forfeited by inexcusable laches in asserting them.

The position that Ryder retained an interest in the trade-mark, after his connection with the firm had been severed, cannot be maintained. Holt & Co. was a firm of character and influence. For years it had preserved its credit and good name unshaken and unimpaired. The trade-mark "La Favorita" was originated, so far at least as the New York market was concerned, by its senior member. The brand was inseparable from and almost synonymous with Holt & Co. Whatever value it had was due to the exertions and reputation of the members of the firm. Its meaning, as a brand for flour, had been imparted to it by them. The moment its use became general it ceased to be valuable. Ryder had been a clerk, and from that position was promoted to a partnership. His retirement was an event of but little more importance than the change of a book-keeper or salesman. The firm still lived. It was the intention of the remaining partners to continue to transact the old business in the old way. That Holt & Co., desiring to retain the good-will of the firm unimpaired, should have permitted Ryder to despoil them of the distinguishing brands upon which their success largely depended, without a word of remonstrance, is hardly credible. But when to the presumptions thus arising is added the positive testimony that at the time of his withdrawal Ryder expressly released all right to the copartnership brands, followed by his equivocal denial, it is very clear that the defense based upon his title must fail. Proof and probability unite in pointing to this conclusion.

Regarding the defense of want of originality it must be said, in addition to the fact that it is not pleaded, that the evidence relied on is not free from uncertainty and doubt. But even should the finding be made that a few years before it was adopted by Holt & Co., the name "La Favorita" was used at St. Louis as a brand for flour, it must also be said that the use was casual and fortuitous and continued for a short period only. As a distinguishing brand for flour at St. Louis it was soon abandoned and forgotten.

There is no merit in the proposition that the complainants' trade-mark cannot be sustained for the reason that the flour is not manufactured by them. The proof is uncontradicted that selection and classification require skill, judgment, and expert knowledge, and add value and reputation to the flour when made by those in whom purchasers have confidence. The case of *Godillot v. Harris*, 81 N. Y. 267, seems conclusive upon this point.

Upon the question of laches, however, I am constrained to say that

the complainants' conduct has been such that the relief granted must be limited to an injunction. Ryder commenced using the brand in 1869, and has used it continuously since. That the complainants knew of this, certainly as early as 1871, is not disputed. That they protested at all is denied. Certainly there was no vigor or courage shown by them until just prior to the commencement of this suit, in 1882. That they did not consent is true, but it is equally true that, men who believed their rights invaded, their course was inconsistent and misleading. Ryder might well have imagined that they did not intend to call him to an account. The circumstances were such as to justify the belief on his part that he was licensed by silence to use the trade-mark. It would be inequitable to compel him to pay for its use during the long years that the complainants slept upon their rights.

In endeavoring to reach a just result the court should not overlook the fact that the delay in commencing the suit was unreasonable, and that some of the evils of which the complainants complain are attributable to their own laches in this regard. The facts seem to bring the case within the doctrine of *McLean v. Fleming*, 96 U. S. 245.

There should be a decree in favor of the complainants for an injunction, with costs.

DE KUYPER and others v. WITTEMAN and others.

(Circuit Court, S. D. New York. January 12, 1885.)

TRADE-MARK—INFRINGEMENT—PRINTING AND SELLING IMITATION LABELS TO THIRD PARTIES.

Printing and selling labels in imitation of a trade-mark, with the purpose of enabling the parties to whom the labels are sold to palm off their goods upon the public as the goods of the owner of the trade-mark, is a violation of the rights of such owner.

In Equity.

Rowland Cox, for plaintiff.

B. B. Foster, for defendant.

WALLACE, J. The demurrer in this case is without merits. The complainants, upon the facts shown in the bill of complaint, have a good title to their trade-mark, and a case for its protection irrespective of their statutory rights under the registration in the patent-office. As the necessary diversity of citizenship exists between the parties, they are entitled to invoke the jurisdiction of this court. Upon the allegations of the bill the defendants are actively engaged in assisting third persons to use the complainants' trade-mark in violation of their rights. The mere act of printing and selling labels in imitation of the complainants' might be innocent, and, without evi-

dence of an illicit purpose, would not be a violation of the complainants' rights. It is otherwise, however, when this is done with the obvious purpose of enabling others by the use of the labels to palm off their goods upon the public as the goods of the complainants.

The demurrer is overruled, with costs. Defendants may answer upon payment of costs.

HILL v. CITY OF MEMPHIS.¹

(Circuit Court, E. D. Missouri. April 27, 1885.)

1. MUNICIPAL BONDS—LOANS OF CREDIT BY MISSOURI TOWNS—SPECIAL ELECTIONS—ACT OF MARCH 21, 1868.

Where, in a suit upon bonds issued by the town of Memphis, Missouri, in payment of a stock subscription in the N. M. R. R. Co., a record of a special election had under the act of March 21, 1868, to authorize the defendant to issue said bonds, was introduced in evidence, and it appeared therefrom that the election was only ordered 12 days before it took place, *held*, that the record showed upon its face that the election was illegal, and the issue of bonds unauthorized.

2. CONSTITUTIONAL LAW—BONDS—ACT OF MARCH 24, 1868, TO ENABLE TOWNS, ETC., TO FUND THEIR DEBTS.

If the act of March 24, 1868, by the general assembly of Missouri, entitled "An act to enable counties, cities, and incorporated towns to fund their respective debts," contemplated a right in towns to subscribe stock thereafter and issue bonds, or to issue bonds for subscriptions under old charters, without any special election authorizing the issuing of such bonds, it is contrary to section 14, art. 11, of the Missouri constitution of 1865, and invalid.

At Law. Motion for a new trial and motion for rehearing.

The record of election offered in evidence in this case shows upon its face that on January 26, 1871, the special election in question was ordered for February 7, 1871, and was held on that day, only 12 days after the order was made.

Section 4 of article 2 of the Missouri constitution of 1865 provides that after the enactment of registration laws "no person shall vote unless his name shall have been registered at least ten days before the day of election." The act of March 21, 1868, concerning the "Registration of Voters" provides (section 18) that "the clerk of the county court shall, 20 days before any special election, * * * cause to be delivered to the board of registration, or any member thereof, the books of registration, who shall immediately proceed to register qualified voters." Section 2 of the same act provides that notice shall be given in each district 10 days before the first session of the board of registration. Section 14, art. 11, of the Missouri constitution of 1865, declares that "the general assembly shall not authorize any

¹ Reported by Benj. F. Rex, Esq., of the St. Louis bar.

county or town to become a stockholder in, or to loan its credit to, any company, association, or corporation, unless two-thirds of the qualified voters of such county, city, or town, at a regular or special election to be held therein, shall assent thereto.

The act of March 24, 1868, referred to in the opinion of the court is entitled "An act to enable counties, cities, and incorporated towns to fund their respective debts;" and provides "that the various counties of this state be, and they are hereby, authorized to fund any and all debts they may owe, and for that purpose may issue bonds bearing interest at not more than ten per centum per annum, payable semi-annually, with interest coupons attached; and all counties, cities, or towns in this state, which have or shall hereafter subscribe for the capital stock of any railroad company, may, in payment of such subscription, issue bonds bearing interest at not more than ten per centum per annum, payable semi-annually, with interest coupons attached."

The charter of the N. M. R. R. Co. referred to in the opinion of the court (Laws Mo. 1851, p. 483) specifically gave *counties* power (1) to subscribe stock; (2) to issue bonds to raise funds to pay such subscription; (3) to take proper steps to protect the credit of such county and in the same section merely authorized *towns* to "subscribe to the stock and appoint an agent to represent its interests."

Judgment having been given for the plaintiff, the defendant moved for a new trial, and the first of the following opinions was delivered thereon April 13, 1885.

Hough, Overall & Judson, F. T. Hughes, and A. J. Baker, for plaintiff.

Henry A. Cunningham, for defendant.

TREAT, J. Under the decision heretofore rendered in this case, the city of Memphis had no authority to issue bonds for a subscription to the railroad unless authorized so to do at an election held therefor. During the trial the record of the alleged election, whereby the bonds would be validated, was offered in evidence, under objections by the defendant. Without passing on each of the various points for a new trial, it must suffice that the record of the election on its face shows non-conformity with the positive requirements of the statutes. Hence the court was in error in its rulings with respect to said record. The motion for new trial will therefore be granted, without considering the other points involved, inasmuch as the effect of said record must be conclusive in this suit as to the rights of the parties.

In order that the parties litigant may not be involved in further expense and costs, it may be well to state that the record of the election on its face shows that there was no authority for the issue of the bonds sued on. The parties, if they so elect, can submit the case on the evidence heretofore offered, and thereupon judgment would necessarily be given for the defendant. The matters of estoppel heretofore presented would not prevail in the absence of authority for the issue of the bonds.

A motion for a rehearing having been made by the plaintiff, and the matter reargued, the following opinion was delivered April 27, 1885:

TREAT, J. When this case was before the court at a former term, it was held by Judge McCABY that the authority of the defendant to subscribe stock under the railroad charters did not carry the right to issue bonds in payment thereof; hence, as that power must be derived from some other source, there being no estoppels by the recitals in the bonds, the plaintiff must produce evidence of such authority. The record of a special election had under the act of March 21, 1868, was produced, whereupon it was held, on the motion for new trial, that the same was void on its face; consequently, as no authority for the issue of the bonds existed, the bonds themselves were therefore void. On the reargument the attention of the court has been directed to the act of March 24, 1868; the other act referred to bearing date March 21, 1868. Under the constitution of 1865 registration of voters was exacted for either general or special elections, under such provisions as the legislature might prescribe with respect thereto. Legislation describing the details will be found in said act of March 21, 1868, conformity with which was not had. By the terms of the constitution, no county, city, or town, could become stockholders, or loan its credit, to any corporation, unless two-thirds of the qualified voters at a regular or special election should assent thereto. Although, under the rulings of the supreme court of Missouri, the right of defendant to subscribe to the stock of the corporations named existed, yet there was no right to issue bonds or loan its credit in payment of such subscription, except by complying with said constitutional provision. Hence, if the act of March 24, 1868, contemplated a right to subscribe thereafter, and issue bonds, or to issue bonds for subscriptions under old charters, irrespective of the needed vote, the same would be invalid. In this case it fully appears that no authority to issue bonds was had under a valid election. The views of the court heretofore expressed are still adhered to, despite said act of March 24, 1868.

Motion overruled.

ROBBINS v. SEARS.¹

(Circuit Court, E. D. New York. February 24, 1885.)

BROKER—AGENCY FOR BOTH PARTIES.

A broker who negotiates the hiring of a steam-boat cannot act as agent of both parties to the transaction, so as to be entitled to pay for his services from each, unless they understood his position and expressly agreed to such payments.

¹Reported by R. D. & Wylls Benedict, Esqs., of the New York bar.

Motion for New Trial.

T. C. Cronin, for plaintiff.

Scudder & Carter, for defendant.

WHEELER, J. This action is brought to recover commissions as broker on negotiating the hiring of a steam-boat by the defendant of one Wright. The case shows that the plaintiff received a commission from Wright for negotiating the letting of the steam-boat to the defendant. He could not act as the agent of both parties to the transaction so as to be entitled to pay for his services from each, unless they understood his position, and expressly agreed to such payments. *Dunlop v. Richards*, 2 E. D. Smith, 181; *Pugsley v. Murray*, 4 E. D. Smith, 245; *Rowe v. Stevens*, 53 N. Y. 621; *Carman v. Beach*, 63 N. Y. 97. Payment for procuring the letting to the defendant would include payment for procuring the hiring by the defendant, unless there was an express agreement to pay more. There was no evidence that the parties agreed to the payment of any more commission than Wright paid. There was evidence that defendant agreed to repay to Wright one-half of what he was to pay to the plaintiff, and that the plaintiff afterwards spoke to defendant about money for services, and that the defendant said it would be fixed when the charter-party was signed. This is all the evidence there was in respect to any agreement by defendant to pay commissions. It was argued that this did somewhat tend to show an express agreement to pay beyond what Wright paid, and the case was submitted to the jury in that view. But this remark, if made, is referable as well to what was coming from Wright as to any additional commission, and falls far short of being sufficient to uphold the verdict finding an express agreement of defendant to pay commissions in addition to what Wright paid.

The motion of defendant to set aside the verdict for plaintiff, and for a new trial, is granted.

It is a well-settled and salutary principle of law that no agent will ever be allowed to take upon himself incompatible duties and characters, or to act in a transaction where he has an adverse interest or employment.¹ And the rule is sometimes laid down, in general terms, that the same person cannot be the agent of both parties to a transaction.² In this case, it was correctly held that, in making a contract for the composition of a debt, the same man could not be the agent of both parties, but that, when the composition was agreed upon with the creditor by the agent of the debtor, he could become the agent of the creditor for another and distinct purpose, such as holding the money for the use of the creditor. So a person standing in the position of agent of both parties cannot execute a mortgage as the attorney of one for the benefit of the other.³

A contract, however, thus made by a person as the agent of both parties is not void, but only voidable at the election of the principal, if he comes into court on timely application.⁴

¹ *Evans' Agency*, *14; *Dunne v. English*, L. R. 18 Eq. 524.

² *Hinckley v. Arey*, 27 Me. 362.

³ *Greenwood v. Spring*, 54 Barb. 375.

⁴ *Greenwood v. Spring*, *supra*.

It is not necessary for a party seeking to avoid such a contract to show that any improper advantage has been gained over him. He has the option to repudiate or affirm the contract, irrespective of any proof of actual fraud.¹

In *Sumner v. Charlotte, C. & A. R. Co.*² it was said that the law does not favor double agencies. Where, therefore, it appeared, in an action for damages against the railroad company, that the plaintiff had employed one C., who was a depot-agent of the defendant, to purchase cotton for him, and to hold and ship it under his directions, it was held that C., in so dealing in cotton for the plaintiff, acted solely as the plaintiff's agent, and there was no liability in the defendant for any loss resulting from the failure of C. to perform his duty as such agent.

In *Adams Mining Co. v. Senter*,³ and in *Colwell v. Keystone Iron Co.*,⁴ however, the rule is more accurately laid down that there is no principle of law which precludes a person from acting as agent for two principals. In the former case, CAMPBELL, J., referring to the claim that the double agency in the case (the same person being the agent of two neighboring mines) involved a conflict of duties, and that all of the agent's dealings, whereby the property of one company was transferred to or used for the other, should be held unlawful, said: "There is no validity in such a proposition. The authority of agents may, when no law is violated, be as large as their employers choose to make it. There are multitudes of cases where the same person acts under power from different principals in their mutual transactions. Every partnership involves such double relations. Every survey of boundaries by a surveyor, jointly agreed upon, would come within similar difficulties. *It is only where the agent has personal interests [the italics are our own] conflicting with those of his principal, [or where the interests of the two principals are adverse or incompatible,] that the law requires peculiar safeguards against his acts.* There can be no presumption that the agent of two parties will deal unfairly with either; and when they both deliberately put him in charge of their separate concerns, and there is any likelihood that he may have to deal with the rights of both in the same transaction, instead of lessening his powers, it may become necessary to enlarge them far enough to dispense with such formalities as one man would use with another, but which could not be possible for a single man to go through with alone."

In *Colwell v. Keystone Iron Co.*⁵ it was accordingly held competent for a person in the general employ of the vendor to accept, by the consent of all parties, as agent of the vendee, the delivery of the property sold.

The fact that the purchaser of negotiable paper, resident in a distant part of the state, employs to collect the same a person who is also an agent for the payee, is not very significant of bad faith.⁶

While a person cannot properly be the agent of both parties, buyer and seller, yet if he accepts the position of agent for the buyer without disclosing the fact that he is agent for the seller, he cannot afterwards repudiate such position to shield himself from liability to the buyer, on the ground that he was agent for the seller. Having assumed the relation of agent for the buyer, he must be held to a strict performance of the duties, and to all the liabilities the relation imposes.⁷ Where an agent is employed by several principals, the common employment creates a relation and privity between the principals, such as will sustain an action for money had and received by one against another to recover moneys belonging to the former paid over by the agent to the latter.⁸

A broker "is strictly a middle-man or intermediate negotiator between the

¹ Id.

² 78 N. C. 289.

³ 26 Mich. 73.

⁴ 36 Mich. 51.

⁵ Supra.

⁶ *Helmer v. Krollick*, 86 Mich. 371.

⁷ *Cotton v. Holliday*, 59 Ill. 176. See, also, *Bowen v. Johnson*, 28 La. Ann. 9.

⁸ *Hathaway v. Town of Cincinnati*, 62 N. Y. 434.

parties; and for some purposes (as for the purpose of signing a contract within the statute of frauds) he is treated as the agent of both parties."¹ In a subsequent section the same author says: "But, primarily, he is deemed merely the agent of the party by whom he is originally employed; and he becomes the agent of the other party only when the bargain or contract is definitely settled as to its terms between the principals. * * * It would be a fraud in a broker to act for both parties, concealing his agency for one from the other, in a case where he was intrusted by both with a discretion as to buying and selling, and of course where his judgment was relied on."² An agent cannot claim commission upon a transaction which has been entered into in violation of his duties to his principal. The same person cannot act as agent for both seller and purchaser, unless both know of and assent to his undertaking such agency, and receiving commissions from both. Whether such double agency, even with the consent of both principals, is consistent with public policy, is not here decided.³ It is accordingly held that a broker employed to sell land (and the same rule would doubtless apply to sales of personalty) cannot recover compensation from both parties.⁴

The rule is the same where an exchange of property is effected by a broker as where a sale is made.⁵ Nor can an action for the recovery of commissions be maintained in such case against the owner of the property exchanged for, although by custom or usage among brokers in the place where the exchange was effected, they were entitled, in exchanges of real estate, to a commission from each party of 2½ per cent. in the value of the property exchanged.⁶ Evidence in behalf of the broker to show a custom among brokers to charge a commission to both parties in such cases is inadmissible.⁷ If the broker in such a case exacts from a customer a promise of compensation additional to that promised by the person employing him to sell or exchange before sending the customer to the owner, he cannot recover any compensation from the owner for services, although a sale or exchange is effected with such customer.⁸ The fact that no loss is suffered from such action of the broker does not vary its effect, the transaction being against public policy.⁹ But where each owner, with knowledge that the broker has been employed by both, promises to pay him a commission, such promise may be enforced.¹⁰ And when a middle-man brings together a buyer and seller, each of whom has agreed, without the knowledge of the other, to pay the middle-man a commission on any contract which may be made between them, in the making of which the middle-man takes no part as the agent for either, the conduct of the middle-man in concealing from each his agreement with the other has been held not to be fraudulent, and hence no defense to an action brought by him against either for

¹ Story, Ag. § 28; *Rucker v. Cammeyer*, 1 Esp. 106; *Hinde v. Whitehouse*, 7 East, 558, 569; *Kemble v. Atkins*, 7 Taunt. 260; *Henderson v. Barnewall*, 1 Younge & J. 387; *Beal v. McKiernan*, 6 La. 407; *Hinckley v. Arey*, 27 Me. 362.

² See *Wright v. Dannah*, 2 Camp. 203; *Farebrother v. Simmons*, 5 Barn. & Ald. 333.

³ *Meyer v. Hanchett*, 39 Wis. 419; *S. C.* 43 Wis. 246.

⁴ *Watkins v. Cousall*, 1 E. D. Smith, 65; *Vanderpoel v. Kearns*, 2 E. D. Smith, 170; *Everhart v. Searle*, 71 Pa. St. 256; *Bennett v. Kidder*, 5 Daly, 512; *Meyer v. Hanchett*, 39 Wis. 419; *S. C.* 43 Wis. 246; *Lloyd v. Colston*, 5 Bush. 587; *Finnerty v. Fritz*, 5 Colo. 174, in which case the rule is laid

down that he is entitled to no commissions from either party.

⁵ *Scribner v. Collar*, 40 Mich. 375; *Pugsley v. Murray*, 4 E. D. Smith, 245; *Farnsworth v. Hemmer*, 1 Allen, 494; *Walker v. Osgood*, 98 Mass. 348; *Raisin v. Clark*, 41 Md. 158; *Meyer v. Hanchett*, 43 Wis. 246; *S. C.* 39 Wis. 419; *Lynch v. Fallon*, 11 R. I. 311; *Rice v. Wood*, 113 Mass. 133. See, also, *Carman v. Beach*, 63 N. Y. 97.

⁶ *Raisin v. Clark*, 41 Md. 158. See, also, *Lynch v. Fallon*, *supra*.

⁷ *Farnsworth v. Hemmer*, 1 Allen, 494.

⁸ *Walker v. Osgood*, 98 Mass. 348.

⁹ *Everhart v. Searle*, 71 Pa. St. 256.

¹⁰ *Pugsley v. Murray*, 4 E. D. Smith, 245; *Rowe v. Stevens*, 53 N. Y. 621; *Alexander v. N. W. C. University*, 57 Ind. 466. See, also, *Meyer v. Hanchett*, *supra*.

the commission agreed upon.¹ In an action against the seller, however, upon such a contract, evidence to prove a usage among brokers as to the time when a commission is to be considered earned, was held inadmissible.² An agreement by a person, desiring to purchase land, to convey a part of it to the seller's broker, cannot be enforced by the broker, if one of the considerations of the agreement was that he would put such person in communication with the seller.³

Tested by the rules above laid down, there can be no doubt of the correctness of the principal case.

M. D. EWELL.

Chicago, June 3, 1885.

¹ Rupp v. Sampson, 16 Gray, 398; Siegel v. Gould, 7 Lans. 177; Mullen v. Keetzleb, 7 Bush, 253. See, also, Redfield v. Tegg, 33 N. Y. 212.

² Rupp v. Sampson, *supra*.

³ Smith v. Townsend, 109 Mass. 500.

In re McVEY.

(District Court, D. California. April, 1885.)

COURTS-MARTIAL.—JURISDICTION OF CIVIL COURTS.—HABEAS CORPUS.

Within the sphere of their jurisdiction, the judgments and sentences of courts-martial are as final and conclusive as those of civil tribunals of last resort, and the only authority of the civil courts is to inquire whether the military authorities are proceeding regularly within their jurisdiction. If they are, they cannot be interfered with, no matter what errors may be committed in the exercise of their lawful jurisdiction.

On Habeas Corpus.

J. H. Dickinson, for petitioner.

Lieut. Col. W. Winthrop, Dep. Judge Adv. Gen., for respondent,
Major A. M. Randol, First artillery.

HOFFMAN, J. The return to the writ shows that the petitioner is a military convict, imprisoned under the sentence of a military court-martial, regularly convened at Fort Vancouver, Washington Territory. The record of the court-martial shows that the petitioner was tried for having deserted on the thirteenth of April, 1877, from an enlistment made March 12, 1877. In his defense, the petitioner pleaded that at the time of his enlistment he was a deserter; that in 1875 he had been tried and convicted of a desertion from a previous enlistment; that he had been sentenced to imprisonment and to be dishonorably discharged from service; that he had escaped from custody without receiving a certificate of discharge and had subsequently made the enlistment, for desertion from which he was on trial. He therefore claimed that under section 1118 of the Revised Statutes, which prohibits the enlistment of a "deserter," his enlistment was void, and that he could not be held for the violation of an engagement prohibited by law. The court overruled the plea, and the petitioner was tried, convicted, and sentenced. It is not denied that, within the sphere of their jurisdiction, the judgments and sentences

of courts-martial are as final and conclusive as those of civil tribunals of last resort. *In re Bogart*, 2 Sawy. 402; *Dynes v. Hoover*, 20 How. 82.

The only authority of the civil courts is "to inquire whether the military authorities are proceeding regularly within their jurisdiction. If they are, we cannot interfere, no matter what errors may be committed in the exercise of their lawful jurisdiction." Per Mr. Justice SAWYER, *In re White*, 9 Sawy. 52; S. C. 17 FED. REP. 723. In the same case it is observed:

"It is not disputed that a military court-martial has general jurisdiction to try a party for the military offense of desertion. * * * This covers the whole ground. Jurisdiction to determine whether the party is guilty of the offense necessarily involves the jurisdiction to determine what constitutes the offense under the statute,—jurisdiction to construe the statute and adjudge what under the statute constitutes a good defense against the prosecution; and to determine whether or not the facts exist which are claimed to constitute a valid defense."

If, as is held by Mr. Justice SAWYER, "jurisdiction to determine whether a party is guilty of the offense necessarily involves the jurisdiction to determine what constitutes the offense," the proceedings of the court-martial in the present case were within its jurisdiction.

I have met with no reported cases where a defense such as now set up has been entertained; still less where the sentence of a court-martial, after disallowance of the plea, has been held void for want of jurisdiction. The defense, however, has heretofore been interposed. In the very valuable digest of opinions of the judge advocate general by Lieut. Col. Winthrop, I find a note of an opinion by the judge advocate general, as follows:

"A deserter who enlists, and afterwards again deserts, cannot, on being brought to trial for the second offense, defend on the ground that his enlistment was void, and that he, therefore, is not amenable to trial. A plea or defense to this effect should not be sustained by the court."

I cite this ruling to show that the defense now relied on has been heretofore set up, and that the question of its validity has apparently been left to the determination of the military tribunal.

It is true that *In re Wall*, 8 FED. REP. 85, Mr. Justice LOWELL declines to decide whether an illegally enlisted minor who openly leaves the service, after formally demanding his discharge, would be guilty of desertion; but he does not intimate that if tried and convicted by a court-martial, its judgment would be wholly void for want of jurisdiction. By the forty-seventh article of war it is provided—

"That any officer or soldier who, having received pay, or having been duly enlisted in the service of the United States, deserts the same, shall, in time of war, suffer death," etc.

It would seem that in this article the reception of pay is treated as the equivalent of a due enlistment. In the case at bar, the petitioner was, at the time of his desertion, a *de facto* soldier of the United States. He had voluntarily assumed the obligations, and had at-

tempted to secure the rights, of an enlisted man. To avoid the consequences of his last crime he sets up as a defense that he has committed three previous offenses: (1) A former desertion; (2) an escape from confinement after conviction of that crime, and without waiting for a certificate of dishonorable discharge; (3) a fraudulent re-enlistment in violation of the law and under an assumed name. It was not claimed on the argument that during the time of his actual service he could commit with impunity *any* military offense. It was only contended that he could not commit the offense of desertion. The distinction is not very apparent. It would seem that he must be regarded either as a civilian or a soldier. If the former, he was not amenable to the military law. If the latter, he was subject to that law for any offenses against its provisions. But the claim to immunity from punishment for desertion would even extend to desertion by a sentry from his post, by which the safety of the army might be compromised, or to desertions in time of war in the face of the enemy, and even to desertions to the enemy for the purpose of conveying plans of fortifications or other information obtained in the course of his service.

It may be urged with great force (1) that by the general principles of law a man cannot profit by his own wrong, still less by his crime; (2) that the obvious intent of the statutory provisions prohibiting the enlistment of deserters was to attach an additional penalty for a crime, and not to confer an immunity from the consequences of its repetition; and (3) that the interests and even the necessities of the service forbid the allowance of the defense set up by the petitioner. But this question it is unnecessary, perhaps improper, now to decide; for even if the ruling of the court-martial was erroneous, this court has no jurisdiction to correct the error or to reverse its judgment.

Petitioner remanded.

In re BOSTON & FAIRHAVEN IRON WORKS, Bankrupts.

(Circuit Court, D. Massachusetts. April 30, 1885.)

BANKRUPTCY—CLAIM FOR PROFITS FOR INFRINGEMENT OF PATENT.

A claim for an account of profits against an infringer of a patent-right is not provable against his estate in bankruptcy under Rev. St. § 5067.

Appeal in Bankruptcy.

Browne & Browne, for petitioners.

C. E. Washburn, for defendant.

COLT, J. On March 2, 1878, the Boston & Fairhaven Iron Works filed a petition in bankruptcy in the United States district court of Massachusetts, and were adjudged bankrupts. On the twenty-second

of March, 1880, one Cyril C. Child, of Boston, recovered judgment in the United States circuit court for this district against the bankrupt corporation, for the sum of \$5,640.26, and \$1,773.28, costs of suit, upon a claim for profits from the infringement of a patent. On July 19, 1884, the proof of claim was duly presented before the register, who refused to allow the same, upon the ground that it appeared to be a claim for damages for infringement of a patent-right not converted into a judgment, or otherwise liquidated, prior to the date of bankruptcy. Subsequently, the district court held that the claim was provable against the estate under section 5067 of the Revised Statutes. This ruling was based upon the assumption admitted by counsel that the decree in the patent suit was not for damages but for the profits of the bankrupt corporation, as an infringer of the patent. The present hearing arises on an appeal by the assignees to this ruling of the district court.

A claim for damages for a tort is not a claim provable in bankruptcy, unless liquidated or reduced to judgment, prior to the date of proceedings in bankruptcy. *In re Schuchardt*, 15 N. B. R. 161; *Black v. McClelland*, 12 N. B. R. 481; *In re Hennocksburgh*, 7 N. B. R. 37.

A claim for an account of profits against an infringer of a patent-right has been held to be provable in bankruptcy, on the ground that it is not a claim for damages, but is more like an equitable claim for money had and received, for the use of the patentee, the wrong-doer being a trustee of the profits for the patentee. *Watson v. Holliday*, 20 Ch. Div. 780; *Re Blandin*, 1 Low. 543.

But this view has been disapproved by the supreme court in *Root v. Railway Co.* 105 U. S. 189, 214, where, upon careful consideration, it was held that the infringer of a patent-right was not a trustee of the profits derived from his wrong for the patentee; that to hold otherwise would, in effect, extend the jurisdiction of equity to every case of tort where the wrong-doer had realized a pecuniary profit from his wrong. The court decided that a bill in equity for a naked account of profits and damages against an infringer of a patent could not be sustained upon the ground that the infringer was a trustee for the profits. See, also, *Child v. Boston & Fairhaven Iron Works*,¹ recently decided by the supreme court of Massachusetts.

It seems to us that the reasoning of the court in *Root v. Railway Co.* is decisive of the question raised by this appeal. It follows that the claim of Child was not a claim provable against the estate of the bankrupts, and should not be allowed, and that the ruling of the district court should be reversed.

v.23r,no.16—56

¹ 137 Mass. 516.

UNITED STATES v. SEAMAN.

(Circuit Court, S. D. New York. April 7, 1885.)

1. FEDERAL ELECTIONS—REV. ST. §§ 5511, 5514—FRAUDULENT ATTEMPT TO VOTE AT ELECTION FOR REPRESENTATIVE IN CONGRESS—INDICTMENT.

An indictment charging a party with a fraudulent attempt to vote in the name of another person at an election for a representative in congress had and conducted under the laws of the state of New York, by which state officers and representatives to congress are voted for on separate ballots, which are deposited in separate ballot-boxes, that fails to allege that such party attempted to vote for a representative in congress, is insufficient.

2. SAME—CONSTRUCTION OF REV. ST. §§ 5511, 5514.

The essence of the crime created by section 5511 of the United States Revised Statutes is an attempt to vote unlawfully for a representative in congress, and not merely an attempt to vote unlawfully at an election at which a representative may be voted for.

On Motion in Arrest of Judgment.

Elihu Root, U. S. Dist. Atty., *Benj. B. Foster*, Asst. U. S. Dist. Atty., and *Charles A. Hess*, for defendant.

WALLACE, J. The defendant was tried and convicted upon an indictment charging him with a fraudulent attempt to vote in the name of another person at an election for a representative in congress had and conducted under the laws of the state of New York on the fourth day of November, 1884. The indictment did not allege that the defendant attempted to vote for a representative in congress. Nor did the evidence upon the trial show such an attempt specifically. State and local officers were voted for at that election. There were seven separate ballots and separate boxes. Under the laws of this state separate ballots are required for representatives in congress from those which contain the names of state officers and local officers. It appeared by the evidence that the defendant presented himself at the polls and handed to one of the inspectors of election a ballot or ballots, when a question arose as to his right to vote by the name which he gave, and he was arrested. At the close of the evidence the counsel for the defendant asked for an instruction that the defendant be acquitted upon several grounds, and among them, because there was no proof that he had attempted to vote for a representative in congress. The court refused to give this instruction to the jury, and instructed them that they were authorized to find the defendant guilty if they were satisfied upon the evidence that he attempted to vote at the election under an assumed name.

The question is now made, upon a motion in arrest of judgment and for a new trial, whether the indictment was sufficient, and whether there was error in the ruling at the trial. The offense for which the defendant was indicted was created by the act of congress of May 31, 1870, commonly known as the enforcement act, and is now found in section 5511, Rev. St., in the chapter relating to crimes against the elective franchise. The section declares:

"If, at an election for representative or delegate in congress, any person knowingly personates and votes, or attempts to vote, in the name of any other person, whether living, dead, or fictitious, or votes more than once at the same election for any candidate for the same office, * * * he shall be punished by a fine of not more than \$500, or by imprisonment not more than three years, or by both, and shall pay the costs of the prosecution."

Section 5514 declares that "whenever the laws of any state require that the name of a person to be voted for as representative in congress shall be contained on any ballot with the names of other persons to be voted for at the same election as state, municipal, or local officers, it shall be deemed sufficient *prima facie* evidence to convict any person charged with voting or offering to vote unlawfully under the provisions of this chapter, to prove that the person so charged cast or offered to cast a ballot wherein the name of such representative might by law be printed or contained." Although the language of section 5511 is sufficiently broad to authorize a conviction when the accused has voted or attempted to vote in the name of another at any election for representative in congress, irrespective of the fact whether he voted or attempted to vote for such representative or not, it ought not to be so construed, even if resort could not be had to section 5514 for interpretation of its meaning. If such a construction were admissible a grave doubt would be suggested whether congress had not transgressed its constitutional power by creating an offense which it is the exclusive province of the state to create and punish.

It is for the several states to determine by their own laws how their own officers shall be elected, who may or may not vote for such officers, and what acts of commission or omission, respecting the exercise of the elective franchise in the election of such officers, shall be criminal. The only restriction upon their power in this behalf is found in that article of the constitution which prohibits the state from denying or abridging the rights of citizens to vote on account of race, color, or previous condition of servitude, and the appropriate legislation of congress to enforce this provision.

The power of congress to intervene by legislation respecting such offenses as the one for which the defendant was tried, is conferred, if it has been conferred at all, by that clause of the constitution which declares that "the times, places, and manner of holding elections for senators and representatives shall be prescribed by each state by the legislature thereof; but the congress may at any time make or alter such regulations, except as to the place of choosing senators." It has been seriously debated whether the power to regulate the "times, places, and manner of holding elections" includes the power to prescribe any regulations or restrictions upon the exercise of the elective franchise by the voters of the states, and whether any interference with the authority of the states to declare who shall vote or shall not vote, and what penalties shall attach to unlawful voting, or for the violation of their own laws concerning elections, is warranted by the power

to regulate the "manner of holding elections." It has been contended that the object of the provision was simply to give to the national government the means to protect itself from being crippled by hostile action of the states in refusing to provide suitable means for holding elections for representatives. The supreme court, however, have decided otherwise in *Ex parte Siebold*, 100 U. S. 371, and *Ex parte Clarke*, Id. 399, where the constitutionality of some of the provisions of the enforcement act were vindicated. It was there held that congress, in the exercise of its lawful authority, could make the violation of state laws for securing the purity of elections by state officers a federal crime; but the court was careful to confine its opinion to the constitutional validity of such legislation when it was legitimately exercised to regulate elections for representatives in congress; and Mr. Justice BRADLEY, speaking for the court in *Ex parte Siebold*, used the following language:

"In what we have said it must be remembered that we are dealing only with the subject of elections of representatives to congress. If, for its own convenience, a state sees fit to elect state and county officers at the same time, and in conjunction with the election of representatives, congress will not be thereby deprived of the right to make regulations in reference to the latter. We do not mean to say, however, that for any acts of the officers of election, having exclusive reference to the election of state or county officers, they will be amenable to federal jurisdiction; nor do we understand that the enactments of congress now under consideration have any application to such acts."

No act of congress should be interpreted, unless the language used admits of no other interpretation, to press beyond the certain confines of constitutional power, (*U. S. v. Coombs*, 12 Pet. 72;) and especially should this rule be observed in the interpretation of a criminal statute relating to offenses upon the border line of the national jurisdiction. Such, clearly, would be the character of the statute in question if it explicitly made it a crime to vote or attempt to vote under an assumed name for a state or county officer at any election for a representative in congress. Such a statute would not only be of doubtful constitutionality, but no doubt is entertained that it would be plainly unconstitutional, unless the act made criminal could in some way affect the election of a representative, as it might in those states where ballots for the state or local officers contain also the name of the candidate for representative.

Aside from these general considerations, a clear exposition of the meaning of the section is furnished by section 5514. That section can have no application if it is unnecessary to prove, upon the trial of an indictment under section 5511, that the accused voted or attempted to vote for a representative in congress. It demonstrates the intention of congress to legislate only to the extent required to secure an honest and unvitiated election of representatives, and in this behalf not to make any act penal which does not necessarily militate against this object.

Reading both sections together it seems plain that the essence of the crime created by section 5511 is an attempt to vote unlawfully for a representative in congress, not an attempt to vote unlawfully at an election at which a representative may be voted for. The indictment should therefore have charged that such an attempt was made by the defendant.

As there was no such averment, the defendant was improperly convicted.

BENEDICT, J. I am of the opinion that the defendant is entitled to a new trial, for the reason that at the trial it was conceded by the district attorney that the indictment did not aver an attempt to vote for representative in congress. The charge to the jury, to which no exception was taken, shows that the case was tried upon this understanding. If it had been submitted to the jury to say whether the evidence satisfied them that the accused attempted to vote for representative in congress, and the jury upon such a charge had found the accused guilty, I incline to think the indictment sufficient after verdict to authorize judgment. The imperfect averment of the indictment would have been cured by such a verdict. But the verdict, taken in connection with the charge, renders it plain that the jury did not by their verdict necessarily find the accused guilty of having attempted to vote for a representative in congress. The absence of such a finding entitles the accused to a new trial.

BROWN, J. The defendant, in my judgment, could not be lawfully convicted unless the jury found that he attempted to vote for a representative in congress. Upon the evidence and proper instructions, the jury might possibly have found that he did attempt to vote for a representative in congress. Had they been instructed they must find such an attempt or acquit the defendant, the imperfect averment in the indictment would, I am inclined to think, have been cured by a general verdict of guilty. But the instructions given, and the disclaimer by the district attorney at the close of the trial, in effect completely withdrew this question from consideration of the jury. The verdict of guilty does not, therefore, import a finding that the defendant attempted to vote for a representative in congress; and upon this ground alone, and without expressing any opinion on the other topics considered in the opinion of the circuit judge, I think a new trial should be ordered.

PARKER, Trustee, v. MONTPELIER CARRIAGE CO.

(Circuit Court, D. Vermont. May 19, 1885.)

PATENTS FOR INVENTIONS—BABY-CARRIAGE TOP—INFRINGEMENT.

Re-issued patent No. 10,363, granted August 7, 1885, to Horatio G. Parker, trustee, for an improved baby-carriage top, held valid, and infringed by the device used by defendant; following *Parker v. Stow*, 23 FED. REP. 253.

In Equity.

William C. Strawbridge, for plaintiff.

Hiram A. Huse, for defendant.

WHEELER, J. This cause has been heard on a motion for a preliminary injunction to restrain an alleged infringement of reissued letters patent No. 10,363, granted August 7, 1883, to the plaintiff for an improvement in children's carriages. The same patent with another which expired February 11, 1885, was before the circuit court for the district of Massachusetts, upon a former reissue, in *Richardson v. Noyes*, 10 O. G. 507, S. C. 2 Bann. & A. 398; and in its present form was before the circuit court for the district of Connecticut in *Parker v. Stow*, 23 FED. REP. 252. In the former case the plaintiff obtained a decree principally, apparently, upon the patent which has now expired; the court remarking (LOWELL, J.) that Richardson's patent, which was the one now in question, "must be restricted to the particular devices there specially described." The defendant relies upon this remark, and claims that the patent so restricted would not cover the alleged infringement, which is precisely the same as that adjudged to be an infringement in *Parker v. Stow*. The case of *Richardson v. Noyes* does not appear to have been before the court in *Parker v. Stow*; but if it had been, there is not so much discrepancy between them as to make it probable that the decision in the latter case would have been any different. The patent in the latter case appears to have been held valid for the particular devices for changing the position of the top of the carriage relatively to the child's head, rather than for a broad invention of a movable top for such a carriage. The devices of that defendant and this, vary from those particularly described in the patent only in the mode of fastening in position and in the place of the joint, and in each of these respects each appears to be an equivalent of the other, as appears to have been held in that case. The authority of that case is not weakened by the other case, and as it covers this case, both as to validity of the patent and infringement, the plaintiff appears to be entitled to a preliminary injunction as prayed for.

Motion granted.

SCHEIDLER v. TUSTIN and others.

(Circuit Court, W. D. Pennsylvania. May 13, 1885.)

1. PATENTS FOR INVENTIONS—NOVELTY.

There is nothing patentable in the application to a horizontal steam-engine and boiler of old devices in the precise combinations in which they had previously existed in steam-engines with vertical boilers, the result obtained being the same in character with the original result.

2. SAME—PATENT No. 269,329.

Letters patent No. 269,329, granted December 19, 1882, to Reinhard Scheidler, relating to a combined bed-plate and heater for portable steam-engines with horizontal boilers, held to be invalid for want of novelty.

In Equity.

M. D. & L. L. Leggett, for complainant.

Bakewell & Kerr, for respondents.

ACHESON, J. The bill charges the defendants with the infringement of letters patent No. 269,329, granted to the complainant December 19, 1882, upon an application filed October 7, 1882. The complainant's invention relates to a combined bed-plate and heater for portable steam-engines with horizontal boilers. It is formed hollow, and contains pipes through which the feed-water is supplied to the boiler, and is nearly triangular in cross-section, the top and outer sides being in planes at right angles to each other, while the under or hypotenuse side is made concave or concentric with the shell of the boiler to "fit closely" thereto. The bracket or pillow-block, which supports the main shaft of the engine, is cast in a single piece with the heater, and is vertically divided through the center of the bearing-box; the cap being secured to the pillow-block by horizontal bolts, and being supported at the lower end by a seat formed on the top of the heater.

The patent has four claims, each purporting to be for a combination of devices. The first claim is as follows:

"(1) In combination with a horizontal boiler for portable steam-engines, a combined bed-plate and heater, the pillow-block or support for the bearing of the main shaft of which is cast in a single piece therewith, and having a vertical division through the center of the box-opening, substantially as set forth."

The second claim is the same as the first, with the addition, as part of the combination, of the bolts which secure the cap to the pillow-block, "extending horizontally into or through the same." The third claim reads thus:

"(3) In combination with a horizontal boiler for portable steam-engines, a combined bed-plate and heater, extending lengthwise and secured to said boiler, of triangular or nearly triangular cross-section, having the side thereof contacting with the boiler-shell, curved or concentric therewith, to allow it to lie with its surface on the boiler throughout its whole extent, whereby all the heat possible may be conducted from the boiler to the heater, in addition

to that produced from the exhaust steam, as and for the purpose hereinbefore set forth."

The fourth claim covers the seat for the support of the cap in combination with "a combined bed-plate and heater for portable steam-engines, having its pillow-block cast integral therewith, as described."

The engine which is alleged to infringe this patent was built by John H. McNamar, a manufacturer of engines, etc., at Newark, Ohio, in the summer of 1882, and was by him sold and delivered to one of the defendants on or about the first of August of the same year. This engine, it is admitted, embodies the devices and combinations covered by the first two claims of the patent, but infringement of the other claims is denied. Whether or not there is infringement in fact of the third claim depends upon the proper construction thereof. It calls for a combined bed-plate and heater, having the concave side thereof "*contacting with*" the boiler shell, curved or concentric therewith, "to allow it to lie with its surface on the boiler throughout its whole extent." In the same connection the specification uses the terms "to fit closely." It also mentions a disadvantage from "buckling," often resulting "when a space is left between the heater and the boiler;" and one of the objects of the invention is declared to be, "by bolting the bed-plate and heater with its curved and most widely extended side in *direct contact* with the boiler and fire-box, to obtain therefrom all the heat possible." Now the prior state of the art, undoubtedly, was such that this claim must be confined within very strict limits, and hence the defendants with much reason contend that it must be held to exclude any sensible intervening space between the curved side of the bed-plate and the boiler-shell. Thus construed, the defendant's engine does not infringe, for therein the combined bed-plate and heater and the boiler-shell do not touch each other, but are separated by a clearly perceptible space, open, and, according to expert testimony, in extent sufficient materially to interfere with the transmission of heat from the boiler to the heater. The agreed distances, indeed, between the hypotenuse side of the bed-plate and the sheets of the boiler-shell are but one-half of an inch and forty-one sixty-fourths of an inch, and between the same side of the bed-plate and the top of the rivet heads, one quarter of an inch and nine sixty-fourths of an inch. These distances do strike one as unimportant, and they ought, perhaps, to be so held. At any rate, in the further consideration of this case, it will be treated upon the theory that if the third claim is valid, infringement thereof is shown.

Touching the fourth claim of the patent, I need only say that, discarding any doubt arising upon the evidence as to whether the cap of the defendant's pillow-block is seated upon the heater, I will assume the fact of infringement.

This brings us to a consideration of the merits of the patent, and at the outset it must be said that the patent is extremely narrow at

the best. All the claims—the first three in express terms and the fourth by implication—are limited to portable steam-engines having horizontal boilers. Hence, all the combinations are open to free public use when applied to vertical boilers. Now, it is well known and in proof that portable steam-engines with vertical and horizontal boilers have long been in common use for the same general purposes. Again, under the evidence it is, beyond disputation, clear that all the devices entering as elements into the several combinations were old at the date of the alleged invention. They had all been previously used on portable steam-engines. The specification here admits that a combined bed-plate and heater for steam-engines was not new, and that the method of heating it by exhaust steam was also old. But the uncontradicted evidence goes far beyond this admission, and conclusively establishes that long prior to the alleged invention portable steam-engines with horizontal boilers were provided with combined bed-plates and heaters, laid lengthwise upon the boiler and closely fitted thereto, of various shapes, in cross-section,—oval, rectangular, triangular, etc.,—the pillow-block being sometimes bolted to the heater and sometimes cast integral therewith. Now, if the evidence stopped right there, it might well be doubted whether, in the undeniable prior state of the art, the complainant's patent discloses anything more than the exercise of mere mechanical skill. *Atlantic Works v. Brady*, 107 U. S. 192; S. C. 2 Sup. Ct. Rep. 225; *Phillips v. City of Detroit*, 111 U. S. 604; S. C. 4 Sup. Ct. Rep. 580.

But the defendants have furnished specific proofs of anticipation, and they are unusually full. And, first, let us take an instance of a vertical engine. Such engines were built as early as 1877, and since, by C. Aultman & Co., of Canton, Ohio. The proofs in respect thereto are complete, and include as an exhibit the bed-plate and heater taken from one of these engines which was sold in 1879. The Aultman was a portable steam-engine with a vertical boiler, and it had a combined bed-plate and heater, of triangular shape in cross-section, placed lengthwise upon the boiler and fitted closely thereto. The side of the bed-plate next the boiler was concentric therewith. The pillow-block was cast in a single piece with the bed-plate and heater, and it was divided through the center of the box-opening at right angles to the length of the heater, and the cap was secured to the pillow-block by bolts extending longitudinally. The above-mentioned exhibit also shows a lip overlapping the outer end of the cap of the pillow-block, and a bearing for the inner end of the cap formed by the projecting end of the bed-plate. This identical form of combined bed-plate and heater is capable of use on horizontal boilers, and, in fact, C. Aultman & Co. have recently so applied it. True, some of the complainant's witnesses state that to make it safe and practicable for a horizontal boiler the bottom-rest for the cap should be increased; but if this be conceded, the object could be effected by the mere elongation or extension of the bed-plate,—a change within the grasp of the lowest

grade of mechanical skill. At the utmost, then, all that the complainant did was to apply to a horizontal engine and boiler old devices in the precise combinations in which they had previously existed in engines with vertical boilers; the result obtained by the new application being the same in character as the original result. That therein there was nothing patentable, may be confidently affirmed upon the authority of the cases of *Pennsylvania R. Co. v. Locomotive Truck Co.* 110 U. S. 490; S. C. 4 Sup. Ct. Rep. 220; and *Blake v. City and County of San Francisco*, 31 O. G. 380; S. C. 5 Sup. Ct. Rep. 692.

But the evidence is convincing that the complainant was not, in fact, the first to apply these devices and combinations to horizontal boilers. For example, it appears that portable steam-engines with horizontal boilers, manufactured and sold by George B. Stevenson between the years 1873 and 1880, had the pillow-block cast in one piece with the combined bed-plate and heater, with a vertical division through the box-opening, and with a seat for supporting the lower end of the cap of the pillow-block, to prevent downward movement; the bolts which secured the cap to the box running horizontally, or in a line with the bed-plate. By indisputable evidence it is shown that the Stevenson engine embodied all that is embraced in the first, second, and fourth claims of the complainant's patent. Furthermore, in that engine the combined bed-plate and heater was laid lengthwise upon the boiler in close proximity therewith, and the proof is quite satisfactory that in several instances, at least, prior to 1880, it was triangular in cross-section.

Again, the Thomas engine, a portable steam-engine with a horizontal boiler which was manufactured and sold as early as 1876, deserves special mention. It had a combined bed-plate and heater extending lengthwise on the boiler and bolted thereto, of nearly triangular shape in cross-section, and the side thereof next the boiler was curved or concentric therewith. The bed-plate was fitted originally close to the boiler, but, as afterwards made, was bolted about a quarter or three-eighths of an inch from the boiler. This engine had the pillow-block bolted to the heater and divided horizontally, but it completely anticipated the third claim of the patent, especially as that claim has been construed for the purposes of this case.

There is much other evidence of prior knowledge and use, but it would subserve no good end to extend this opinion by a particular reference thereto. Suffice it to say that in my judgment the defense of want of novelty is fully made out. And, having reached this conclusion, I deem it unnecessary to consider the further defense that has been insisted on, resting on the alleged invalidity of the patent on the ground, as is claimed, that it is for mere aggregations of old devices.

Let a decree be drawn dismissing the complainant's bill, with costs.

VACUUM OIL Co. v. BUFFALO LUBRICATING OIL Co.

(Circuit Court, N. D. New York. March 20, 1885.)

1. PATENTS FOR INVENTIONS—NOVELTY—PATENT No. 68,426.

Claims 2 and 12 of patent No. 68,426 granted to Hiram B. Everest, on September 3, 1867, for an improvement in apparatus for distilling petroleum, *held void for want of novelty.*

2. SAME—DISCLAIMER.

After the term of a patent has expired, it is too late to file a disclaimer.

In Equity.

WALLACE, J. For the reasons stated orally at the hearing of this cause the second and twelfth claims of the patent in suit (No. 68,426, granted September 3, 1867, to Hiram B. Everest, assigned to complainant) are clearly void for want of novelty. Inasmuch as no disclaimer has been filed, it is unnecessary to consider the validity of the other claims. After the term of a patent has expired it is too late to file a disclaimer. The suit cannot therefore be maintained, and the bill is dismissed.

GAGE v. KELLOGG and another.

(Circuit Court, N. D. New York. May 29, 1885.)

1. PATENTS FOR INVENTIONS—CLAIM FOR MACHINE AND PROCESS FOR USING IT.

There cannot be in the same patent a claim for a machine and a claim for the process of using that machine.

2. SAME—REISSUE VOID—ENLARGEMENT OF CLAIMS.

Reissued letters patent No. 8,615, dated March 1, 1879, and granted to William B. Fisher for an improvement in seed-steaming apparatus, expand the claims in the original patent, and are void.

3. SAME—INFRINGEMENT.

Reissue No. 8,615 compared with defendants' machine which is used to moisten meal, and not to dry or clean the seed for storage or shipping, and *held not infringed.*

John Dane, Jr., for complainant.

John W. Munday, for defendants.

COXE, J. The complainant, as assignee, seeks by bill in equity to restrain the infringement of reissued letters patent No. 8,615, dated March 11, 1879, and granted to William B. Fisher for an "Improvement in methods and apparatus for treating seeds." The application for the reissue was filed February 19, 1878. The original patent, No. 129,018, is dated July 16, 1872, and is for an "Improvement in seed-steaming apparatus." The defendants contend, among other defenses, that the reissue is void, its claims having been expanded after a delay of five years and seven months. The claims

are placed below side by side. The italics in each show the matter not found in the other.

Original.

1. The combination of the hopper, *H*, perforated conical steam-coil, *B*, jacket, *O*, shaft, *D*, and rotating arms, *C C*, carrying scrapers, *E E*, constituting an improved apparatus for treating oily seeds, as and for the purpose herein set forth.

2. The improved method of cleaning and drying oleaginous seed by feeding the same over the inclined surface of a perforated conical steam-coil, substantially in the manner described.

Reissue.

1. The herein described method of treating seed, consisting in allowing it to flow downward around a central perforated steam reservoir, and forcing jets of steam from said reservoir outward through the mass of seed, the flow of said seed being regulated by stirrers, substantially as set forth.

2. The combination, with a seed receptacle provided with a perforated steaming device, arranged within or below the material operated upon, of devices for stirring its contents at will, said devices operating upon a platform, substantially as and for the purposes set forth.

3. In combination with a seed receptacle for holding the seed while being steamed, means for directing the steam into said seed, and horizontally rotating stirrers adapted to regulate the flow of said seed, substantially as set forth.

4. An apparatus for treating oleaginous seed by steam, consisting of a receptacle adapted to receive and retain the seed at will, a steaming device adapted to be surrounded by said seed and eject steam in different directions outwardly from within the mass, and rotating stirrers, substantially as described, whereby said seed may be thoroughly permeated by said steam, substantially as and for the purposes set forth.

The first claim of the original, which is for the apparatus, contains the following elements: *First*, the "hopper;" *second*, the "perforated conical steam-coil;" *third*, the "jacket;" *fourth*, the "shaft;" *fifth*, the "rotating arms;" *sixth*, the "scrapers;" and, *seventh*, (construing the patent liberally,) the "bed," "base," or "table." For this claim the reissue substitutes three indefinite and nebulous claims,—the second, third, and fourth,—each enlarging and expanding the scope of the original. In the second claim the "hopper," "perforated conical steam-coil," "jacket," "rotating arms," "scrapers," and "table" are all discarded, and in their places appear "a perforated steaming device," "a seed receptacle," and "devices for stirring its contents at will, said devices operating upon a platform." It will be observed that as these devices stir the contents of the seed receptacle they must necessarily

be so located that they can perform this function. In the drawing they are placed outside of and below the hopper. In the original they are not described as doing the work of stirrers.

The third claim is even more sweeping in its terms. It deals with a combination having three elements: A "seed receptacle for holding the seed while being steamed," "means for directing the steam into said seed," and "horizontally rotating stirrers adapted to regulate the flow of said seed."

The fourth claim is hardly less ambiguous. It is for a "receptacle adapted to receive and retain the seed at will;" "a steaming device, adapted to be surrounded by said seed, and eject steam in different directions, outwardly, from within the mass;" and "rotating stirrers."

In the so-called "process claim" the method of "cleaning and drying oleaginous seed" becomes in the reissue a method of "treating seed." A manufacturer, therefore, who, like the defendants, is engaged in moistening linseed meal for the press is as much within this claim as one engaged in drying or cleaning.

The only attempt, either in the testimony or the brief, to defend the patent from the attack based upon the expansion of the claims, has reference to this first claim of the reissue. The attention of the complainant's expert witness was called to it, and he expressed the opinion that it is not broader, but narrower, than the original, for the reason that it is limited by the use of the words, "the flow of said seed being regulated by stirrers." His silence with reference to the other claims is suggestive. Even if this theory of the witness were correct, it would still be for a different invention. But is it correct? The patentee himself evidently understands that this claim is only for the process of treating seed by the apparatus, and the whole thereof, described in the patent. He says:

"I do not wish to be understood as claiming, broadly, the art of treating seed by steam; neither do I wish to be understood as claiming, broadly, all mechanism with which steam may be used for treating oleaginous seed, irrespective of the construction, arrangement, and operation of the same, as I am aware that steam has been employed heretofore for the purpose of treating seed."

In the original and in the reissue he seeks to secure the method of using the apparatus described in each respectively. The difficulty is that in the original the description is narrow and specific, in the reissue it is broad and general.

It is quite evident that no one would infringe the original who did not use a perforated conical steam-coil, or its equivalent, which, in the description, the drawing, and the claims, is made an element, and an essential element, of the invention. It is equally clear that when the inventor, in the reissue, speaks, for instance, of "means for directing steam into said seed," he uses language broader and more generic in its scope and meaning than is used in the original. A mechanism might infringe the claims of the reissue, and be entirely

outside of the claims of the original. For a "perforated steaming device," "a central perforated steam reservoir," etc., many equivalents suggest themselves, which would not occupy such a relation to a "steam-coil." In short, for the apt terms and perspicuous statement contained both in the description and the claims of the original patent, obscure and general language has been substituted. In no case has a word of a more limited meaning been employed, but in almost every instance the reverse is true. In studying the reissue the conviction is forced upon the mind that the inventor had before him his own and other machines, when drawing its specification, and that he endeavored to cover them all by an ingenious and clever use of words. Had the decision in *Miller v. Brass Co.* 104 U. S. 350, been announced at that time it is safe to assume that so venturesome an undertaking would not have been attempted. The language of *Coon v. Wilson*, 30 O. G. 889, S. C. 5 Sup. Ct. Rep. 537, is applicable. The court say:

"In the present case, there was no mistake in the wording of the claim of the original patent. The description warranted no other claim. It did not warrant any claim covering bands not short or sectional. The description had to be changed in the reissue, to warrant the new claims in the reissue. The description in the reissue is not a more clear and satisfactory statement of what is described in the original patent, but is a description of a different thing, so ingeniously worded as to cover collars with continuous long bands, and which have no short or sectional bands."

The conclusion is therefore reached that the reissue is void under the doctrine so often announced by the supreme court, and which has been reaffirmed as lately as May 4, 1885, in *Wollensak v. Reiher*, 5 Sup. Ct. Rep. 1132.

But irrespective of these considerations the inquiry is suggested, with reference to the first claim of the reissue, can there be in the same patent a claim for a machine and a claim for the process of using that machine? I have reached the conclusion that there cannot be, with some hesitation, for the reason that the question has not been argued by counsel, and yet I am unable to understand how the complainant can avoid the rule enunciated in the following cases: *MacKay v. Jackman*, 12 FED. REP. 615; *Brainard v. Cramme*, Id. 621; *Goss v. Cameron*, 14 FED. REP. 576; *Hatch v. Moffitt*, 15 FED. REP. 252; *New v. Warren*, 22 O. G. 587; *Corning v. Burden*, 15 How. 252.

But, in any view, the defendants do not infringe. Their machine is used to moisten meal, not to dry or clean the seed for storage or shipping. It is doubtful whether the apparatus described in the complainant's patent could be used at all with moistened linseed meal. The experiment has not been tried, as no machine precisely like the patented apparatus was ever built or operated, and the testimony seems, practically, to be unanimous that the meal would clog in the space between the jacket and the coil, and soon cease to flow. The defendants have no conical steam-coil or central reservoir. There is no flowing down of the seed around a perforated steam reservoir while being sub-

jected to the action of the steam. There are no adjustable stirrers, performing the functions of complainant's stirrers, and the flow is not regulated by their action. Nor can it be said, remembering that an equivalent must perform the same function in substantially the same manner, that for these elements mechanical equivalents are used.

Take, for illustration, the lower part of the seed receptacle. In the description the inventor states as follows:

"The lower part of the seed receptacle, (represented at O,) adapted for partially confining the seed and steam, when the softening and moistening process is required for pressing or other purposes, may be removed, and a perforated or screen-jacket substituted in lieu thereof. By the employment of the latter the steam may be forced directly through the moving seed and screen-jacket, in such a manner as to cleanse it, and remove and carry away all impurities and excess of moisture previously contained therein."

It is said that for this the steam-jacket of the defendants (the sides of their tub or kettle are made double and filled with steam) is an equivalent; but the defendants' jacket does not perform the same functions as the jacket O. Certainly it does not perform them in substantially the same way. If a curb were placed around complainant's table the defendants' jacket would, perhaps, be an equivalent for such curb.

For these reasons it follows that the bill must be dismissed.

TOMKINSON v. WILLETS MANUF'G Co.

(Circuit Court, S. D. New York. March 7, 1884.)

1. PATENTS FOR INVENTIONS—DECREE BY CONSENT—RES JUDICATA.

When a decree has been entered by consent in a prior suit declaring a patent valid, and that complainant is the sole owner thereof, such decree will be considered binding, as to all questions determined thereby, in a second suit between the same parties.

2. SAME—DESIGN PATENTS—INFRINGEMENT—RESEMBLANCE.

It is not necessary that a design patent should be copied in every particular to constitute an infringement. It is sufficient if the resemblance is such that an ordinary purchaser would be deceived, although the infringer has deviated slightly in details, or has omitted something which an expert could discover.

In Equity.

Frank v. Briesen, for complainant.

Philo Chase, for defendant.

COXE, J. This is an equity action for infringement founded upon design patent No. 13,295, granted to John Slater, assignor to Gildea & Walker, September 12, 1882, for a design for a vegetable dish. The patent is now owned by the complainant. The invention relates to a new shape or configuration for a vegetable dish or other similar household article of china. The claims are as follows:

(1) The design for a rectangular vegetable dish, having upper straight section, *c*, central curved section, *d*, and lower straight section, *e*, substantially as shown. (2) The design for a rectangular vegetable dish, having straight top and a section, *d*, curved first outward and then inward in such manner that the base of the dish is smaller than its top, substantially as shown. (3) The design for a vegetable dish, having parallel sides, *a*, *a'*, and parallel sides *b*, *b'*, and composed of the sections, *c*, *d*, *e*, substantially as shown.

It will be observed that as to the handles, ornamentation, size, and color of the dish, nothing is said in the claims. They are for the shape only.

In June, 1883, prior to this suit, the complainant commenced an action in the United States circuit court, district of New Jersey, against the defendant for an infringement of this patent. The complaint was in all respects similar to the one in the present suit. The defendant appeared by its president and consented to a decree and an injunction as prayed for. On or about the twenty-first of July, 1883, a final decree was entered, by which it was determined that the complainant is the sole owner of the letters patent in suit, and that they are good and valid in law. That decree was pleaded and proved in this action; it is valid and binding upon the rights of the parties, and, as to all the questions determined by it, is *res judicata*. Unfortunately, perhaps, for the defendant, the court is not now permitted to consider the defenses, which, by the defendant's own action, are thus eliminated from the case. The question of infringement is alone open to investigation.

In approaching this subject, the rule with reference to design patents should be kept steadily in view. It is by no means necessary that the patented thing should be copied in every particular. If the infringing design has the same general appearance, if the variations are slight, if to the eye of an ordinary person the two are substantially similar, it is enough. It is of no consequence that persons skilled in the art are able to detect differences. Those who have devoted time and study to the subject, who have spent their lives in dealing in articles similar to those in controversy, may see at a glance features which are wholly unimportant, and unobserved by those whose pursuits are in other directions, and who are attracted only by general appearances. If the resemblance is such that a purchaser would be deceived, it will not aid the infringer to show that he has deviated slightly from a straight line in one place and from a curved line in another, or that he has added or omitted something which an expert can discover. *Gorham Co. v. White*, 14 Wall. 511; *Lehnbeuter v. Holt-haus*, 105 U. S. 94; *Wood v. Dolby*, 19 Blatchf. 214; S. C. 7 Fed. Rep. 475; Sim. Pat. 218; Walk. Pat. § 375. Tested by this rule, I am constrained to say that the defendant infringes.

The principal difference pointed out between the two dishes in controversy is that in the upper vertical section of defendant's dish the sides are not exactly parallel, but bulge outwardly, departing from a straight line something less than half an inch. It is thought, how-

ever, that this divergence is not sufficiently marked to arrest the attention of the average observer. Bearing in mind that the patent deals with shape alone, the same conclusion must be reached with reference to the other differences suggested by the defendant's witnesses.

There should be a decree for the complainant.

RICHARDSON v. BRESNAHAN and others.

(Circuit Court, D. Massachusetts. May 15, 1885.)

PATENTS FOR INVENTIONS—INFRINGEMENT—FOURTH CLAIM OF PATENT No. 101,931.

The fourth claim of patent No. 101,931, dated April 12, 1870, granted to N. J. Simonds for a leather-cutting press for shoe stocks, construed, and held not infringed by defendants in the use of a revolving block and cutting-die, without the cutting-press described in the specifications and drawings of the Simonds patent.

In Equity.

W. A. Macleod, for complainant.

C. A. Taber, for defendants.

COLT, J. This suit is brought upon letters patent, No. 101,931, dated April 12, 1870, granted to N. J. Simonds, for a leather-cutting press. The complainant derives title to the patent by assignment. The invention relates to certain improvements in cutting-presses, used for cutting shoe stock, and consists, among other things, in so constructing the press that the cutting-block, as it recedes from the die, will vibrate or swing, and thus expose the cutting-die; also, in imparting to the cutting-block a rotary motion relative to the cutting-die, whereby, in cutting, a change of contact of the surface of the block is constantly produced, and a smoothness of face preserved under the continued cuts of the die. The defendants are charged with infringing the fourth claim of the patent, which is as follows: "The revolving cutting-block, P, in combination with the cutting-press, substantially as and for the purpose specified." The defendants use a revolving block and cutting-die, but they do not use the cutting-press described in the specification and drawings of the patent. At the outset, therefore, the question arises as to the proper construction of claim 4. Does it cover the combination of a revolving block and cutting-die, or is it limited to the combination of a revolving block and the cutting-press set out in the patent? The claim says a revolving block in combination with the cutting-press. The cutting-press refers to the mechanism set out and described in the patent. It not only includes the cutting-die, but the other mechanism involved in the machine, and elaborately set forth in the specification. There is nothing to be found in the patent which shows that the words cut-

v.23F,no.16—57

ting-press are synonymous with cutting-die; on the contrary, when the term is used elsewhere in the patent, it plainly refers to the entire mechanism of the machine. The natural meaning of the words, as well as the sense in which they are used in the patent, forbid the construction contended for by the complainant. It would be a forced and unwarranted construction to say that cutting-press means cutting-die, and by this means make the claim cover all leather-cutting machines in which we find a die and a revolving cutting-block. And, in view of the prior state of the art, we think the broad claim of a revolving cutting-block, in combination with a die, would be void for want of novelty. Simonds was not the first inventor of a revolving cutting-block; and we find a revolving cutting-block in combination with a die in the leather cutting-machine made by S. D. Tripp as early as 1868 and 1869, and a revolving cutting-block operated upon with knives in prior machines for cutting meat. It was necessary, therefore, for Simonds to limit his claim, in order that it might be valid, to the specific mechanism described in his patent. The defendants not using such mechanism, there can be no infringement, and the bill must be dismissed.

Bill dismissed.

JENKINS and others v. GURNEY.

(Circuit Court, D. Massachusetts. May 11, 1885.)

PATENTS FOR INVENTIONS—HYSLOP MACHINE FOR MAKING SHOE-SHANKS—INFRINGEMENT.

Patent No. 159,577, dated February 9, 1875, granted to John Hyslop, for an improvement in machines for making shoe-shanks, *held valid*, and infringed by defendant's machine, having a forming die, flanged table, and vibrating arms.

In Equity.

C. H. Drew and C. F. Perkins, for complainants.

P. E. Tucker and C. H. Swan, for defendant.

COLT, J. This suit is brought upon letters patent, numbered 159,577, dated February 9, 1875, granted to John Hyslop, Jr., assignor to the complainants, for an improvement in machines for making shoe-shanks. The invention relates to a device for packing shoe-shanks upon a table after leaving the cutting and forming dies, by which means the labor is saved of packing by hand. The same patentee is the inventor of a machine for cutting, punching, and bending metal shoe-shanks, for which a patent, No. 129,347, was issued July 16, 1872. The patent in suit was intended as an attachment to this machine. This appears from the drawings, specification, and evidence. The claim of the patent is as follows:

"As an improvement in machines for cutting and bending metallic shoe-shanks, the combination, with the forming die, E, of flanged table, F, and vibrating arms, H, fastened to a shaft, I, oscillated by mechanism, substantially as described, as and for the purposes set forth."

The objection is urged that the claim of the patent does not describe an operative device. The claim is for a packing device in combination with a forming die, in a machine for cutting and bending shoe-shanks, and taken in connection with the prior machine, it is plainly operative and useful. The description of the prior machine in the patent being sufficiently clear and specific, it became unnecessary to make the movable former, D, which comes forward and presses against the forming die, E, or the other elements of the prior machine, parts of the combination claimed in the patent. *Loom Co. v. Higgins*, 105 U. S. 580. But, in view of the prior state of the art, it is contended that the patent is void for want of novelty, and we are referred to several patents as anticipating the Hyslop invention.

The Kellogg patent, for printing-presses, dated January 6, 1863, shows a "fly" which receives the printed work as it passes from the press, and deposits the sheets, one by one, in a box. It can hardly be said, we think, that the "fly" of a printing-machine anticipates the Hyslop device. The mechanism may be somewhat similar, but the mode of operation is different. Nor does the Kellogg patent contain the same combination of elements as the patent in suit.

The Weymouth patent, dated September 25, 1866, for making envelopes, has a device for slightly compressing the envelopes as they fall from the machine. It is difficult to understand from the drawings precisely the operation performed by what is termed the "follower." It is evident the device would not work in a machine for making shoe-shanks. Certain parts of Weymouth pressing device are absent from Hyslop's machine. If we regard the claim of the patent as a combination of a forming die with a packing device, the Weymouth patent presents no such combination.

As for the Baird patent, granted June 8, 1869, for an improvement in receiving and conveying blanks from printing-presses, it is manifest that the mechanism is quite different from the Hyslop device. The Briner patent, No. 159,559, for forming spring shanks for shoes, is dated the same day as the patent in suit; but we think the evidence goes to establish the fact that the Hyslop invention was prior in point of time. It is therefore unnecessary to discuss the question of anticipation. So far as Briner undertakes to prove the use of a packing device similar to Hyslop's, for a period of six years prior to the date of his patent, we cannot but conclude from his whole testimony that he has failed to establish such use with anything like the clearness and certainty that is necessary.

Upon the question of infringement we entertain no doubt. The defendant's machine has a forming die, flanged table, and vibrating arms. The fact that the blanks are cut before use in defendant's

machine can make no difference. The patent in suit is not for any cutting mechanism. The invention is simply a forming die, which bends the shank so that it will stand on its edge in combination with the packing device. The end attained in both machines is the same, and the mechanism is substantially the same, or the equivalent. In the patent in suit the blank falls to the table by the action of gravity, after being operated upon by the forming dies. In the defendant's machine the working faces of the forming dies are horizontal, so that gravity cannot take the shank from the forming dies. Means are therefore provided to push the shank from the dies; and, as it is necessary for the shank to be on its edge, the forward end of the table is so shaped that in pushing the blank forward it will turn from a flat to an edgewise position. The devices are in substance the same, and the differences of construction are insufficient, in our opinion, to relieve the defendant from the charge of infringement. Though the invention of Hyslop is limited in its scope, we think it fairly patentable. He was the first to attach a packing device to a machine for making shoe-shanks.

Let a decree be entered for the complainants, for an injunction and account, as prayed for in their bill.

Decree for complainants.

THE E. B. WARD, Jr.¹

CARLSDOTTER and others v. THE E. B. WARD, Jr.¹

(Circuit Court, E. D. Louisiana. March 27, 1885.)

COLLISION—DAMAGES FOR DEATHS OF RELATIVES.

Relatives of persons whose lives have been lost by reason of a collision upon the high seas are entitled to recover, under the general admiralty law, from the offending vessel damages for the loss of the society and support of their deceased relatives, and for the value of their personal effects.

Admiralty Appeal. See 17 FED. REP. 456.

John D. Rouse and *Wm. Grant*, for libelants, appellants.

Wm. S. Benedict and *A. J. Murphy*, for claimants, appellees.

PARDEE, J. This cause came on to be heard at this time upon the pleadings and evidence, and was argued by counsel, whereupon, and in consideration thereof, the court doth find the following facts:

(1) The steam-ship *E. B. Ward, Jr.*, owned by Oteri & Bro., of New Orleans, and the Swedish bark *Henrik*, were, on the twentieth day of January, 1882, in the Gulf of Mexico, about 95 miles off Cape San Antonio, Island of Cuba; the steam-ship proceeding on her voyage, under steam, in a direction south-east by south, and the bark proceeding, under sail, north by west.

¹Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

Both vessels were fully equipped, and carried the usual lights. At 9 o'clock P. M. the vessels sighted each other. The bark first saw the Ward off her port bow, first her white light, then both lights, and the only evidence produced by claimants—that of the man at the wheel of the Ward—shows that the red or port light of the Henrik was the first and only light seen by the Ward. It follows, therefore, that the Ward was approaching the Henrik across her course, when the two vessels came in sight of each other, some time before the collision. In this situation, the wheel of the Ward was put to starboard, and afterwards hard a-port, the vessel changing her course about one and one-half points under each. While the wheel was hard a-port, the Ward struck the Henrik amid-ships, sinking her in a very few minutes. The sailors mentioned in the libel (part of the crew of the Henrik) went down with her, and were drowned.

(2) The bark Henrik kept her course after she sighted the Ward, being the same course she had been sailing since 5 o'clock P. M., until the collision was inevitable, when she luffed, but was struck before she had changed her course very materially. As the wind was blowing from the east, and the sails of the Henrik were close set, the luffing had a tendency to check her speed and to prevent a collision. The master of the Ward admits that the two vessels would have come together head on, if the Henrik had not luffed. This being the case, the action of the bark was not a fault, even if an error of judgment, since it was caused by the immediate presence of a peril caused by the Ward.

(3) The Ward was running at the rate of nine miles, an hour when she first saw the lights of the bark, but did not check her speed, when, according to the answer of the claimants and the conduct of her officers, there seems to have been doubt as to the true position of the bark. No attempt was made to stop, by the officers of the Ward, until after the collision actually occurred.

(4) The steam-ship E. B. Ward, Jr., was solely in fault for the collision with the Henrik,

(5) The libelants are the legal representatives of the three sailors named in the libel, who lost their lives in said collision, in manner and form as alleged in said libel.

(6) The said sailor, Carl Peterson, was born on the — day of —, 1837, and was 45 years old at the time of his death, and was earning £2 15s. per month. Gustof Leander Jonssen was born on the eighth day of April, 1860, and was 22 years old at death, and was earning £2 per month. Erick Anderson Holm was born the fifteenth day of January, 1844, and was 38 years old, and was earning £3 per month. Each of said sailors was of good moral character, industrious, and contributed to the support of libelants. Each of said sailors lost clothing and personal effects of the value of \$75, and the said Holm lost in addition his chest of tools, valued at \$480.

(7) That by the said wrongful and negligent acts of the said steamer E. B. Ward, Jr., her master and crew, the said libelant Christina Carlsdotter, widow and legal heir of Carl Peter Peterson, in the manner and means by which said Peterson came to his untimely death as heretofore found, has suffered damages for the loss of the services, society, comfort, and support of her said husband in the sum of \$2,000, and for personal effects in the sum of \$75.

(8) That by the said wrongful and negligent acts of said steamer, her master and crew, the said libelants John Gustaf Jonssen and his wife, Charlotta Jacksdotter Jonssen, surviving father and mother and sole heirs at law of said Gustaf Leander Jonssen, in the manner and means by which said Jonssen came to his untimely death as heretofore found, have suffered damages for the loss of services, society, comfort, and support of their said son in the sum of \$2,000, and for personal effects in the sum of \$75.

(9) That by the said wrongful and negligent acts of the said steam-ship, her master and crew, the said libelants Ulrika Beata Holm, mother, and Eva Maria Holm, sister, and both heirs of Erick Anderson Holm, in the manner

and means by which said Holm came to his untimely death as heretofore found, have suffered damages for the loss of services, society, comfort, and support of their said son and brother in the sum of \$2,000, and for personal effects in the sum of \$182.20.

1. I find that the steam-ship E. B. Ward, Jr., was in fault in not so changing her course, in presence of the approaching bark, as to avoid said bark, and in not reversing her engines and stopping when her officers were in doubt as to the position of the bark.

2. In my opinion the bark Henrik simply complied with the well-established rules of navigation in keeping her course until the collision became apparently inevitable; and that it was not a fault on her part to attempt to avoid the collision at the last moment, while in the presence of a danger brought about by the fault of the steam-ship.

3. Libelants, in my opinion, are entitled to recover under the general admiralty law for the loss of the society and support of their deceased relatives, and for the personal effects.

It is therefore ordered, adjudged, and decreed that the libelant Christina Carlsdotter, surviving widow of the said Carl Peter Peterson, deceased, do have and recover of the steam-ship E. B. Ward, Jr., the sum of \$2,075. That the libelants John Gustof Jonssen and his wife, Charlotta Jacksdotter Jonssen, parents of the said Gustof Leander Jonssen, deceased, do have and recover of the said steam-ship E. B. Ward, Jr., the sum of \$2,075; and that Ulrika Beata Holm, the mother, and Eva Maria Holm, the sister, of the deceased Erick Anderson Holm, do have and recover of the steam-ship E. B. Ward, Jr., the sum of \$2,182.20,—all with 5 per cent. interest on each sum from January 20, 1882, until paid, and all costs of suit. And whereas, the said steam-ship E. B. Ward, Jr., having been claimed by Salvator Oteri and Joseph Oteri, was released unto them on bond, with E. M. Stella as security: It is ordered, adjudged, and decreed that libelants respectively have judgment against the said Salvator Oteri, Joseph Oteri, and E. M. Stella, *in solido*, for the several amounts awarded as above against the said steam-ship E. B. Ward, Jr., with 5 per cent. interest per annum from January 20, 1882, until paid, and all costs of this suit. It is further ordered that execution issue in favor of each of said libelants for the amount due them respectively in due course.

KELLY and others v. OTIS.¹

(Circuit Court, E. D. Louisiana. January 30, 1885.)

SEAMEN'S WAGES—REV. ST. §§ 4577-4586.

The general maritime law, which, in a case of *seminaufragium*, or where the vessel was condemned and sold as too unseaworthy to be repaired, gave discharged seamen passage home and wages up to the time of reaching home, is modified by the statutes of the United States which provide for all cases of discharge of seamen in foreign ports, and, in case of destitute seamen, their return home, by the consular agents of the United States, at the expense of a fund derived from the one-third of the three months' extra wages collected by the consuls or agents from all American ships discharging seamen in foreign ports, except where ships are stranded or wrecked, or condemned as unfit for service. See sections 4577-4586, Rev. St.

Admiralty Appeal.

R. King Cutler and E. D. Craig, for libelants.

W. S. Benedict and Ambrose Smith, for defendant.

PARDEE, J. About December, 1882, the schooner John G. Whipple, of which the succession of Peter A. Fronty was the owner, and of which Henry Otis was the mortgagee in possession and control, sailed from this port for the port of Minatitlan, Mexico, with a cargo of lumber. With more or less trouble from leaking the voyage was made in safety, and the cargo delivered. A return cargo of mahogany timber was loaded, consigned to said Otis, and, on the 14th day of February, 1883, the said schooner sailed from said port of Minatitlan for the port of New Orleans. At the time of sailing, according to the sworn protest of the master, mate, and carpenter,—the two latter being libelants herein,—the said schooner was tight, staunch, and strong; had her cargo well and sufficiently stowed and secured; had her hatches well calked and covered; and was well and sufficiently manned, etc. On the sixteenth of February she encountered heavy head seas and storms, which so distressed her through laboring and leaking that the master, on consultation with his officers and crew, abandoned the voyage and turned back to the port of departure, which was safely reached on the seventeenth day of February. On the 17th the master appeared before the American consul and made protest, which on the 20th was extended, and was signed and sworn to by the master, mate, and carpenter. On the same day, on application of the master, the consul ordered a survey, which resulted in recommending the forthwith discharge of the cargo to ascertain the cause and extent of the leaks. After the discharge of cargo, on the first of March, the consul ordered another survey, which, on March 3d, resulted in finding as follows:

"We find five planks on each side started from her transom, main boom broken, her jib-stay parted, the after-port chain-plate broken, and the bolts loose; her seams from light-water mark to plankshire and wood ends open, causing great leaks; her water-way seams we find very much open, and there is no doubt that the seams sprung open in the sea-way, causing her to leak

¹ Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

badly; that the said vessel is badly strained and unfit for sea in her present condition, and in dilapidated condition, which would necessitate a repair, which in this port could not be had, but at an exorbitant expense which would far exceed her value when completed."

On this finding the schooner was advertised and sold, the sale taking place on March 7th, under the authority of the consul. March 8th the crew were paid off in full and discharged by the consul, but no future pay was given then, nor expense for sending them home was provided. The entire crew returned to this port at their own expense, and have brought their libel against Otis as owner, each for three months' advance pay, for \$25 expense of passage home, and for \$10 expense of board in foreign port while waiting to get passage home. In the district court their demand was rejected, because the evidence showed a condemnation and sale of the schooner within the provisions of section 4583 of the Revised Statutes of the United States, in which case no damage in the nature of extra wages or for expenses or passage money is recoverable under the law. In this court the right to recover is claimed, notwithstanding the sale and condemnation under article 4583, because the schooner was unseaworthy when she sailed from the port of New Orleans, within the knowledge of Otis, as owner, and unknown to libelants, from whom it was concealed.

The evidence in the record does not satisfactorily show that the schooner was unseaworthy when she sailed from the port of New Orleans on the voyage to Minatitlan; and such fact of unseaworthiness is entirely inconsistent with the fact that the voyage was made in safety, with the sworn protest of February 20th of two of the libelants, and with the additional fact that at Minatitlan no complaint was made by any of the crew, under section 4559 of the Revised Statutes, which provides for a survey in case of unseaworthiness in a foreign port. But, considering the fact that the schooner was old and decayed, and leaked a good deal on the voyage to Minatitlan, and was found to be dilapidated by the board of survey after her return from the attempted voyage from Minatitlan to New Orleans, I am disposed to think that she was unseaworthy when she left New Orleans. The evidence, however, entirely fails to show that Otis, the alleged owner, but really the mortgagee in possession, had any knowledge of her unseaworthiness or acted with bad faith in any respect. The libelants cannot, therefore, recover from him on any such ground. In fact, in no aspect of the case made by the evidence can I see that libelants can recover against the respondent.

Section 4583, to the effect that "no payment of extra wages shall be required upon the discharge of any seaman in cases where vessels are wrecked or stranded, or condemned as unfit for service," makes no exception in terms, and, unless we can have a case where a ship shall be condemned as unfit for service, and yet be seaworthy, it would seem to be difficult to imply or infer an exception. It would seem that no statutory right to three months' wages can exist in any

case of discharge of seamen in a foreign port, where the vessel is condemned as unfit for service. The three months' extra wages under the statute are clearly intended to be in lieu of expenses and passage money, to enable the discharged seamen to return home.

The general maritime law which, in a case of *seminaufragium*, or where the vessel was condemned and sold as too unseaworthy to be repaired, gave discharged seamen passage home, and wages up to the time of reaching home, is unquestionably affected and modified by the statutes of the United States, which provide for all cases of discharge of seamen in foreign ports, and, in case of destitute seamen, their return home by the consular agents of the United States at the expense of a fund derived from the one-third of the three months' extra wages, collected by the consul or agents from all American ships discharging seamen in foreign ports, except where ships are stranded or wrecked, or condemned as unfit for service. See sections 4577-4586, inclusive, of the Revised Statutes of the United States.

Before the statute of 1856, (11 St. at Large, 62,) where the provision, "that in cases of wrecked or stranded ships or vessels, or where vessels are condemned as unfit for service, no payment of extra wages shall be required," first appears in the laws of the United States, courts of admiralty usually followed the case of *The Dawn*, where Judge WARE, in a case like the present, denied the three months' extra wages, but allowed a sum in addition to wages sufficient to defray expenses of returning home, to be paid out of the proceeds of the sale of the vessel, (see Davies, 121, and Fland. Mar. Law, § 473;) but since the act of 1856 the cases generally deny, when the ship was condemned and unfit, both extra wages and expenses home. See *Hoffman v. Yarrington*, 1 Low. 168; *Drew v. Pope*, 2 Sawy. 72; *Galagher v. Murray*, 10 Ben. 290.

In *Henop v. Tucker*, 2 Paine, 151, and perhaps other cases decided before the act of 1856, it is intimated that the extra wages stand upon a different footing if the ship were started on her voyage in an unseaworthy condition, and that in such case they might be recovered. While I am not disposed to concede that in any case where the ship is condemned in a foreign port as unfit for sea service, that the extra three months' wages can be recovered, I am of the opinion that, in case of fraud or bad faith on the part of the owner, a seaman discharged improperly or prematurely may recover all the damages suffered by reason of such discharge.

Entertaining these views of this case, it follows that the extra wages demanded must be refused, because the schooner was condemned in a foreign port as unfit for sea service, and the demand for expenses in returning home incurred by libelants must be rejected because no fraud nor bad faith existed on the part of Otis, considering him as the responsible owner.

Let a decree be entered affirming the decree rendered in the district court in this case, with costs against libelants.

THE PRINZ GEORG.¹BELLIOI and others v. THE PRINZ GEORG.¹

(Circuit Court, E. D. Louisiana. December 25, 1884.)

1. ADMIRALTY—JOINDER OF PARTIES.

Where a thing is defendant, and several persons are asserting rights in it, distinct but before the same tribunal, the proceedings are, for certain purposes, necessarily to be considered together, *i. e.*, to rank the claims or to proportion the proceeds. S. C. 19 FED. REP. 653, affirmed.

2. THE PASSENGER ACT, 22 ST. AT LARGE, 186.

The responsibilities and duties devolving upon vessels and their masters under the passenger act of 1882 (22 St. at Large, 186) cannot be evaded by a contract of charter.

3. SAME—SECTION 4.

The penalty of three dollars *per diem* for each passenger put upon short allowance for food and water, given by the fourth section of said passenger act, constitutes a claim against the vessel, and may be enforced by proceedings *in rem*.

Admiralty Appeal.

R. King Cutler and Richard De Gray, for libelants.

E. W. Huntington, Horace L. Dufour, George H. Braughn, and Emmet D. Craig, for claimants.

PARDEE, J. The district judge decided (1) that the libelants might join their actions in one common libel; (2) that the responsibilities and duties devolving upon vessels and their masters under the passenger act of 1882 (22 St. at Large, 186) could not be evaded by a contract of charter; (3) and that the penalty of three dollars *per diem* for each passenger put on short allowance for food and water, given by the fourth section of said act, constituted a claim against the vessel, and might be enforced by proceedings *in rem*. The reasons given for thus deciding seem to be full and conclusive, and I deem it unnecessary to amplify or add to them.

The next point in this case to be determined is what said section 4 of said passenger act requires to be furnished to each passenger in the way of food, under the penalty of three dollars per day. The language of the act is:

"An allowance of good, wholesome, and proper food, with a reasonable quantity of fresh provisions, which food shall be equal in value to one and a half navy rations of the United States, and of fresh water not less than four quarts per day, shall be furnished each of such passengers. * * * If any such passengers shall at any time during the voyage be put on short allowance for food and water, the master of the vessel shall pay to each passenger three dollars for each and every day the passenger may have been put on short allowance, except in case of accidents where the captain is obliged to put the passengers on short allowance."

It has been assumed in argument that one and a half navy rations in kind are required for each passenger under this law, but I cannot assent to this view, not only because of the exact language in ques-

¹ Reported by Joseph P. Horner, Esq., of the New Orleans bar.

tion, i. e., "which food shall be equal in value to one and a half navy rations," but because, considering the matter of climate and the diversity of country and habit among the many emigrant passengers coming to this country, such construction is not reasonable, and is against the interest of both emigrants and vessels. If any nice point could be raised as to the proper construction of the language quoted, it would be whether the food to be furnished was to be equal in money value or in nutritive value to one and a half navy rations, but this case hardly requires a discussion of so nice a point.

It has been further argued in this case that the failure of the master or the vessel to comply with other requirements of said section 4, "such as failing to serve three meals daily at stated hours, to furnish mothers with infants' wholesome milk, or to furnish tables and seats for passengers at regular meals, would entitle the passengers to recover the three dollars per day penalty; but, again, I think that the language of the act settles the matter, and renders it clear that such a penalty is only allowed for putting passengers on short allowance of food and water."

On the facts of the case I arrive at practically the same conclusions as the district judge. The case shows that the voyage contemplated was one of about 30 days, from Palermo to New Orleans; that the food to be furnished passengers was scheduled on the back of each ticket furnished to passengers; that of such food a supply for the voyage was taken aboard before sailing; that such supply was set apart under the charge of a *gratis* passenger cook, and, together with more or less supplies of the ship, was served with more or less regularity up to the stormy weather occurring between Gibraltar and the Bermudas; that during such stormy weather the unexhausted passengers' supplies were badly damaged; and that, from the time of the stormy weather on to this port of New Orleans, except while lying in port at Bermudas and Philadelphia, the passengers were on short allowance of provisions, as required to be furnished by the passenger act of 1882. Whether the passengers were on short allowance under the law prior to the stormy weather referred to depends upon whether the provisions scheduled on the tickets for each passenger, and supplied on the vessel was or not *equal in value* to one and a half navy rations of the United States, and of this nothing can be said positively from the evidence in the case.

It is true that the passengers grumbled and protested from the time their first sea-sickness was overcome, and that the master procured a small supply at both Escombrero and Gibraltar, and added some from the ship's stores; but I think the main and controlling facts as proved are that the quantity and quality as specified on the tickets were approved by the passengers and port authorities at Palermo before sailing, and that, in kind, they were better suited to emigrant passengers from Italy than the United States navy rations, in kind, would have been.

These facts, taken with the presumption that the master knew our law on the subject and complied with it, and the total absence of evidence of value, warrant the court in finding that the libelants' case fails on this point. While the passengers were in port at Bermudas and at Philadelphia fresh provisions were furnished, and, while they may have had other grounds of complaint, it does not seem that they can, under the evidence, complain of a short allowance of food.

The next question is how far accident obliged the captain to put the passengers on short allowance, as we have seen was the case for the latter part of the voyage. After the provisions were damaged and destroyed the ship neared the Bermudas, where the master in his protest says he was compelled to put in for repairs and to renew provisions. Up to the arrival in Bermudas, then, it is easy to point out the accidents which obliged short allowances to the passengers, but from there on no accident is alleged or proved. At the Bermudas the master knew that the 30 days originally contemplated for the voyage, and for which time the passengers had been provisioned, had expired, and he knew that the supplies originally put aboard for them had been exhausted or destroyed. It was his plain duty, therefore, to have provided at Bermudas sufficient to furnish each passenger "an allowance of good, wholesome, and proper food, with a reasonable quantity of fresh provisions, equal in value to one and a half navy rations of the United States," until his ship could reach Philadelphia; and, again, it was his duty at Philadelphia to have made like provision for the voyage from Philadelphia to this port, all of which he failed to do.

It was not accident, but neglect, of the master that put the passengers on short allowance from Bermudas to Philadelphia, and from Philadelphia to this port, and the time of such short allowance was from December 9th to December 15th, six days; and from December 26th to January 9th, 14 days,—in all making 20 days of unjustifiable short allowance, for which the three dollars per day penalty for each passenger may be allowed. All the adult passengers who have joined in this libel are clearly entitled to recover, each for him or herself, this penalty amounting to \$60 each. It seems, from the evidence, that, in contracting for passage, those over 12 years were classified as adults, and those under 12 as half, quarter, and *gratis* passengers, and fare was charged accordingly. The demands of the libel are for the penalty for all, whether adult, half, or quarter passengers. The law provides for each passenger, but cannot contemplate that infant passengers shall be furnished provisions equal in value to one and a half full navy rations. It does not provide for any half or quarter penalties, and the court would have no discretion to impose less than the full sum of three dollars per day for each infant passenger, if it should be held that the law provided a penalty for short allowance of food for such passengers.

The case is one of difficulty, and it is, perhaps, fortunate that in

this case this demand of libelants can be rejected on the evidence without committing the court to a construction of the law, further than to hold that under the law a half or quarter passenger is not entitled to have an allowance of food equal in value to one and a half navy rations, for the evidence does not show what such passengers were allowed, and the presumption in the absence of evidence is that they received all that the law required. The demands of the libel for \$100 general damages for each passenger for breach of contract of passage is not sustained by the evidence sufficiently to warrant the court in further mulcting the owners of the vessel. The six passengers who purchased tickets to San Francisco, and who were landed in this port without further transportation being furnished, have a case that the court would relieve if their demand had been put in the libel as well as in the brief of proctors, and sufficient evidence had been offered to enable the court to assess the actual damage; but the fact is that no such demand is contained in the libel.

A decree will be entered to the same effect as that of the district court: the costs of the district court and of this court on claimants' appeal to be paid by the claimants, and the costs of libelants' appeal to be paid by libelants.

THE NEW ORLEANS.¹

OTERI v. THE NEW ORLEANS.¹

(Circuit Court, E. D. Louisiana. February 25, 1885.)

1. SALVAGE SERVICE.

When a vessel at sea answers signals of distress from a steam-ship whose machinery has been disabled, and goes to her assistance, and supplies provisions, and takes an officer of the steam-ship, by request, to a place where he can summon assistance for the steam-ship, such services are salvage services.

2. SAME—DISTRIBUTION OF AWARD.

Where valuable services were rendered by the ship and her machinery, the master and crew doing only their ordinary duty, for which they were paid by the owners, on principles of salvage the men must receive a share of the reward. No amount of reward to owners and machinery will so stimulate and encourage efforts to save life and property in peril on the high seas, as will moderate rewards to masters and crews who are on hand to control the ship and machinery, and are the effective agents to set the machinery in motion.

3. SAME—SALVING SHIP UNDER CHARTER.

In this case, where a salvage award has been made to the owners of a ship and her crew, and where it was shown that at the time the salvage services were rendered the salvaging ship was under charter and in possession of the charterer, the court first allowed to the charterers, out of the salvage award, their actual outlay in rendering the services,—that is, for the hire of the ship, and for the pay-roll, and fuel consumed during the delay,—and divided the balance of the award equally between the charterer, the owner of the ship, and the crew. *The Alfen*, Swab. 189, and *The Waterloo*, 2 Dod. 433, distinguished.

¹Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

4. Costs.

Where claimants have made no tender, paid no money into court, brought in no parties, and have done nothing to facilitate the cause save to admit a contract made with a salving vessel, the costs should be borne by them.

Admiralty Appeal.

W. S. Benedict, for libelants, appellants.

E. W. Huntington and *Horace L. Dufour*, for claimants, appellees.

Richard De Gray, for owners of the *Raleigh*.

PARDEE, J. The facts appear to be substantially as follows:

On the ninth of May, 1884, while the steam-ship *New Orleans* was in the Gulf of Mexico, on a voyage from New York to New Orleans, at a point about 125 miles south-east from the South Pass of the Mississippi river, her cylinder exploded, killing one of her engineers, injuring others of her crew, and rendering her motive power useless. Thereupon signals of distress for assistance were given from the *New Orleans*, which were first discovered from the bark *Ophir*, then on a voyage from Aspinwall to Pascagoula, about 12 o'clock on the night of May 9th, and in obedience thereto said bark tacked and beat towards said signal,—which was a flash-light,—and at daybreak the *New Orleans* was discovered with her signal of distress flying. As the *Ophir* approached, the master of the *New Orleans* put off from her in a ship's boat, in company with his first officer and a boat's crew, and came on board of the *Ophir*, reported the above accident to the *New Orleans*, asked for provisions, and that the *Ophir* would convey his first officer to the mouth of the Mississippi river, or to some steam-vessel going to the mouth of the Mississippi river, to summon assistance to the *New Orleans*.

Provisions were furnished by the master of the *Ophir* to the *New Orleans* to the value of \$60, and the *Ophir* cleared away for the mouth of the Mississippi in the forenoon of that day, with the first officer of the *New Orleans* on board. The wind at the time was light, and while thus proceeding, on the following morning, a steam-ship hove in sight, and then signals of distress were made on the *Ophir* to attract the steamer's attention, in obedience to which the steamer, which proved to be the *Raleigh*, bound to Honduras, came under the bark's stern and was informed of the condition of the *New Orleans*, and her latitude and longitude, and was requested to go to her assistance, which she did, while the bark continued her course to the South Pass until the night of the twelfth of May, when the first officer of the *New Orleans* was transferred to the steam pilot-boat *Underwriter*, bound to South Pass, and the *Ophir* proceeded on her way to Pascagoula.

In obedience to the above information and request, the *Raleigh* changed her course and ran to the point indicated, where she arrived in the course of four hours, and was boarded by the master from the *New Orleans*, who requested the master of the *Raleigh* to tow him to South Pass, but as they could not agree on terms, the *Raleigh*, after supplying the *New Orleans* with more provisions, proceeded on her voyage. When the *Raleigh* had arrived at a point about 10 miles distant from the *New Orleans*, she was again signaled from the *New Orleans* to go back to her, which she did. Then a contract was signed by the master of the *Raleigh*, on behalf of *her owners* and the master of the *New Orleans*, for the towing of the latter by the former, using the latter's hawser, to safe anchorage at South Pass bar, for the sum of \$5,000, which was safely done; and the *Raleigh*, after coming inside the Pass and receiving coal, again went to sea and proceeded on her voyage to Belize, Honduras.

The services so rendered by the *Ophir* and the *Raleigh* to the *New Orleans* were salvage services. See *The Hædwig*, 24 Eng. Law & Eq. 582; *The Susan*, 1 Spr. 499; *The James T. Abbott*, 2 Spr. 101; *The*

Williams, Brown, Adm. 208; *The Bolivar*, 1 Woods, 397; *The Sarah*, 3 Prob. Div. 39; *The Saragossa*, 1 Ben. 553; *The Charles Adolphe* Swab. 158; *The Reward*, 1 W. Rob. 174.

The amount to be allowed for these salvage services, if presented as a new question to the court, might require an examination into the value of the property saved, and a consideration of the circumstances under which the services were rendered; but the parties have practically settled the matter themselves. The main service was that of the *Raleigh*, and as to that the respective masters agreed and contracted before the services were rendered, and the amount of \$5,000, so fixed, is not attacked by either party as too much or too little, or as oppressive or inequitable.

The master of the *Ophir*, before suit, offered to settle for \$250. The service of the *Ophir* was incidental, and should be fixed with reference to the main amount allowed. In view of the litigation and the intervention of the crew, \$500 seems the proper compensation.

Having determined that the services were salvage services, and the amount to be awarded therefor, the next question is one of distribution. As to the sum awarded the *Ophir* there is no trouble,—one-half should go to the owners, and the other half to the master and crew, according to the pay-roll. The distribution of the sum awarded the *Raleigh* presents more difficulty. The valuable services were rendered by the ship and her machinery, the master and crew doing only their ordinary duty, for which they were paid by the owners, and yet on principles of salvage the men must receive a share of the reward. No amount of reward to owners and machinery will so stimulate and encourage efforts to save life and property in peril on the high seas as will moderate rewards to masters and crews who are on hand to control the ship and machinery, and are the effective agents to set the machinery in motion.

The next question is, who is entitled to the owner's share of the *Raleigh's* salvage? or, in other words, who were the owners of the *Raleigh* at the time the services were rendered? The libellant *Oteri* was the charterer of the bare ship and machinery, etc., by the day, manning, equipping, and navigating her at his own expense, carrying his own cargoes,—the owner *pro hac vice*. At the same time, the owners' property was used to some extent and was risked in the rendition of services to the New Orleans. If it were a mere question of compensation for work and labor, the owners would be entitled to nothing; but I think the case is very different, so far as it is a question of reward for the use and risk of property, and encouragement for the rendition of salvage services. Why reward a temporary owner and leave out the real owner? Neither one had really anything to say as to whether the services should or not be rendered. The case is one to be settled on principle, for we have no authorities at hand, if such cases have been adjudged in the admiralty courts.

The Alfen, Swab. 189, and *The Waterloo*, 2 Dod. 433, are not in

point; for, while they hold in terms that charterers are not entitled to salvage earned, they refer to charterers who are not in possession of and navigating the ship,—were freighters under charter-party. See Cohen, Adm. 60-63. In this case I do not understand that the contract of charter provides, either by inclusive terms or exclusive terms, as to which party to it shall be entitled to salvage money earned by the ship during the running of the charter. It seem to me that the proper rule in a case like the present is to first allow to the charterers out of the salvage award their actual outlay in rendering the services,—that is, for the hire of the ship, and for the pay-roll, and fuel consumed during the delay,—and then to divide the balance as a reward; and such rule will be followed in this case, so that from the \$5,000 awarded the Raleigh the libellant Oteri shall first be paid his actual expense in rendering the services, and the balance will be equally divided,—one-third to the charterer, one-third to the owner, and one-third to the master and crew; the last according to the pay-roll. For the purpose of distribution a reference will be ordered.

As to the costs of the case I think it clear that they should be borne by the claimants. They made no tender; they paid no money into court; they brought in no parties; they have done nothing to facilitate the cause, save to admit the contract with the Raleigh, which the court has found did not cover all the salvage service rendered; in short, they have not brought themselves within the rules applied in salvage cases in order to save themselves from costs. See Cohen, 260, 261, 288, 289; Jones, Salv. 204.

The costs of the reference in this court for apportionment among the libellants will be taxed to the owners and charterers of the Raleigh.

THE THOMAS CARROLL.

(District Court, N. D. New York. June 5, 1885.)

1. COLLISION—ERIE CANAL—INEVITABLE ACCIDENT—FAULT.

Where a collision occurs, on a bright starlight night, between two boats going in opposite directions at a speed of less than three miles an hour, upon the sluggish waters of a canal, it cannot be attributed to inevitable accident, and especially so, when they see each other in ample time to execute all necessary maneuvers.

2. SAME—DUTY OF BOAT IN UNUSUAL POSITION.

Where a boat is in an unusual position, where she has no right to be, she must take adequate and necessary means to inform others of the fact.

3. SAME—NEGLIGENCE.

In order to hold the injured vessel responsible, she must not only be at fault, but the fault must in some way contribute to produce the accident.

Benjamin H. Williams, for libellant.
George Clinton, for respondents.

COXE, J. On the fifth of August, 1883, the steam canal-boat Venus, with her consort Leto, was proceeding westwardly along the Erie canal. Both boats were loaded with cement. The Leto was pushed ahead of the Venus, being fastened to her by stiff iron couplings. At midnight, and when about a half of a mile west of May's point, in the county of Seneca, a collision occurred between the Leto and the steam canal-boat Thomas Carroll. It is to recover for the injuries thus sustained by the Venus and Leto that this action is brought. The Carroll was loaded with grain, and was destined for New York. She was without a consort. At the point in question the canal is about 68 feet wide, the navigable channel being about 38 feet wide. The berme bank is on the north, or right-hand side, the tow path on the south, or left-hand side, going east. The three boats were of about equal dimensions, being 96 feet in length and 17½ feet beam.

Where a collision occurs, on a bright starlight night, between two boats, going in opposite directions, at a speed of less than three miles an hour, upon the sluggish waters of the canal, it cannot be attributed to inevitable accident, and especially so, when they see each other in ample time to execute all necessary maneuvers. Merely to state the facts is to answer the proposition in the negative. As there was no *vis major*, it necessarily follows that either the Venus and her consort, or the Carroll, or both, were at fault.

A careful examination of the evidence has failed to disclose any dereliction of duty on the part of the Venus and Leto which can fairly be said to have contributed, in any appreciable degree, to the accident. For it is quite evident that the injured vessels would not be inculpated, even though it were determined that all the accusations now brought against them, both in equipment and management, were fully supported by the proofs. It is not easy to trace any connection between the collision and the absence of inboard screens for the lights, the use of the stiff coupling, or the failure to have a lookout on the bow of the Leto. Had the screens been present and the coupling absent, had the captain stood at the exact point where, it is now asserted, he should have been, the consequences would have been the same. Nothing that the Venus and Leto reasonably could be expected to do to avert the injury was omitted. The crew exhibited as much skill and prudence as could be expected in the circumstances. Had they executed some of the maneuvers and followed some of the theories advanced upon the trial, not only would the disaster, in all probability, have been more severe, but the libellant would, in part at least, have been held responsible for it. The Venus and Leto were where they had a right to be, and where it was their duty to be. Immediately upon discovering the proximity of the Carroll, and informing her of their presence, they followed the ancient law of the sea, and put their helm a-port. They kept as close to the berme bank as possible, and were there when the blow was given.

Their engine was reversed, and speed slackened as soon as danger was apparent. They were hardly moving at the time of the collision. Every means of safety had been exhausted, and they were practically helpless. The situation in this respect was not unlike that of the injured steamer in *The Pennsylvania*, 24 How. 307, 312. Could their master have foreseen the erratic and unexpected course of the Carroll, he might have taken many additional precautions, but this he could not know. It was to him an ordinary case of two steam-boats meeting on a clear night. He assumed, and he had a right to assume, that if he kept his own side all would be well. He was not called upon to predict that the coming boat would take his water and attempt to pass him on the starboard side. From what has been said already, it follows, as an almost inevitable presumption, that the Carroll was at fault. Her negligence is, however, not left to presumption; it is clearly proved. Even upon her own theory she cannot escape. The evidence, viewing it in the best possible light for the respondents, is that the Carroll saw the Venus and Leto far enough ahead to do all that was necessary to prevent accident. She was then 19½ feet from the berme bank and 300 or 400 feet from the Leto. If, in traversing this space, she had swung 18 feet to the right, she would have passed in safety. She gave one whistle,—“Go to the right,”—which was answered by the same signal from the Venus. The libellant's evidence regarding the signals is stoutly disputed, but it is thought that the preponderance of proof is against the respondents on this point. Moreover, the direct testimony is supported by strong presumptions. It is hardly within the realm of probability that two boats, meeting at night upon a narrow water-way, would give contrary signals, one saying, “Go to the right;” the other replying, “We cannot; we are going to the left, and you must go to the left also;” and that there the interchange of signals should cease. All agree that but one signal was given from each boat; the respondents, however, contend that the Carroll answered the one blast of the Venus by giving two. If this were true, would not so experienced a navigator of the canals as the master of the Venus have taken some notice of it, and if he failed to do so, would not common prudence have dictated to the Carroll the necessity of repeating her own signal in order that the Venus might surely understand it? Is it likely that both boats would run into inevitable danger, each knowing that the other was turning toward the berme bank, and make no further attempt to extricate themselves?

If the Carroll, as her master says, was aground, or dragging on the bottom of the canal, 19 or 20 feet from the berme bank, unable to get off, she should not have contented herself with one signal or two signals. She should have informed the Venus and Leto beyond the reach of doubt that she lay directly in their path; the path, which, in ordinary circumstances, it was their duty to take. But she did nothing of the kind. The libellant insists that the Carroll at first

turned to the right and kept upon the tow-path side until so near the Venus and Leto, that any change of the latter's course was impossible, when she suddenly took a sheer and struck the Leto, lying helpless on the berme bank. If this be the correct version she was guilty of a grave fault. If, on the contrary, as the respondents assert, she was aground on the berme bank, directly in the path of the Venus and Leto, and took no measures, except the one signal, to inform them of her extraordinary situation, she was equally culpable.

Where a boat is in an unusual position, where she ought not to be, where she has no right to be, she must take adequate and necessary means to inform others of the fact. Upon either theory, then, the Carroll was negligent, and the agreement of her master, immediately after the accident, when it was thought the injury was slight, to pay the damages incurred, is very suggestive as to what his opinion, at that time, was.

It follows that there must be a decree for the libellant, with costs, and a reference to compute the damages.

MINA v. I. & V. FLORIO S. S. Co.

(District Court, D. New Jersey. May 25, 1885.)

1. ADMIRALTY PRACTICE—MISNOMER—WAIVER—APPEARANCE AND ANSWER.

After a respondent has appeared generally, and answered upon the merits, it is too late to move for a dismissal because of a misnomer in the libel and motion.

2. CARRIERS OF GOODS BY VESSEL—BILL OF LADING—TRANSHIPMENT—DELAY—DAMAGE TO CARGO OF PRUNES.

On the twenty-third, thirtieth, and thirty-first of March, 1881, L. shipped on board respondent's three steamers 600 casks of prunes at Trieste, to be delivered in New York, unto order, and took therefor bills of lading, in which respondent stipulated that said steamers were bound for New York, and reserved the right to tranship any part of said cargo to another steamer. Two of the steamers proceeded to Palermo, Sicily, and discharged the prunes, where they remained for 55 days, when they were shipped on another of respondent's steamers, brought to New York, and delivered in a damaged condition, owing to the delay that ensued in their transhipment, and the want of proper care in their handling and storage at Palermo. *Held*, that respondent was not bound to tranship in other vessels than his own, under the bill of lading, but that he was obliged to use diligence and care that adequate facilities were furnished to comply with its agreement to tranship without unreasonable delay, and that he was liable for the damage caused by his neglect to provide for the more direct transportation of the prunes to New York after their arrival at Palermo.

Libel in rem.

Jas. K. Hill, Wing & Shoudy, for libelants.

Lorenzo Ullio, for respondents.

NIXON, J. The libel in this case is filed against a foreign company, claiming damages for negligence and want of care in the tranship-

ment of 600 casks of prunes from Trieste to New York, and praying for process against the goods and chattels of the company within this district, if the respondent could not be found. The return of the marshal on the monition shows that not finding the respondents, he attached certain property, belonging to them; to-wit: the steamship *Vicenzo Florio*, her tackle, etc., in obedience to the clause of foreign attachment contained in the process. A general appearance was entered for the respondents by Lorenzo Ullo, Esq., a claim for the property seized put in by the I. & V. Florio Steam-ship Company of Palermo, satisfactory security given, and an answer filed to the merits of the libel, acknowledging the reception and transshipment of the prunes in the attached steamer, but denying the negligence and want of care complained of. A reference was made to a commissioner to take testimony. Commissions issued to the respondents for the examination of witnesses in foreign countries, and very voluminous evidence, has been returned and filed. When the case came up for final hearing, the proctor for respondents, before the argument, moved the court to vacate the attachment and dismiss the suit, as to the respondents, on the ground of a misnomer in the libel and monition. The motion comes too late; the general appearance to the suit by the respondents and an answer upon the merits, without objection, are always regarded as a waiver of such irregularities.

Expressing no opinion respecting the action of the court, if the respondents had put in a special appearance for the purpose of entering a motion to vacate, or had filed answer, which raised the question now suggested, I have no hesitation in holding that the respondents cannot be permitted to waive such defects at the beginning of the proceedings, and afterwards urge them at the conclusion of the case.

The libel alleges that on March 23, 1881, at Trieste, one Liedmann shipped on board the steamer *Cariddi*, owned by respondents, 200 casks of prunes, to be carried from that port to the port in New York; that on the thirtieth of the same month, he shipped on the *Taormina*, another steamer of the respondents, 200 other casks of prunes, to be delivered to the port in New York; that on the thirty-first of the same month he shipped 200 other casks, on board the last-named steamer, for the same destination; that said casks were to be delivered in New York, unto order, and that the agents of the respondents at Trieste signed bills of lading therefor, in which they stipulated that the said steamers were bound to New York, and reserved the right to tranship any part of said cargo to another steamer; that the said steamers *Cariddi* and *Taormina* proceeded from Trieste to the port of Palermo, Sicily, where they discharged said prunes, and the same remained at Palermo an unreasonable length of time, to-wit, for a period of 55 days; that they were afterwards shipped upon the steamer *Vicenzo Florio*, another vessel of respondents, and brought by her to New York, and delivered to the libellant in a dam-

aged and deteriorated condition, owing to the delay which ensued in their transportation, and the want of proper care in their handling and stowage at Palermo; that the respondents neglected to transfer said prunes from Palermo for the long period above stated, although they had a number of opportunities so to do; that after their shipment Leidmann indorsed the bills of lading in blank, and forwarded them to libelant for value; that libelant is the true and lawful owner of the merchandise therein described, and by reason of the negligence and want of care and diligence of respondents in the transportation and custody of said merchandise he has sustained damages to the amount of \$6,000, which has been duly demanded, and not paid.

The I. & V. Florio Steam-ship Company of Palermo, Sicily, alleging itself to be a corporation duly organized under the laws of Italy, files its answer admitting the shipment of the prunes by Leidmann on the said steamer at Trieste, but denying that the steamers were bound for New York. The answer avers that the respondent corporation owns and manages two certain lines of steam-ships, of a different class and capacity; one of which carries merchandise along the east coast of Italy from Trieste to ports in Sicily, and back again to Trieste; and the other plies along the west coast of Italy to Palermo, in Sicily, and thence to the port of New York, and back again; and that, in the regular course of management of said two lines, all merchandise shipped on the east coast of Italy, intended to be delivered in New York, is transhipped at the port of Palermo on one of respondent's steamers bound to New York, and that such course of management is a matter of general notoriety among merchants in the ports where the steamers pass, and was also known to Leidmann, the shipper of the prunes; that when the prunes were put on respondent's steamers at Trieste, as alleged in the libel, the said Leidmann, with full knowledge of the usual mode of transportation, accepted bills of lading containing a stipulation that the respondents should have the liberty of transshipping the same upon any other of their steamers leaving the ports of Sicily for the port of New York; that the steam-ships Cariddi and Taormina proceeded, with the prunes on board, from Trieste to Palermo, where they were discharged, and remained for a certain time, awaiting an opportunity to tranship on one of the steam-ships of respondent leaving that port for New York; that they were, in fact, transhipped on the steam-ship Vincenzo Florio, one of the steamers of the respondent on the line between the ports of Italy and New York, with due dispatch, and in the proper and customary manner, and were carried to New York and duly delivered to the libelant; and that said transshipment was made without unreasonable delay and in the regular course of their business, and at the first opportunity which respondent had to forward the merchandise to the port of New York.

The bills of lading, which are made exhibits in the case, reveal the contract between the parties at the time of the shipment. From them

I learn that 600 casks were shipped at Trieste for New York on the steamers of respondent, as follows: On March 23, 1881, 200 casks on the Cariddi; on March 30th, 200 casks on the Taormina; and on March 31st, 200 other casks on the last-named steamer. That they were all shipped in good order and condition, to be delivered in the port of New York; "the liberty to tranship any part of said cargo by steamer" being reserved in the said bills of lading. The undertaking of the respondent was that the merchandise thus committed to its charge for delivery in New York would be transported there with reasonable care and dispatch,—not necessarily in the steamer selected for the voyage at Trieste, but in some steamer belonging to and under the control of the company with which the contract was made. I agree with the learned advocate for the respondent that a transshipment into steamers other than the respondent's was not in contemplation, or obligatory, under the above clause, in the bills of lading. But, nevertheless, they were obliged to use diligence and care that adequate facilities were furnished to comply with their agreement to transport without unreasonable delay.

Do the facts of the case show that the respondent performed its duty in this respect? One-third of the cargo was received by the Cariddi, at Trieste, on March 23d, and they reached Palermo on April 3d, following. The other two-thirds were shipped at Trieste, on the Taormina, on March 30th and 31st. It does not clearly appear when they arrived at Palermo, but the weight of the evidence is that it was about nine days afterwards. The only steamer of the respondent that sailed from Palermo to New York during the month of April was the Washington, which was lying at Palermo for several days, both before and after the arrival of the prunes. They were not forwarded by her to New York, and the excuse rendered is that she was already loaded when the Cariddi and Taormina arrived. I think it was the duty of the company, when they accepted the prunes and receipted for the delivery in New York, to ascertain whether they had at their command the means of their transportation within a reasonable time. If they had not, they should have declined to receive them. The Washington did not, and, it is alleged, could not, take them. Their next steamer for New York was the Vincenzo Florio, which did not leave Palermo until May 24th. In the mean time the prunes, taken from the Trieste steamers about the first of April, were kept, either in lighters or in a floating magazine, at the port of Palermo for nearly two months, awaiting the departure of another steamship. If any injury resulted to the cargo from this long detention, the loss must be chargeable to the respondent corporation, which caused it.

It should be observed, in this connection, that while the average time for a voyage from Trieste to New York, in a sailing vessel, is twice as great as is required for a steamer, the freight, or the cost of transportation, by the former is less by more than one-half than by the latter. Both methods were available in the present case, but

the steamer was selected, doubtless, on account of the promise of greater dispatch. The merchandise was delicate, and of a character to be damaged by any exposure or delay in a tropical climate. The Vincenzo Florio arrived in New York on June 11th,—about 80 days after they had been shipped at Trieste, and some weeks after they would have been regularly due if forwarded by a sailing vessel. There is no proof that the long delay was caused by any stress of weather, but it seems to have arisen from the respondent's neglect to provide for the more direct transportation of the merchandise to New York after its arrival in Palermo.

The testimony of Josiah Rich and John A. Jansen is quite explicit as to the fact and the cause of the damage to the cargo. Both had had large experience in the business, and for many years had handled the greater part of the Turkish prunes that had come into the port of New York. They agree in opinion, after a careful examination of the 600 casks, that the damaged condition of the prunes arose from the delay at Palermo in their transportation. It is a case where there should be a decree for libelant, and a reference to ascertain the damages, if the parties desire to take further evidence upon the subject.

THE SULIOTE.¹

(District Court, S. D. New York. May 8, 1885.)

1. MARITIME LIEN—SHIP'S CREDIT—CASE STATED.

The ship *S.*, belonging to American owners, arrived with cargo at Greenock, Scotland. She was a stranger there, and the captain designated C. N. & Co. as her collecting and disbursing agents, who collected the inward freights and held a large balance for the ship. It appearing that she was in need of re-metaling, C. N. & Co. ordered the necessary metal of the libelants, it being understood that the bill should be "paid by C. N. & Co. when the ship's accounts were adjusted," in cash, "under discount." Thereafter the ship remained in the vicinity for four months; but no demand for payment was ever made of the captain, and no inquiries were made of him about any of their dealings. The bill, audited by the captain, was rendered to C. N. & Co. The latter, on settling their accounts with the captain, included the bill as paid by them. After the ship had finally sailed, demands were made of C. N. & Co., but before payment they failed: and about a year after furnishing the supplies inquiries were first made after the owners. This action was thereafter brought to enforce an alleged lien upon the ship for the supplies, and, by consent, the liability of ship and owners was submitted. The judge found that the goods were not ordered or furnished on any intended credit of the ship. *Held*, that under the well-settled rule that no lien arises for a vessel's supplies except in case of necessity for the credit of the ship to obtain them, as large funds of the *S.* in the hands of C. N. & Co. were shown to have existed, which was known to the libelants, or would have become known to them on reasonable inquiry, there was no necessity for credit, and that no lien attached.

2. SAME—OWNER'S LIABILITY—PRINCIPAL AND AGENT—INQUIRY FOR RESPONSIBLE PARTY—FOREIGN PRINCIPAL.

The libelants contended that the ship's owners were liable *in personam* for the supplies. It was shown that the libelants did not know who the owners

¹Reported by R. D. & Edward G. Benedict, Esqs., of the New York bar.

were when the supplies were furnished; that they made no inquiry in regard to them until after the failure of C. N. & Co.; and that they evidently relied on the latter firm for payment. *Held*, that by the English law the credit of a foreign principal is not presumptively pledged by the dealings of an agent resident in the kingdom; that the maritime law also affords no *prima facie* presumption of authority in mere ship-brokers having funds of the ship, to bind her owners for supplies ordered by them, and there was no proof of any actual authority, that as C. N. & Co. were only agents in a limited capacity, did not know or have correspondence with the owners, and had in their hands sufficient funds of the ship, their ordering of supplies for the ship did not bind the owners by implication, and that the circumstances negated any such authority; that the libelants were bound to make inquiries of the master of the ship, or take the risk of the actual authority of C. N. & Co. Not having done so, they could not now hold the owners responsible; and the libel was dismissed.

In Admiralty.

Wingate & Cullen, for libelants.

Owen & Gray, for the Suliote.

BROWN, J. This libel *in rem* was filed to recover the sum of £283 (\$1,380) for supplies, consisting of white metal furnished in September, 1881, to the ship Suliote at Greenock, Scotland. The only question litigated is the liability of the vessel or of her owners upon the facts of the case; the parties having desired that the whole question, as respects the liability of either, should be considered and determined without reference to the form of the action.

The ship belonged to American owners. She was a stranger in Greenock, and the libelant had no knowledge of her master or owners. She arrived at that port with a cargo in August, 1881; and the master designated Clerk, Nuel & Co., of Greenock, as her collecting and disbursing agents there. They were an established firm of ship-brokers in that place, of good repute, and in good credit; and they were well known to the libelants. They collected the inward freights of the ship, amounting to about \$17,500. The vessel being in need of remetaling, Clerk, Nuel & Co., through Mr. Nuel, since deceased, ordered the necessary white metal of the libelants. They furnished it, accordingly, prior to September 13, and the old metal was returned to them and credited on account. The libelants' witnesses say that Mr. Nuel told them that he was acting as agent of the ship and had authority to make inquiries about prices; and that it was understood that the sale was made to the captain and owners; and that they gave no credit to Clerk, Nuel & Co. But it was "understood that payment would be made through Clerk, Nuel & Co. in cash, under discount, Mr. Nuel never having said anything about the ship's taking credit." No dealings were had with the captain in making the contract, nor were any inquiries made of him as to the terms of Clerk, Nuel & Co.'s authority. Both Mr. Nuel and the captain are dead. Their testimony was not procured; and there is no proof of the actual authority of Clerk, Nuel & Co., except such as is to be inferred from the circumstances of the case. It was understood at first that the bill should be paid by Clerk, Nuel & Co., "when the ship's accounts were adjusted, in cash, under discount;" that there should be a discount

of $2\frac{1}{2}$ per cent., and 1 per cent. additional if payment was made in cash, which, as I understand, might be at any time not exceeding one or two months after the sailing of the ship. This was the custom of the trade at Greenock. The bark did not sail until the seventeenth of November. On the twenty-first of September, about a week after the metal had been furnished and the bill, audited by the captain, had been rendered by the libelants to Clerk, Nuel & Co., the latter rendered to the captain of the ship their account of the debits and credits of the ship, in which the libelants' bill was included as paid; and a receipted voucher, signed by Clerk, Nuel & Co. for this bill as well as for other bills, was also returned to the captain. The account also showed a credit amounting to £2,000, which Clerk, Nuel & Co. had deposited with Baring Bros. & Co. to the credit of the ship on the tenth of September, the same week in which the libelants' supplies were furnished; and a final balance of £269, 8s., besides the amount needed to pay for the libelants' bill, was thereupon receipted for to the captain, and was paid by Clerk, Nuel & Co. upon various subsequent drafts by the captain to answer the ship's needs.

Shortly after sailing the ship met bad weather and was compelled to put back to Lamash, 40 miles from Greenock. Her arrival was reported in the Greenock papers; and a mutiny of her crew, which led to judicial proceedings in Greenock, was also extensively commented upon. The captain finally sailed again from Lamash on the ninth of January. During all this time the libelants had never consulted the captain in reference to the goods furnished by them, or the payment of their bill, and had never made any demand upon him. After the seventeenth of January, at some time not stated, and which does not definitely appear, requests for payment were made by the libelants of Clerk, Nuel & Co., to whom their bill had been rendered, as already stated, about the middle of September. As above observed, it "had been at first understood that they would settle the bill when the ship's accounts were adjusted." But after the ship had sailed for good they began to prevaricate, to speak of insufficient funds; and on various pretexts they put off payment, stating that they had not sufficient money, and that the owners would remit. In November following the firm failed and dissolved, and then, or shortly before, for the first time, the libelants instituted inquiries to ascertain who and where the owners were. On learning that they were in New York, the libelants forwarded to them a demand for the payment of their bill. Payment being declined, the present libel was filed on the fifth of December, 1883.

The evidence on behalf of the libelants shows that the charge upon their books was made against the "Bq. Suliote, and owners;" that it was usual at Greenock to furnish supplies on the order of ship-brokers, in the manner above stated, to be paid for, either in cash or at some time subsequent to the sailing of the vessel; but that it was "not usual in the case of a sale of goods to a foreign vessel, not known,

to permit her to depart without payment, except on the responsibility of reputable agents there;" and that in this case they did not know who or where the owners were, or anything as regards their responsibility, until their inquiries, after the failure of Clerk, Nuel & Co.

Upon the above facts I must hold that neither the vessel nor her owners are responsible for this bill.

1. It is well settled, under both the English and American law, that no maritime lien arises for supplies except in case of necessity, or apparent necessity, for the credit of the ship to obtain them. In the case of *Thomas v. Osborn*, 19 How. 22, 31, CURTIS, J., states the law on this point as follows:

"To constitute a case of apparent necessity, not only must the repairs and supplies be needful, but it must be apparently necessary for the master to have a credit to procure them. If the master has funds of his own which he ought to apply to purchase the supplies, which he is bound, by the contract of hiring, to furnish himself, and if he has funds of the owners which he ought to apply to pay for the repairs, then no case of actual necessity to have a credit exists; and if the lender knows these facts, or has the means by the use of due diligence to ascertain them, then no case of apparent necessity exists to have a credit; and the act of the master in procuring a credit does not bind the interest of the general owners in the vessel." *The Lulu*, 10 Wall. 192; *Stephenson v. The Francis*, 21 FED. REP. 715, 720.

The proofs show clearly that there was an abundance of funds available at Greenock, in the inward freights of the *Suliot*, to pay for all her repairs there, with a large surplus besides. There is no reason to suppose that there was any concealment of this fact from the libelants when the supplies were ordered. There was then no possible motive for concealment; the facts were easily ascertainable; and if the libelants did not know them, as they now testify, although I think they must have known them at the time, it was clearly their own fault in making no proper inquiry. They do not say whether they made any inquiries on this subject of Clerk, Nuel & Co. even; but do say that it was not understood "that the ship was to take credit." Material-men in a foreign port are bound to make inquiries of the master as to her need of credit, before seeking to charge the ship or her owners. Had any inquiry been made of the master with regard to the payment for these supplies, it is not to be supposed that the libelants would not have been fully informed of the ample funds which the inward freights afforded to pay for them; and that they could not, therefore, lawfully charge the ship. The master, moreover, was the only person that had any authority to bind the ship at all. In dealing with Clerk, Nuel & Co., instead of the master, the libelants must be held legally chargeable with such knowledge as a dealing with the master, and upon ordinary business inquiries of him, would have conveyed to them. The case is clearly, therefore, one in which neither the master, nor any one else at Greenock, had authority to bind the ship for supplies; because there were abundant means to pay for such supplies, and the libelants had means, by the use of ordinary dili-

gence, of ascertaining that fact. *The Lulu*, *supra*; *Insurance Co. v. Baring*, 20 Wall. 163; *The Eledona*, 2 Ben. 31, 37; *The J. F. Spencer*, 5 Ben. 151, 153; *Thacker v. Moates*, 1 Moody & R. 79; *Abb. Shipp.* *135.

2. Whether the respondents are liable *in personam* depends upon the law of principal and agent. For goods ordered by Clerk, Nuel & Co., the respondents cannot be held unless Clerk, Nuel & Co. had authority to charge them personally therefor; nor unless such was the intent of the transaction. In both respects I think the libelants fail to make out a satisfactory case. The libelants' contract was clearly made with Clerk, Nuel & Co.; and the latter had no more presumptive authority to pledge the personal liability of the owners than they had to bind the ship. The case is one in which the language of Dr. LUSHINGTON in the case of *The Druid*, 1 W. Rob. 391, 399, is specially applicable:

"The liability of the ship," he says, "and the responsibility of the owners in such cases are convertible terms; the ship is not liable, if the owners are not responsible; and *vice versa*, no responsibility can attach upon the owners, if the ship is exempt, and not liable to be proceeded against."

In the English law it is now well settled that resident agents, buying goods on account of foreign principals, in the absence of facts showing a contrary intention, pledge their own credit only; on the ground that, for the conveniences of trade, it is not to be supposed that any privity of contract with a foreign principal is intended in such transactions. In *Smyth v. Anderson*, 7 C. B. 33, MAULE, J., says:

"It is well known, in ordinary cases, where a merchant resident abroad buys goods here through an agent, the seller contracts with the agent, and *there is no contract or privity between him and the foreign principal*. If that question had been specifically put to the jury, there can be no doubt as to what their decision would have been."

In the case of *Armstrong v. Stokes*, L. R. 7 Q. B. 598, 605, BLACKBURN, J., says:

"The great inconvenience that would result if there were privity of contract established between the foreign constituents of a commission merchant and the home suppliers of the goods has led to a course of business, in consequence of which it has been long settled that a foreign constituent does not give the commission merchant any authority to pledge his credit to those from whom the commissioner buys them by his order and on his account. It is true that this was originally (and in strictness, perhaps, still is) a question of fact; but the inconvenience of holding that privity of contract was established between a Liverpool merchant and the grower of every bale of cotton which is forwarded to him in consequence of his order given to a commission merchant at New Orleans, or between a New York merchant and the supplier of every bale of goods purchased in consequence of an order to a London commission merchant, is so obvious and so well known that we are justified in treating it as a matter of law, and saying that, *in the absence of evidence of an express authority to that effect, the commission agent cannot pledge his foreign constituents' credit*. Where the constituent is resident in England, the inconvenience is not so great, and we think that, *prima facie*, the authority is given, unless there is enough to show that it was not in fact given."

In the subsequent case of *Hutton v. Bulloch*, L. R. 8 Q. B. 331, 334, the same law was restated, and the decision on appeal was affirmed in the exchequer chamber, (L. R. 9 Q. B. 572,) where BRETT, J., says of the foreign merchant abroad dealing in England through an English correspondent, his agent here:

"In such cases it is now settled that it is not in ordinary course for the foreign merchant to *authorize* the English merchant to bind him to the English contract." Story, Ag. § 268; Whart. Ag. § 791. See, also, *The St. Joze Indiano*, 1 Wheat. 208.

These cases, doubtless, apply only to purchases made through established agents resident in foreign countries. They have no application to *masters* of vessels who purchase necessary supplies in foreign ports. But here the purchase was not by the *master*. The libelants had no dealings with the master, but only with established agents residing at Greenock, and in good credit there; and in that point of view, the above authorities would seem strictly applicable.

A different rule is applied as respects an undisclosed principal residing within the kingdom. In that case, payment to the agent by the principal, and great delay by the vendor, will not deprive the vendor of his remedy against the principal, if the latter has not been in any way misled by the acts of the seller himself. *Davison v. Donaldson*, 9 Q. B. Div. 623; *Irvine v. Watson* 5 Q. B. Div. 102, 414. The question of election between the liability of the agent or of the principal does not here arise. See *Curtis v. Williamson*, L. R. 10 Q. B. 57; *Tuthill v. Wilson*, 90 N. Y. 428.

I have not been referred to any case in the federal courts of this country, nor have I found any such, in which this question is considered; though one branch of the subject was referred to in *Oelricks v. Ford*, 23 How. 64. In a number of cases in the state courts the creditor has been regarded as having a concurrent remedy against the agent, and against the foreign principal, when discovered, unless an exclusive credit was given to the agent; and that it is for the jury to determine that question from all the circumstances of the case. But the rule has no application to residents of different states in this country. *Kirkpatrick v. Stainer*, 22 Wend. 244, 254; *Taintor v. Prendergast*, 3 Hill, 72, 73; *Barry v. Page*, 10 Gray, 398; *Bray v. Kettell*, 1 Allen, 80.

But, aside from this view, all the facts of the case seem to me to show, and, as I think, any jury would find, that it was not Clerk, Nuel & Co.'s intention to buy these goods on the owners' credit at the time when the goods were ordered, and that the libelants did not understand that the goods were sold upon any credit to be given to the captain or to the ship or to the owners; but that such credit as they chose to give, was given exclusively to Clerk, Nuel & Co., notwithstanding the qualifications that the libelants now seek to make in that respect. The facts and circumstances of the case, and the conduct of the libelants at the time, must be taken to outweigh their

statements, three years afterwards, as to the particular form of their dealings with Mr. Nuel, especially as he and the captain are dead, and their version of the matter cannot be obtained. Clerk, Nuel & Co. had ample funds of the ship, and there is not the slightest probability that the libelants were not fully informed of that fact. They had easy means of knowledge, and the evidence clearly shows that they expected payment from these funds. The bark was a stranger in Greenock. She was not expected to return. The owners were unknown, and were not inquired after. The bill was rendered to Clerk, Nuel & Co.; nothing was said about any credit of the ship; demand of payment was made of them, and of them only; payment was promised, and evidently expected, out of the ship's funds in their hands; and not an inquiry, even, was ever made of the master, during the four months that he was accessible in that vicinity, about the ship, her owners, or her destination. It is incredible that any credit was, under such circumstances, given to the captain, as the libelants now assert; and if the captain was not liable, the owners are not.

As a question of intention at the time, and upon the actual facts of this case, I should feel constrained to find, as I think a jury would find, for the reasons previously stated, that Clerk, Nuel & Co. neither had, nor pretended to have, any authority to bind the vessel or her owners; that they did not intend to bind either, but themselves only; and that the libelants, in not calling for immediate payment, gave credit to Clerk, Nuel & Co. exclusively. The latter were agents of the ship for a very limited purpose. They had but a very limited authority, namely, to collect the ship's freights and to pay over the proceeds to the captain or upon his order, or else to apply them to the payment of such bills as they themselves should order for the ship on the captain's request. They were not the general agents of the owners. They did not know the owners. They had no correspondence with them, nor any previous dealings with them. The funds to pay for whatever they might order for the ship were in their own hands. Manifestly, therefore, they had no right, nor color of right, to buy anything upon the credit of the owners or of the ship. That, clearly, was not intended. To do so would be a fraud. The captain did, indeed, desire them to procure these supplies; but for the very reason that they already had the money to pay for them. That is why the captain did not make the contract. The captain audited the bill; but only to show that the work had been done, and that the bill might go to Clerk, Nuel & Co. for payment. The libelants never made any demand upon the captain for payment, and manifestly they never intended to make any demand of him; and the owners could not be liable for the bill unless the captain was liable. It is not credible that the captain ever authorized, or intended to authorize, Clerk, Nuel & Co. to procure supplies on his own credit, or on the credit of the ship or of her owners, when he had already put an excess of funds in Clerk, Nuel & Co.'s hands to pay for them, and when,

under the circumstances, he himself had no lawful authority to pledge the credit of the ship or her owners. If I give a servant \$10, and tell him to go and buy me a barrel of flour with it, the seller, knowing the facts, cannot bind me by charging me with the price of the flour and letting the servant keep the money. Such facts, known to the seller, would import a cash transaction only, and would conclusively negative any authority for a credit. If, instead of exacting payment, the seller chose to give a credit, the credit must be a credit to the servant only. Clerk, Nuel & Co. had no more authority to pledge the credit of the owners than the servant his master's in the case supposed.

The maritime law, moreover, affords no *prima facie* presumption of authority in ship brokers having funds to bind the ship, or her owners, for supplies ordered by them. They had no presumed authority beyond their actual authority. The libelants were bound at their peril to ascertain their authority through proper inquiries. Had such inquiries been made, they would have learned all the facts; and I have little doubt that all the facts were sufficiently known to the agent of the libelants that transacted this business. It is only the *master*, or ship's husband, or managing part owner, or the general agents of the owners, as in the cases of *The Patapsco*, 13 Wall. 329, and *The Ludgate Hill*, 21 FED. REP. 431, that have any general authority implied by the maritime law to bind the ship or her owners. The libelants, in dealing with Clerk, Nuel & Co., instead of with the captain, whom they never saw and of whom they made no inquiries, were therefore bound to ascertain the authority of Clerk, Nuel & Co., if they undertook to charge the ship or her owners. There were no acts, either of the captain or of the owners, that gave Clerk, Nuel & Co. any apparent authority to bind the ship or the owners, and thus operated as an equitable estoppel. There was no difficulty in making proper inquiries of the captain. When the libelants wanted their bill audited by him, in order to get payment from Clerk, Nuel & Co., they had no difficulty in getting the captain's signature. The libelants, therefore, were bound to make proper inquiries of the master, or take the risk of the actual authority of Clerk, Nuel & Co.; and this authority manifestly, as it seems to me, did not extend to bind the ship or her owners for supplies when they had in their hands the money to pay for them. I do not credit the suggestion that Clerk, Nuel & Co. intended to bind them, or that they gave any ground for such a supposition until after the bark had sailed. The libelants' testimony, carefully scrutinized, does not say that Mr. Nuel at first suggested any credit to the ship or to her owners, or any liability of either, but rather the contrary. In effect all that the libelants testify to is that they "understood the sale to be made to the captain and owners," and "solely on their credit." They do not say that Mr. Nuel pretended to have any authority to pledge the credit of the ship or of the captain or of her owners, or that he undertook to pledge their credit for these supplies. But what-

ever Mr. Nuel may have said, his assertions could not bind the absent owners. The fact that the ship had sufficient funds being known, or easily ascertainable, even the captain could not have charged the owners personally for the supplies; much less could Clerk, Nuel & Co. do so.

The bill presented to the captain to be audited was, indeed, headed, though in a way little likely to attract his attention, "Bq. Suliote and owners." But this was not until after all the goods had been supplied. The libelants, in furnishing the goods, were in no way influenced by the captain's signature; and, as I have said, it was but an audit by the captain indicating the delivery of the articles, so as to entitle the libelants to payment from Clerk, Nuel and Co. Two of the libelants' witnesses testify that "the purpose of obtaining the master's approval of the bill was to satisfy Clerk, Nuel & Co. that it was correct, so that they would pay the bill as rendered." After the death of the captain and of Mr. Nuel, and the inability to obtain their testimony, no conclusive weight can be fairly attached to such a circumstance, against the other strong implications of the case. Nor can much weight, under the circumstances of this case, be given to the form of the charge on the libelants' own books. That form would be naturally used as a means only of identifying the bill. *Beinecke v. The Secret*, 3 FED. REP. 667; *Stephenson v. The Francis*, 21 FED. REP. 722.

Notwithstanding the able and elaborate brief of the libelants' counsel, I feel constrained, therefore, to dismiss the libel, but without costs.

THE JACK JEWETT.¹

(District Court, E. D. New York. April 29, 1885.)

TUG AND TOW—NEGLIGENCE—ORDER TO START.

It was not part of the duty of a tug, which started to tow a vessel by a hawser away from a pier, to see that the vessel was ready to move, when she received the order from the ship, "All right; go ahead!" and the tug was held not responsible for damage to a lighter made fast to the ship, which could not cast loose soon enough to avoid injury from the yard of the ship.

In Admiralty.

Beebe, Wilcox & Hobbs, for libellant.

Benedict, Taft & Benedict, for claimants of the tug.

BENEDICT, J. The only question presented for decision on this occasion is whether the steam-tug Jack Jewett is responsible to the owners of the lighter Enterprise for the damages to the lighter Enterprise and her cargo, caused by the fact that the Jack Jewett started to tow

¹Reported by R. D. & Wyllys Benedict, Esqs., of the New York bar.

the ship Bengal away from a pier when the lighter Enterprise was fast to the ship by lines which could not be cast off soon enough after the ship began to move to prevent the fore-yard of the ship catching upon the lighter's mast and rigging, whereby the lighter was tipped over, and part of her cargo lost.

It is proved that the tug did not start the ship until the word, "All right; go ahead!" was given by those in command of the ship to those in charge of the tug. It is also proved that the master of the tug, when he started the ship, did not know that the lighter was alongside the ship, and that he stopped his tug as soon as informed that the lighter's mast had caught on the yards.

Upon these facts, I am of the opinion that the libelant cannot recover against the tug. It was not part of the duty attaching to those in charge of the tug to see that the ship was ready to move. The negligence which caused the damage to the lighter was either negligence of those in charge of the lighter in not moving away from the ship before the ship started, or negligence on the part of those in charge of the ship in directing the tug to start the ship when the ship was not ready to start, owing to the fact that she had a lighter alongside so situated as to be in danger of injury as soon as the ship did start.

The libel against the Jack Jewett is accordingly dismissed, and with costs.

END OF VOLUME 23.



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THE FEDERAL REPORTER.

VOL. 24.

CASES ARGUED AND DETERMINED

IN THE

CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES.

JULY—OCTOBER, 1885.

**SAINT PAUL:
WEST PUBLISHING COMPANY.
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¹ Deceased.

² Appointed to succeed Hon. AMOS MORRILL.

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CASES REPORTED.

	Page		Page
Aaronson v. Deutsch.....	465	Barthet v. City of New Orleans.....	533
Abercrombie, Satterthwaite v.....	543	Bate R. Co. v. Eastman.....	645
A. Burritt H. Co., Parmelee v.....	785	Bate R. Co. v. Gillett.....	696
Adams, United States v.....	848	Baxter, The Edgar.....	386
Adele Thackera, The.....	809	Bean v. Oceanic Steam Nav. Co....	124
Ætna Nat. Bank v. Manhattan L. Ins. Co.....	769	Behan v. City of New York.....	239
Ætna Nat. Bank v. United States L. Ins. Co.....	770	Belt v. Gumbel.....	888
Albany S. T. Co. v. Felthousen.....	699	Berry, United States v.....	780
Alberto, The.....	379	Bickelhaupt, Hayes v.....	806
Alberto, The, Forstall v.....	379	Bittinger v. Providence W. Ins. Co.	549
Alden Evap. F. Co. v. Bowen.....	787	Blair v. St. Louis, H. & K. R. Co..	148
Allen v. Jones.....	11	Blair v. St. Louis, H. & K. R. Co. (four cases).....	539
Allen, Fay v.....	804	Blake, Loud Gold Min. Co. v.....	249
Allie & Evie, The.....	745	Blue Bonnet, The.....	512
Allie & Evie, The, Philadelphia & R. R. Co. v.....	745	Board of Liquidation, Sun Mut. Ins. Co. v.....	4
American D. R. B. Co. v. Gilson....	374	Bonnet, The Blue.....	512
American D. R. B. Co. v. Sheldons.	374	Bostwick v. Covell.....	402
American D. R. B. Co. v. Sutherland Falls Marble Co.....	374	Bowen, Alden Evap. F. Co. v.....	787
American Freehold Land Mortg. Co. v. Groves.....	197	Boyd, United States v.....	690
American G. S. Co., New York G. S. Co. v.....	604	Boyd, United States v.....	692
American Inst. of N. Y., New York Exhaust Ventilator Co. v.....	561	Brady, The.....	800
American P. F. Co., Consolidated B. A. Co. v.....	658	Briarly, The Pres.....	478
Ames v. Carlton S. B. Co.....	785	Briarly, The Pres., Douglas v.....	478
Ames Iron-works v. West.....	318	British Empire, The.....	490
Andrew Hicks, The, The Marathon v.....	658	Brown v. Hicks.....	811
Anheuser-Busch Brewing Ass'n v. Piza.....	149	Brown, Banque Franco-Egyptienne v.....	106
Arkansas Val. L. & C. Co., Mann v.	261	Brown, The G. F.....	399
Arnheim v. Finster.....	276	Brush v. Naugatuck R. Co.....	371
Arnson v. Murphy.....	355	Bryant v. Charter Oak L. Ins. Co..	771
Atchison, T. & S. F. R. Co., Elgin O. Co. v.....	866	Buffalo G. S. Co., New York G. S. Co. v.....	604
Baker, The Lorenzo D.....	814	Buford, Long v.....	241
Ballin v. Lehr.....	193	Bumberger v. Gerson.....	257
Baltimore Steam-packet Co. v. The Clara Davidson.....	763	Bundy v. Jackson.....	638
Baltimore & Ohio Tel. Co. v. Western U. Tel. Co.....	319	Bunt v. Sierra Buttes G. M. Co....	847
Banque Franco-Egyptienne v. Brown.....	106	Bush v. United States.....	917
Barney v. Winona & St. P. R. Co..	889	Bust v. Cornell Steam-boat Co.....	188
Barney, Hennequin v.....	580	Calabria, The.....	607
v.24—FED.		California Min. Co., Pratt v.....	849
		Callaghan, Myers v.....	636
		Campbell, Snell v.....	880
		Canal-boats, Five, Morten v.....	500
		Cannon, The John W.....	892
		Cannon, The John W., McCan v....	892
		Capital City Bank v. Hodgin.....	1
		Carll, Winchell v.....	885
		Carlton S. B. Co., Ames v.....	785
		Carriere, Lafolnye v.....	346

(vii)

	Page		Page
Carter v. Town of Ottawa.....	546	Continental Ins. Co., Williams v....	767
Cary v. Lovell Manuf'g Co.....	141	Continental L. Ins. Co., Dreier v....	670
Cary v. Wolff.....	189	Cornell Steam-boat Co., Bust v.....	188
Castanola v. Missouri Pac. R. Co....	207	Cornelly v. Markwald.....	187
Celluloid Manuf'g Co. v. Chrolithian C. & C. Co.....	275	Cotton, The Quantic.....	325
Celluloid Manuf'g Co. v. Chrolithian C. & C. Co.....	585	County v. The Mabel Comeaux.....	490
Celluloid Manuf'g Co. v. Crofut.....	796	County of Oktibbeha, Mobile Savings Bank v.....	110
Central Nat. Bank v. Lock-stitch Fence Co.....	231	Covell, Bostwick v.....	402
Central Nat. Bank, United States v.....	577	Covenant Mut. Ben. Ass'n, Smith v.....	685
Central Trust Co. v. Texas & St. L. Ry. Co.....	151	Crandall v. Plano Manuf'g Co.....	738
Central Trust Co. v. Texas & St. L. Ry. Co.....	158	Crawford v. Jessup & M. P. Co....	308
Central Trust Co. v. Wabash, St. L. & P. R. Co.....	98	Crittenden, Mercartney v.....	401
Cepheus, The.....	507	Crofut, Celluloid Manuf'g Co. v....	796
Chambers, The John M.....	383	Dausman, Glenn v.....	536
Chandler, Leach v.....	791	Davidson, The Clara, v. The Virginia	763
Chapman, Davis v.....	674	Davidson, The Clara, Baltimore Steam-packet Co. v.....	763
Charles P. Sinnickson, The, Tygert Co. v.....	304	Davis v. Marine Nat. Bank.....	194
Charter Oak L. Ins. Co., Bryant v....	771	Davis v. Chapman.....	674
Chicago, M. & St. P. Ry. Co., English v.....	906	Davis, Newman v.....	609
Chicago & A. Ry. Co. v. New York, L. E. & W. R. Co.....	516	Deering v. Winona Harvester Works	90
Chrolithian C. & C. Co., Celluloid Manuf'g Co. v.....	275	Delliker, Drake v.....	527
Chrolithian C. & C. Co., Celluloid Manuf'g Co. v.....	585	Denoyer v. Ryan.....	77
O. H. Valentine, The.....	703	Dent, Ferguson v.....	412
City of Chester, The, Conover v....	91	Deplanque v. Ripka.....	278
City of Chester, The, Heckman v....	91	Deutsch, Aaronson v.....	465
City of Elizabeth, United States v....	851	De Wolf v. Tupper.....	289
City of Merida, The.....	229	Dimmock, Glenn v.....	536
City of Mexico, The.....	33	Dolan, Jennings v.....	697
City of New Orleans, Barthet v.....	563	Dorn, Spooner v.....	700
City of New York v. New Jersey Steam-boat Transp. Co.....	817	Dorsheimer, Glenn v.....	536
City of New York, Behan v.....	239	Douglas v. The Pres. Briarly.....	478
City & County of San Francisco, Liebman v.....	705	Drake v. Delliker.....	527
Clara Davidson, The, v. The Virginia	763	Dreier v. Continental L. Ins. Co....	670
Clara Davidson, The, Baltimore Steam-packet Co. v.....	763	Duffy v. Reynolds.....	855
Clark v. Hezekiah.....	663	Dugan, Underwood v.....	74
Clark T. Co., Willimantic L. Co. v....	799	Dundee Mortgage Trust Investment Co. v. Parrish.....	197
C. N. Nelson Lumber Co. v. Town of Loraine.....	456	Dyer v. National Rod Elevating Co.	182
Co. F. Young, The.....	511	East Tennessee V. & G. R. Co. v. Pickard.....	614
Cohn v. Spalding.....	19	Eastman, Bate R. Co. v.....	645
Cokeley v. The Snap.....	504	Easton v. German-American Bank.....	525
Colwell v. Springfield Iron Co.....	631	Easton, The J. T.....	95
Comeaux, The Mabel.....	490	Eaton, Rust v.....	830
Comeaux, The Mabel, County v.....	490	Eclipse Windmill Co. v. Woodmanse Windmill Co.....	650
Commercial F. Ins. Co., Endy v....	657	Edgar Baxter, The.....	836
Conoho, The.....	758	El Dorado Co., Hall v.....	257
Conover v. The City of Chester.....	91	El Dorado Co., Nash v.....	252
Consolidated B. A. Co. v. American P. F. Co.....	658	Elgin C. Co. v. Atchison, T. & S. F. R. Co.....	866
Continental Ins. Co., Northwestern Transp. Co. v.....	171	Elizabeth, The Mary.....	397
		Elizabeth, The Mary, Jackson v....	397
		Elizabeth, The Mary, Russell v....	397
		Ella B., The.....	508
		Ellison v. Hartranft.....	136
		Empire, The British.....	498
		Emulous, The.....	48
		Endy v. Commercial Fire Ins. Co....	657
		English v. Chicago, M. & St. P. Ry. Co.....	906

	Page		Page
Evans v. State Nat. Bank.....	325	Glenn v. Von Phul.....	596
Farmers' L. & T. Co. v. Oregon & C.		Goldsmith v. Gilliland.....	154
Ry. Co.....	407	Grace, The, Rollison v.....	761
Farwell v. Spalding.....	18	Graham v. Geneva Lake Crawford	
Fay v. Allen.....	804	Manuf'g Co.....	642
Felthousen, Albany S. T. Co. v.....	690	Graves, In re.....	550
Ferguson v. Dent.....	412	Gray v. Philadelphia & R. R. Co.....	168
Fern Holme, The.....	502	Grinnell Wire Co., Washburn & Moen	
Ferring, Hartinger v.....	15	Manuf'g Co. v.....	28
Field v. Williams.....	513	Griswold, United States v.....	361
Fifth Nat. Bank v. New York Ele-		Groves, American Freehold Land	
vated R. Co.....	114	Mortg. Co. v.....	197
Fink v. Queen Ins. Co.....	818	Groves, New England Mortg. Se-	
Finster, Arnheim v.....	276	curity Co. v.....	197
First Nat. Bank v. Lock-stitch Fence		Gulnare, The.....	487
Co.....	221	Gulnare, The, Macheca v.....	487
Fish, United States v.....	585	Gumbel, Belt v.....	383
Five Canal-boats, Morten v.....	500	G. W. Pratt, The.....	512
Fletcher, Hamlet v.....	305	Hagar, The Sarah O.....	511
Fletcher, The Thomas.....	375	Haught v. The Mayor.....	98
Fletcher, The Thomas.....	481	Hall v. El Dorado Co.....	257
Fletcher, The Thomas, Ross v.....	481	Hall v. Supreme Lodge K. of H.....	450
Foellinger, Preston v.....	680	Halsted, McWhirter v.....	328
Forstall v. The Alberto.....	379	Hamlet v. Fletcher.....	305
Foy, Glenn v.....	536	Hans v. State of Louisiana.....	55
Frame, Sewing-machine Co. v.....	596	Harman v. Lewis.....	97
Frayser, Rice v.....	460	Harman v. Lewis.....	530
Friedlander, Viterbo v.....	320	Hart, Thayer v.....	558
Frisia, The.....	495	Hartford & N. Y. Transp. Co. v. The	
Fuller v. Knapp.....	100	G. F. Brown.....	399
Galileo, The.....	386	Hartinger v. Ferring.....	15
Geneva Lake Crawford Manuf'g Co.,		Hartranft, Ellison v.....	186
Graham v.....	642	Hayes v. Bickelhaupt.....	806
German-American Bank, Easton v.....	523	Hays, Richards v.....	277
Gerson, Bumberger v.....	257	Heckman v. The City of Chester...	91
G. F. Brown, The.....	399	Hennequin v. Barney.....	580
G. F. Brown, The, Hartford & N. Y.		Herrick v. Throop.....	582
Transp. Co. v.....	399	Hewitt v. Pennsylvania Steel Co....	367
G. F. Brown, The, L'Hommedieu v.		Hezekiah, Clark v.....	663
G. F. Brown, The, Lord v.....	399	Hicks, Brown v.....	811
G. F. Brown, The, New Jersey Dry-		Hill, Roberts v.....	571
dock & Transp. Co. v.....	399	Hill, Sharon v.....	726
G. F. Brown, The, Palmer v.....	399	Hodgin, Capital City Bank v.....	1
Gibbon, United States v.....	135	Holiday v. Mattheson.....	185
Gilett, Bate R. Co. v.....	696	Holme, The Fern.....	502
Gill, Roberts v.....	918	Home Ins. Co., Seignouret v.....	332
Gilliland, Goldsmith v.....	154	Hospes v. O'Brien.....	145
Gilman, Taylor v.....	632	Howe S. M. Co. v. Rosensteel.....	583
Gilson, American D. R. B. Co. v.....	374	Hubel v. Tucker.....	701
Given v. Western Union Tel. Co....	119	Hume, The S. B.....	296
Glanz v. Spalding.....	20	Hunt, Glenn v.....	536
Glenn v. Dausman.....	536	Hyatt, Naumburg v.....	398
Glenn v. Dimmock.....	536	Insurance Co. v. Proceeds of Sale of	
Glenn v. Dorsheimer.....	536	Barge Waubaushe.....	559
Glenn v. Foy.....	536	Interstate R. T. Ry. Co., Jackson Co.	
Glenn v. Hunt.....	536	H. R. Co. v.....	306
Glenn v. Liggett.....	536	Iron Silver Min. Co., United States v.	568
Glenn v. Lucas.....	536	Isle of Pines, The, West Virginia	
Glenn v. Noonan.....	536	Cent. & P. Ry. Co. v.....	498
Glenn v. Priest.....	536	Isle of Pines, The, Williams v.....	498
Glenn v. Scott.....	536	Jackson v. The Mary Elizabeth....	397
Glenn v. Tausig.....	536	Jackson, Bundy v.....	628
Glenn v. Triplett.....	536		

	Page		Page
Jackson Co. H. R. Co. v. Interstate		Magin v. Welker.....	743
R. T. Ry. Co.....	306	Mairer v. Olmstead.....	193
James H. Moore, The.....	655	Manasse v. Spalding.....	86
Jennings v. Dolan.....	697	Manhattan L. Ins. Co., Aetna Nat.	
Jennings v. Kibbe.....	697	Banky.....	769
Jensen v. Keasbey.....	144	Mann v. Arkansas Val. L. & C. Co.	261
Jessup & M. P. Co., Crawford v....	808	Marathon, The, v. The Andrew Hicks	653
J. F. Pease F. Co., Mershon v....	741	Marchand v. Sobral.....	316
John M. Chambers, The.....	883	Marine Nat. Bank, Davies v.....	194
John N. Parker, The.....	495	Markwald, Cornelly v.....	187
Johnston Harv. Co., Toledo M. & R.		Mary Elizabeth, The.....	397
Co. v.....	739	Mary Elizabeth, The, Jackson v.....	397
John W. Cannon, The.....	893	Mary Elizabeth, The, Russell v.....	397
John W. Cannon, The, McCan v....	892	Mattheson, Holiday v.....	185
Jones, Allen v.....	11	Max Morris, The.....	880
Joseph, In re.....	187	Mayhew v. West Virginia Oil & Oil	
J. T. Easton, The.....	95	Land Co.....	205
J. W. Paxton, The, The Sally McDev-		Mayor, The, Haight v.....	93
itt v.....	303	McAlpine v. Tourtelotte.....	69
Keasbey, Jensen v.....	144	McCan v. The John W. Cannon.....	392
Kibbe, Jennings v.....	697	McCollock, Singer Manuf'g Co. v....	667
King v. Ohio & M. Ry. Co.....	835	McDevitt, The Sally, v. The J. W.	
Kirk v. Williams.....	437	Paxon.....	803
Knapp, Fuller v.....	100	McDonald v. Whitney.....	600
Koehler, Ex parte.....	107	McKay, Magin v.....	743
Kraft, The Wm.....	191	McKee, Parker v.....	808
Lafolnye v. Carriere.....	346	McLaren v. The Pennsylvania.....	296
Laura Lee, The.....	483	McLaughlin, United States v.....	823
Leach v. Chandler.....	791	McManus, The Thomas.....	509
Lee, The.....	47	McWhirter v. Halsted.....	823
Lee, The Laura.....	483	Memphis, S. & B. R. Co., Thompson v	838
Lee, The, Tessier v.....	47	Mercantile F. & M. Ins. Co., Will-	
Lehr, Ballin v.....	198	iams v.....	625
Leonard, Ozark Land Co. v.....	653	Mercartney v. Crittenden.....	401
Leonard, Ozark Land Co. v.....	660	Merida, The City of.....	229
Lewis, Harman v.....	97	Mershon v. J. F. Pease F. Co.....	741
Lewis, Harman v.....	580	Mexico, The City of.....	83
L'Hommedieu v. The G. F. Brown.....	899	Miller v. Wattier.....	49
Liebman v. City and County of San		Missouri Pac. R. Co., Castanola v....	267
Francisco.....	705	Mobile Savings Bank v. County of	
Liggett, Glenn v.....	536	Oktbbha.....	110
Lock-stitch Fence Co., Central Nat.		Moore v. Oceanic Steam Nav. Co.....	237
Bank v.....	231	Moore, The James H.....	655
Lock-stitch Fence Co., First Nat.		Morrell v. Rheinfrank.....	94
Bank v.....	231	Morris v. The Oranmore.....	923
London & P. Ins. Co., Williams v....	625	Morris, The Max.....	860
Long v. Buford.....	241	Morten v. Five Canal-boats.....	500
Loomis, Tuttle v.....	789	Murphy, Arson v.....	353
Lord v. The G. F. Brown.....	899	Mutual Benefit Life Ins. Co., Sale-	
Lord v. Whitehead.....	801	tine v. (two cases).....	159
Lord v. Whitehead & A. Mach. Co....	901	M. Vandercook, The.....	473
Lorenzo D. Baker, The.....	814	Myers v. Callaghan.....	636
Loud Gold Min. Co. v. Blake.....	249	Nash v. El Dorado Co.....	252
Lovell Manuf'g Co., Cary v.....	141	National Hod Elevating Co., Dyer v.	182
Lucas, Glenn v.....	536	Naugatuck R. Co., Brush v.....	871
Luray, The.....	751	Naumburg v. Hyatt.....	596
Luray, The, Rollison v.....	751	New England Mortg. Security Co. v.	
Luray The, Vickery v.....	751	Groves.....	197
Mabel Comeaux, The.....	490	New England Transp. Co., Philadel-	
Mabel Comeaux, The, County v....	490	phia & R. R. Co. v.....	505
Macheca v. The Gulsare.....	487	New Jersey Dry-dock & Transp. Co.	
Magin v. McKay.....	743	v. The G. F. Brown.....	839
		New Jersey Steam-boat Transp. Co.,	
		City of New York v.....	817

	Page		Page
Newman v. Davis.....	609	Pratt, In re.....	895
New York Elevated R. Co., Fifth Nat. Bank v.....	114	Pratt, The G. W.....	512
New York Exhaust Ventilator Co. v. American Inst. of N. Y.....	561	Pres. Briarly, The.....	478
New York G. S. Co. v. American G. S. Co.....	604	Pres. Briarly, The, Douglas v.....	478
New York G. S. Co. v. Buffalo G. S. Co.....	604	Preston v. Foellinger.....	680
New York L. E. & W. R. Co., Chicago & A. Ry. Co. v.....	516	Priest, Glenn v.....	536
Noonan, Glenn v.....	536	Proceeds of Sale of Barge Waubashene, Insurance Co. v.....	559
Norman v. Peper.....	408	Prouty, In re.....	554
North German Ins. Co., Williams v.....	625	Providence W. Ins. Co., Bittinger v.....	549
North Hudson Co. R. Co., Railway Reg. Manuf'g Co. v.....	798	Pullam, Oliver v.....	127
Northwestern Transp. Co. v. Continental Ins. Co.....	171	Purissima Concepcion, The.....	358
Oberteuffer v. Robertson.....	852	Purissima Concepcion, The, United States v.....	358
O'Brien, Hospes v.....	145	Quantico Cotton, The.....	825
Oceanic Steam Nav. Co., Bean v.....	124	Quebec S. S. Co., Pearse v.....	285
Oceanic Steam Nav. Co., Moore v.....	237	Queen Ins. Co., Fink v.....	818
Ohio & M. Ry. Co., King v.....	835	Railway Reg. Manuf'g Co. v. North Hudson Co. R. Co.....	798
Oliver v. Pullam.....	127	Red River C. Line, St. Louis & V. A. L. Co. v.....	488
Olmstead, Maier v.....	198	Rescue, The.....	44
Oranmore, The.....	922	Rescue, The.....	190
Oranmore, The, Morris v.....	922	Reynolds, Duffy v.....	855
Oregon & C. Ry. Co., Farmers' L. & T. Co. v.....	407	Rheinfrank, Morrell v.....	94
Orsino, The.....	918	Rhode Island, The.....	295
Osage, The, v. Ridgway.....	298	Rice v. Frayser.....	460
Ozark Land Co. v. Leonard.....	658	Richards v. Hays.....	277
Ozark Land Co. v. Leonard.....	660	Ridgway, The Osage v.....	298
Palmer v. The G. F. Brown.....	899	Rindskopf, In re.....	542
Parker v. McKee.....	808	Ripka, Deplanque v.....	278
Parker, The John N.....	495	Roberts v. Gill.....	918
Parmelee v. A. Burritt H. Co.....	785	Roberts v. Hill.....	571
Parrish, Dundee Mortgage Trust Investment Co. v.....	197	Roberts, In re.....	182
Paxon, The J. W., The Sally McDevitt v.....	802	Robertson, Oberteuffer v.....	852
Pearse v. Quebec S. S. Co.....	285	Rogers v. Walker.....	344
Pennsylvania, The.....	296	Rollison v. The Grace.....	751
Pennsylvania, The, McLaren v.....	296	Rollison v. The Luray.....	751
Pennsylvania Steel Co., Hewitt v.....	867	Rose, United States v.....	196
People's F. Ins. Co., Peoria S. R. Co. v.....	778	Rosensteel, Howe S. M. Co. v.....	583
Peoria S. R. Co. v. People's F. Ins. Co.....	778	Ross v. The Thomas Fletcher.....	481
Peper, Norman v.....	408	Royal Exch. S. Co., Wilson v.....	815
Perkins, Sweet v.....	777	Russell v. The Mary Elizabeth.....	397
Philadelphia & R. R. Co. v. New England Transp. Co.....	505	Rust v. Eaton.....	890
Philadelphia & R. R. Co. v. The Alle & Erie.....	745	Ryan, Denoyer v.....	77
Philadelphia & R. R. Co., Gray v.....	168	St. Louis, H. & K. R. Co., Blair v.....	148
Pickard, East Tennessee V. & G. R. Co. v.....	614	St. Louis, H. & K. R. Co., Blair v. (four cases).....	539
Piza, Anheuser-Busch Brewing Ass'n v.....	149	St. Louis & V. A. L. Co. v. Red River C. Line.....	488
Plano Manuf'g Co., Crandall v.....	788	Salentine v. Mutual Benefit Life Ins. Co., (two cases),.....	159
Pottsville, The.....	655	Sally McDevitt, The, v. The J. W. Paxon.....	802
Pratt v. California Min. Co.....	869	Sands, Smith v.....	470
		Sarah C. Hagar, The.....	511
		Satterthwaite v. Abercrombie.....	543
		S. B. Hume, The.....	296
		Scott, Glenn v.....	536
		Scottish-American Mortg. Co. v. Wilson.....	810
		Seignouret v. Home Ins. Co.....	832

	Page		Page
Seixas, Wells v.....	83	Town of Loraine, C. N. Nelson Lum-	456
Sewing-machine Co. v. Frame.....	596	ber Co. v.....	456
Sharon v. Hill.....	726	Town of Ottawa, Carter v.....	546
Sheldons, American D. R. B. Co. v.....	874	Triplett, Glenn v.....	596
Sierra Buttes G. M. Co., Bunt v.....	847	Tucker, Hubel v.....	701
Silsby Manuf'g Co. v. Town of Chico.....	893	Tupper, De Wolf v.....	289
Singer Manuf'g Co. v. McCollock.....	667	Tuttle v. Loomis.....	789
Sinnickson, The Charles P., Tygert		Tygert Co. v. The Charles P. Sin-	
Co. v.....	304	nickson.....	304
Smith v. Covenant Mut. Ben. Ass'n.....	685	Ty Moy, In re.....	725
Smith v. Sands.....	470		
Snape, The.....	510	Underwood v. Dugan.....	74
Snape, The, (two cases,).....	292	Underwood v. Warren.....	183
Snape, The, Cokeley v.....	504	Union Ins. Co., Young v.....	279
Snell v. Campbell.....	880	United States v. Adams.....	348
Snyder, In re.....	910	United States v. Berry.....	217, 780
Sobral, Marchand v.....	316	United States v. Boyd.....	690
Southern Kansas Ry. Co., State v.....	179	United States v. Boyd.....	692
Souweine, Walker Glass Co. v.....	603	United States v. Central Nat. Bank.....	577
Spalding, Cohn v.....	19	United States v. City of Elizabeth.....	851
Spalding, Farwell v.....	18	United States v. Fish.....	585
Spalding, Glanz v.....	20	United States v. Gibbon.....	185
Spalding, Manasse v.....	86	United States v. Griswold.....	861
Spalding, Stodder v.....	89	United States v. Iron Silver Min.	
Spalding, Vanacker v.....	88	Co.....	568
Spalding, Yanada v.....	21	United States v. McLaughlin.....	823
Spalding, Young v.....	22	United States v. Rose.....	196
Spalding, Young v.....	87	United States v. The Purissima Con-	
Sperry, United States Mortg. Co. v.....	838	cepcion.....	858
Spooner v. Dorn.....	700	United States, Bush v.....	917
Springfield Iron Co., Colwell v.....	631	United States L. Ins. Co., Ætna Nat.	
State v. Southern Kansas Ry. Co.....	179	Bank v.....	770
State, Hans v.....	55	United States Mortg. Co. v. Sperry.....	838
State Nat. Bank, Evans v.....	325		
Stodder v. Spalding.....	89	Valentine, The C. H.....	703
Stowell, In re.....	468	Vanacker v. Spalding.....	88
Sun Hung, In re.....	723	Vandercook, The M.....	472
Sun Mut. Ins. Co. v. Board of Liqui-		Vickery v. The Luray.....	751
dation.....	4	Virginia, The, The Clara Davidson v.....	763
Supreme Lodge K. of H., Hall v.....	450	Viterbo v. Friedlander.....	320
Sutherland Falls Marble Co., Amer-		Von Phul, Glenn v.....	536
ican D. R. B. Co. v.....	374		
Sweet v. Perkins.....	777	Wabash R. Co., In re.....	217, 780
		Wabash St. L. & P. R. Co., Central	
Taussig, Glenn v.....	536	Trust Co. v.....	98
Taylor v. Gilman.....	632	Walker, Rogers v.....	344
Tessier v. The Lee.....	47	Walker Glass Co. v. Souweine.....	603
Texas & St. L. Ry. Co., Central Trust		Warren, Underwood v.....	183
Co. v.....	151	Washburn & Moen Manuf'g Co. v.	
Texas & St. L. Ry. Co., Central Trust		Grinnell Wire Co.....	23
Co. v.....	153	Wattier, Miller v.....	49
Thackera, The Adele.....	809	Weill v. Thompson.....	14
Thayer v. Hart.....	558	Welker, Magin v.....	743
Thomas Fletcher, The.....	875	Wells v. Seixas.....	82
Thomas Fletcher, The.....	481	West, Ames Iron-works v.....	313
Thomas Fletcher, The, Ross v.....	481	Westernland, The.....	703
Thomas McManus, The.....	509	Western U. Tel. Co., Baltimore &	
Thompson v. Memphis, S. & B. R.		Ohio Tel. Co. v.....	319
Co.....	338	Western U. Tel. Co., Given v.....	119
Thompson, Weill v.....	14	West Virginia Cent. & P. Ry. Co. v.	
Throop, Herrick v.....	532	The Isle of Pines.....	496
Toledo M. & R. Co. v. Johnston		West Virginia Oil & Oil Land Co.,	
Harv. Co.....	739	Mayhew v.....	205
Tourtelotte, McAlpine v.....	69	Whitehead, Lord v.....	801
Town of Chico, Silsby Manuf'g Co. v.....	893	Whitehead & A. Mach. Co., Lord v.....	801

	Page		Page
Whitney, McDonald v.....	600	Winchell v. Carll.....	865
Wm. Kraft, The.....	191	Winona Harvester Works, Deering	
Williams v. Continental Ins. Co....	767	v.....	90
Williams v. London & P. Ins. Co....	625	Winona & St. P. R. Co., Barney v..	889
Williams v. Mercantile F. & M. Ins.		Wolff, Cary v.....	189
Co.....	625	Woodmanse Windmill Co., Eclipse	
Williams v. North German Ins. Co.	625	Windmill Co. v.....	650
Williams v. The Isle of Pines.....	498		
Williams, Field v.....	513	Yanada v. Spalding.....	21
Williams, Kirk v.....	487	Young v. Spalding.....	22
Willimantic L. Co. v. Clark T. Co....	799	Young v. Spalding.....	87
Wilson v. Royal Exch. S. Co.....	815	Young v. Union Ins. Co.....	279
Wilson, Scottish-American Mortg.		Young, The Co. F.....	511
Co. v.....	810		

CASES REPORTED.

ARRANGED UNDER THEIR RESPECTIVE CIRCUITS AND DISTRICTS.

FIRST CIRCUIT.

CIRCUIT COURT, D. MASSACHUSETTS.

Brown v. Hicks.....	811
Bush v. United States.....	917
Lord v. Whitehead.....	801
Lord v. Whitehead & A. Mach. Co....	901
McDonald v. Whitney.....	600

DISTRICT COURT, D. MASSACHUSETTS.

James H. Moore, The.....	655
Lorenzo D. Baker, The.....	814
Marathon, The, v. The Andrew Hicks	658
Pottsville, The.....	655

SECOND CIRCUIT.

CIRCUIT COURT, D. CONNECTICUT.

Brush v. Naugatuck R. Co.....	871
Parmelee v. A. Burritt H. Co.....	785
Peoria S. R. Co. v. People's F. Ins. Co.....	778
Winchell v. Carll.....	865

DISTRICT COURT, D. CONNECTICUT.

G. F. Brown, The.....	899
Hartford & N. Y. Transp. Co. v. The G. F. Brown.....	899
L'Homedieu v. The G. F. Brown.....	899
Lord v. The G. F. Brown.....	899
New Jersey Dry-dock & Transp. Co. v. The G. F. Brown.....	899
Palmer v. The G. F. Brown.....	899

DISTRICT COURT, E. D. NEW YORK.

Blue Bonnet, The.....	512
Cepheus, The.....	507
Co. F. Young, The.....	511

v.24—FED.

Page

Emulous, The.....	43
Frisia, The.....	495
G. W. Pratt, The.....	512
John N. Parker, The.....	495
Sarah C. Hagar, The.....	511
Thomas McManus, The.....	509
Wilson v. Royal Exch. S. Co.....	815

CIRCUIT COURT, N. D. NEW YORK.

Albany S. T. Co. v. Felthousen.....	699
Alden Evap. F. Co. v. Bowen.....	787
Fay v. Allen.....	804
Gray v. Philadelphia & R. R. Co. . .	168
Herrick v. Throop.....	532
Insurance Co. v. Proceeds of Sale of Barge Waubaushene.....	559
Magin v. McKay.....	743
Magin v. Welker.....	748
Mershon v. J. F. Pease F. Co.....	741
New York G. S. Co. v. American G. S. Co.....	604
New York G. S. Co. v. Buffalo G. S. Co.....	604
Toledo M. & R. Co. v. Johnston Harv. Co.....	789
Tuttle v. Loomis.....	789

DISTRICT COURT, N. D. NEW YORK.

Ella B., The.....	508
Graves, In re.....	550
Stowell, In re.....	468

CIRCUIT COURT, S. D. NEW YORK.

Ætna Nat. Bank v. Manhattan L. Ins. Co.....	769
Ætna Nat. Bank v. United States L. Ins. Co.....	770
Anheuser-Busch Brewing Ass'n v. Piza.....	149
Arnheim v. Finster.....	276
Arnson v. Murphy.....	355
Ballin v. Lehr.....	198
Banque Franco-Egyptienne v. Brown.....	106

(xiv)

	Page
Bate R. Co. v. Eastman.....	645
Bean v. Oceanic Steam Nav. Co.....	124
Bostwick v. Covell.....	402
Bust v. Cornell Steam-boat Co.....	188
Cary v. Wolff.....	189
Celluloid Manuf'g Co. v. Chrolithian C. & C. Co.....	375
Celluloid Manuf'g Co. v. Chrolithian C. & C. Co.....	585
Chicago & A. Ry. Co. v. New York, L. E. & W. R. Co.....	516
City of New York v. New Jersey Steam-boat Transp. Co.....	817
Colwell v. Springfield Iron Co.....	681
Cornelly v. Markwald.....	187
Davies v. Marine Nat. Bank.....	194
Easton v. German-American Bank.....	538
Fifth Nat. Bank v. New York Elevated R. Co.....	114
Fuller v. Knapp.....	100
Hayes v. Bickelhaupt.....	806
Hennequin v. Barney.....	580
Holiday v. Mathieson.....	185
Hubel v. Tucker.....	701
Jennings v. Dolan.....	697
Jennings v. Kibbe.....	697
Joseph, In re.....	187
Mairer v. Olmstead.....	198
New York Exhaust Ventilator Co. v. American Inst. of N. Y.....	561
Oberteuffer v. Robertson.....	852
Parker v. McKee.....	808
Prouty, In re.....	554
Rindskopf, In re.....	542
Satterthwaite v. Abercrombie.....	543
Taylor v. Gilman.....	682
Thayer v. Hart.....	558
United States v. Boyd.....	690
United States v. Boyd.....	692
United States v. Central Nat. Bank.....	577
United States v. Fish.....	585
Walker Glass Co. v. Souweine.....	608
Wells v. Seixas.....	82

DISTRICT COURT, S. D. NEW YORK.

Adele Thackera, The.....	809
Allie & Evie, The.....	745
Behan v. City of New York.....	239
British Empire, The.....	493
Calabria, The.....	607
C. H. Valentine, The.....	703
City of Merida, The.....	229
City of Mexico, The.....	38
Conover v. The City of Chester.....	91
De Wolf v. Tupper.....	289
Edgar Baxter, The.....	886
Galileo, The.....	386
Haight v. The Mayor.....	93
Heckman v. The City of Chester.....	91
J. T. Easton, The.....	95
Max Morris, The.....	860
Moore v. Oceanic Steam Nav. Co.....	287
Morrell v. Rheinfrank.....	94

Pearse v. Quebec S. S. Co.....	265
Philadelphia & R. R. Co. v. New England Transp. Co.....	505
Philadelphia & R. R. Co. v. The Al- lie & Evie.....	745
Rhode Island, The.....	295
Westernland, The.....	708
West Virginia Cent. & P. Ry. Co. v. The Isle of Pines.....	496
Williams v. The Isle of Pines.....	498

CIRCUIT COURT, D. VERMONT.

American D. R. B. Co. v. Gilson....	374
American D. R. B. Co. v. Sheldons.	374
American D. R. B. Co. v. Suther- land Falls Marble Co.....	374
Roberts v. Hill.....	571

THIRD CIRCUIT.

CIRCUIT COURT, D. NEW JERSEY.

Bate R. Co. v. Gillett.....	696
Celluloid Manuf'g Co. v. Crofut....	796
Drake v. Delliker.....	527
Duffy v. Reynolds.....	855
McWhirter v. Halsted.....	828
Railway Reg. Manuf'g Co. v. North Hudson Co. R. Co.....	798
United States v. City of Elizabeth..	851
Willmantio L. Co. v. Clark T. Co..	799

DISTRICT COURT, D. NEW JERSEY.

Cokeley v. The Snap.....	504
Fern Holme, The.....	502
Morten v. Five Canal-boats.....	500
M. Vandercook, The.....	472
Snap, The.....	510

CIRCUIT COURT, E. D. PENNSYLVANIA.

Deplanque v. Ripka.....	278
Dyer v. National-Hod Elevating Co.	182
Ellison v. Hartranft.....	136
Hewitt v. Pennsylvania Steel Co....	367
Jensen v. Keasbey.....	144
McLaren v. The Pennsylvania.....	296
Pennsylvania, The.....	296
Richards v. Hays.....	277
S. B. Hume, The.....	296
Sewing-machine Co. v. Frame.....	596

DISTRICT COURT, E. D. PENNSYLVANIA:

Brady, The.....	300
Crawford v. Jessup & M. P. Co....	303
Osage, The, v. Ridgway.....	298

	Page
Sally McDevitt, The, v. The J. W. Paxon.....	802
Tygart Co. v. The Charles P. Sin-nickson.....	804

CIRCUIT COURT, W. D. PENNSYLVANIA.

Cary v. Lovell Manuf'g Co.....	141
Howe S. M. Co. v. Rosensteel.....	588

DISTRICT COURT, W. D. PENNSYLVANIA.

Rescue, The.....	44
Rescue, The.....	190
Wm. Kraft, The.....	191

FOURTH CIRCUIT.

DISTRICT COURT, D. MARYLAND.

Morris v. The Oranmore.....	922
Oranmore, The.....	922
Orsino, The.....	918
Roberts v. Gill.....	918

CIRCUIT COURT, W. D. NORTH CAROLINA.

Long v. Buford.....	241
Naumburg v. Hyatt.....	898
Oliver v. Pullam.....	127

DISTRICT COURT, E. D. VIRGINIA.

Baltimore Steam-packet Co. v. The Clara Davidson.....	768
Clara Davidson, The, v. The Virginia Conoho, The.....	768
Conoho, The.....	758
Luray, The.....	751
Rollison v. The Luray.....	751
Snap, The, (two cases,).....	292
Vickery v. The Luray.....	751

CIRCUIT COURT, D. WEST VIRGINIA.

Mayhew v. West Virginia Oil & Oil Land Co.....	205
--	-----

FIFTH CIRCUIT.

CIRCUIT COURT, S. D. ALABAMA.

Jackson v. The Mary Elizabeth....	897
Mary Elizabeth, The.....	897
Russell v. The Mary Elizabeth....	897

CIRCUIT COURT, N. D. GEORGIA.

Loud Gold Min. Co. v. Blake.....	249
----------------------------------	-----

CIRCUIT COURT, S. D. GEORGIA.

Ross v. The Thomas Fletcher.....	481
Thomas Fletcher, The.....	375
Thomas Fletcher, The.....	481

DISTRICT COURT, S. D. GEORGIA, E. D.

Roberts, In re.....	192
---------------------	-----

CIRCUIT COURT, E. D. LOUISIANA.

Alberto, The.....	379
Allen v. Jones.....	11
Ames Iron-works v. West.....	818
Baltimore & Ohio Tel. Co. v. Western U. Tel. Co.....	319
Barthet v. City of New Orleans....	568
Belt v. Gumbel.....	883
County v. The Mabel Comeaux....	490
Douglas v. The Pres. Briarly.....	478
Evans v. State Nat. Bank.....	325
Fink v. Queen Ins. Co.....	318
Forstall v. The Alberto.....	379
Gulnare, The.....	487
Hamlet v. Fletcher.....	305
Hans v. State of Louisiana.....	55
John M. Chambers, The.....	853
John W. Cannon, The.....	392
Lafolloye v. Carriere.....	346
Lee, The.....	47
Mabel Comeaux, The.....	490
Macheca v. The Gulnare.....	487
Marchand v. Sobral.....	816
McCan v. The John W. Cannon....	392
Pres. Briarly, The.....	478
Purissima Concepcion, The.....	358
Quantico Cotton, The.....	325
Rogers v. Walker.....	844
Seignouret v. Home Ins. Co.....	832
Sun Mut. Ins. Co. v. Board of Liquidation.....	4
Tessier v. The Lee.....	47
United States v. The Purissima Concepcion.....	358
Viterbo v. Friedlander.....	320
Weill v. Thompson.....	14

DISTRICT COURT, E. D. LOUISIANA.

Laura Lee, The.....	488
St. Louis & V. A. L. Co. v. Red River C. Line.....	488

CIRCUIT COURT, W. D. LOUISIANA.

Bumberger v. Gerson.....	267
--------------------------	-----

DISTRICT COURT, N. D. MISSISSIPPI, E. D.

Mobile Savings Bank v. County of Oktibbeha.....	110
---	-----

	Page
DISTRICT COURT, N. D. MISSISSIPPI, W. D.	
Thompson v. Memphis, S. & B. R. Co.....	338

CIRCUIT COURT, N. D. TEXAS.	
Underwood v. Dugan.....	74

DISTRICT COURT, W. D. TEXAS.	
Castanola v. Missouri Pac. R. Co....	267

SIXTH CIRCUIT.

CIRCUIT COURT, E. D. MICHIGAN.	
Northwestern Transp. Co. v. Continental Ins. Co.....	171

CIRCUIT COURT, W. D. MICHIGAN, S. D.	
Smith v. Sands.....	470

CIRCUIT COURT, E. D. TENNESSEE.	
East Tennessee V. & G. R. Co. v. Pickerd.....	614
Snyder, In re.....	910

CIRCUIT COURT, W. D. TENNESSEE.	
Ferguson v. Dent.....	412
Kirk v. Williams.....	437

SEVENTH CIRCUIT.

CIRCUIT COURT, N. D. ILLINOIS.	
Ames v. Carlton S. B. Co.....	785
Bryant v. Charter Oak L. Ins. Co..	771
Carter v. Town of Ottawa.....	546
Central Nat. Bank v. Lock-stitch Fence Co.....	221
Cohn v. Spalding.....	19
Crandall v. Plano Manuf'g Co.....	788
Eclipse Windmill Co. v. Woodmanse Windmill Co.....	650
Farwell v. Spalding.....	18
First Nat. Bank v. Lock-stitch Fence Co.....	221
Glanz v. Spalding.....	20
Manasse v. Spalding.....	86
Myers v. Callaghan.....	686
Spooner v. Dorn.....	700
Stodder v. Spalding.....	89
United States Mortg. Co. v. Sperry.	888
Vanaecker v. Spalding.....	83

24 Fed.—b

	Page
Yanada v. Spalding.....	21
Young v. Spalding.....	22
Young v. Spalding.....	87

DISTRICT COURT, N. D. ILLINOIS.	
Young v. Union Ins. Co.....	279

CIRCUIT COURT, D. INDIANA.	
Davis v. Chapman.....	674
Dreier v. Continental L. Ins. Co....	670
King v. Ohio & M. Ry. Co.....	835
Leach v. Ohandler.....	791
Pratt, In re.....	835
Preston v. Foellinger.....	680

CIRCUIT COURT, E. D. WISCONSIN.	
Consolidated B. A. Co. v. American P. F. Co.....	608
Field v. Williams.....	518
Graham v. Geneva Lake Crawford Manuf'g Co.....	642
Salentine v. Mutual Benefit Life Ins. Co. (two cases).....	156
Smith v. Covenant Mut. Ben. Ass'n.	635
Sweet v. Perkins.....	777

CIRCUIT COURT, W. D. WISCONSIN.	
C. N. Nelson Lumber Co. v. Town of Loraine.....	456

EIGHTH CIRCUIT.

CIRCUIT COURT, E. D. ARKANSAS.	
Aaronson v. Deutsch.....	465
Bundy v. Jackson.....	628
Newman v. Davis.....	609
Norman v. Peper.....	403
Ozark Land Co. v. Leonard.....	658
Ozark Land Co. v. Leonard.....	660
Rice v. Frayser.....	460
Singer Manuf'g Co. v. McCollock...	667

DISTRICT COURT, E. D. ARKANSAS.	
Clark v. Hezekiah.....	668
Hall v. Supreme Lodge K. of H.....	450

CIRCUIT COURT, D. COLORADO.	
Bittinger v. Providence W. Ins. Co.	549
Mann v. Arkansas Val. L. & C. Co.	261
United States v. Iron Silver Min. Co.....	568

	Page		Page
CIRCUIT COURT, N. D. IOWA, C. D.		Glenn v. Lucas.....	586
Snell v. Campbell.....	889	Glenn v. Noonan.....	586
CIRCUIT COURT, N. D. IOWA, E. D.		Glenn v. Priest.....	586
Elgin C. Co. v. Atchison, T. & S. F.		Glenn v. Scott.....	586
R. Co.....	866	Glenn v. Taussig.....	586
Hartinger v. Ferring.....	15	Glenn v. Triplett.....	586
CIRCUIT COURT, S. D. IOWA.		Glenn v. Von Phul.....	586
Given v. Western Union Tel. Co....	119	Harman v. Lewis.....	97
Williams v. London & P. Ins. Co....	625	Harman v. Lewis.....	580
Williams v. Mercantile F. & M. Ins.		Underwood v. Warren.....	183
Co.....	625	CIRCUIT COURT, W. D. MISSOURI.	
Williams v. North German Ins. Co.	625	Wabash R. Co., In re.....	217, 780
CIRCUIT COURT, S. D. IOWA, C. D.		CIRCUIT COURT, W. D. MISSOURI, W. D.	
Capital City Bank v. Hodgins.....	1	United States v. Berry.....	217, 780
Washburn & Moen Manuf'g Co. v.		DISTRICT COURT, D. NEBRASKA.	
Grinnell Wire Co.....	23	United States v. Gibbon.....	185
CIRCUIT COURT, D. KANSAS.		NINTH CIRCUIT.	
Jackson Co. H R. Co. v. Interstate		CIRCUIT COURT, D. CALIFORNIA.	
R. T. Ry. Co.....	906	Bunt v. Sierra Buttes G. M. Co....	847
McAlpine v. Tourtelotte.....	69	Endy v. Commercial Fire Ins. Co...	657
Scottish-American Mortg. Co. v.		Hall v. El Dorado Co.....	257
Wilson.....	810	Liebman v. City and County of San	
State v. Southern Kansas Ry. Co....	179	Francisco.....	705
CIRCUIT COURT, D. MINNESOTA.		Mercartney v. Crittenden.....	401
Barney v. Winona & St. P. R. Co....	889	Nash v. El Dorado Co.....	262
Deering v. Winona Harvester Works	90	Sharon v. Hill.....	726
Denoyer v. Ryan.....	77	Silsby Manuf'g Co. v. Town of Chico.	808
English v. Chicago, M. & St. P. Ry.		Sun Hang, In re.....	726
Co.....	906	Ty Moy, In re.....	725
Hospes v. O'Brien.....	145	United States v. McLaughlin.....	823
Rust v. Eaton.....	880	United States v. Rose.....	196
DISTRICT COURT, D. MINNESOTA.		CIRCUIT COURT, D. NEVADA.	
Williams v. Continental Ins. Co....	787	Pratt v. California Min. Co.....	869
CIRCUIT COURT, E. D. MISSOURI.		CIRCUIT COURT, D. OREGON.	
Blair v. St. Louis, H. & K. R. Co....	148	American Freshhold Land Mortg. Co.	
Blair v. St. Louis, H. & K. R. Co.		v. Groves.....	197
(four cases).....	539	Dundee Mortgage Trust Investment	
Central Trust Co. v. Texas & St. L.		Co. v. Parrish.....	197
Ry. Co.....	151	Farmers' L. & T. Co. v. Oregon & C.	
Central Trust Co. v. Texas & St. L.		Ry. Co.....	407
Ry. Co.....	153	Goldsmith v. Gilliland.....	154
Central Trust Co. v. Wabash, St. L.		Koehler, Ex parte.....	107
& P. R. Co.....	98	Miller v. Wattier.....	49
Glenn v. Dausman.....	586	New England Mortg. Security Co. v.	
Glenn v. Dimmock.....	586	Groves.....	197
Glenn v. Dorsheimer.....	586	United States v. Adams.....	348
Glenn v. Foy.....	586	DISTRICT COURT, D. OREGON.	
Glenn v. Hunt.....	586	United States v. Griswold.....	361
Glenn v. Liggett.....	586		

CASES

ARGUED AND DETERMINED

IN THE

United States Circuit and District Courts.

CAPITAL CITY BANK OF DES MOINES *v.* HODGIN and others.¹

(Circuit Court, S. D. Iowa, C. D. June 4, 1885.)

CHATTEL MORTGAGE—DELIVERY—TWO MORTGAGES EXECUTED ON SAME DAY—
RECORDING—PRIORITY—PREVIOUS AGREEMENT.

When a party, to secure an indorser of his notes, in pursuance of a previous agreement, executes and files for record a chattel mortgage on his stock in trade, and at the same time executes another mortgage on the same goods, to secure a creditor, but does not file it for record until the next day, in order that the indorser may have a first lien on his property, and neither of the mortgagees knows at the time of the execution of the mortgages, or at the time of their filing for record what has been done, but both of them, on learning what has been done, accept them, the mortgage first recorded will be a first lien on the goods.

In Equity.

W. L. Reed and Goode, Wishard & Phillips, for complainant.

Nourse & Kauffman and N. B. Raymond, for defendants.

SHIRAS, J. In the year 1883 Frank L. Hodgin was engaged in the clothing business at Des Moines, Iowa. In November of that year he executed upon his stock in trade two mortgages: one to his mother, Adaline Hodgin, who resided in Ohio; the other to the Capital City Bank of Des Moines. The indebtedness secured by these mortgages coming due and remaining unpaid, possession of the stock was taken under the mortgage to Adaline Hodgin, and thereupon the Capital City Bank brought this suit, claiming the prior right to and lien upon the mortgaged property.

The question upon which the rights of the parties depends, is that of priority. It appears from the evidence that Adaline Hodgin had indorsed the notes given by F. L. Hodgin to Leon Marks & Co., of Cincinnati, for goods purchased of them, and that she had been assured that in case of trouble she should be protected by security against

¹ Reported by Robertson Howard, Esq., of the St. Paul bar.

such liability. About the first of November, 1883, F. L. Hodgkin visited his mother at her home in Ohio, and she testifies that on that occasion it was agreed and understood that, upon the son's return to Des Moines, he should execute to her a chattel mortgage upon the stock of goods then owned by the son, and kept in the store at Des Moines. The business at Des Moines had originally been carried on by Robert and Frank L. Hodgkin, under the firm name of Hodgkin Bros.; but, during the summer of 1883, Robert withdrew from the firm. The indebtedness of the Capital City Bank was for money borrowed and used in the business of the firm; and it appears from the evidence that the president of the bank had been assured that, in case of need, the bank should be protected by the execution of a mortgage upon the stock.

On the twelfth day of November, 1883, F. L. Hodgkin signed two mortgages covering the stock: one to his mother, and the other to the bank. He instructed his attorney, who drew up the instruments, that he wished to give his mother the preference, by giving her the first lien upon the property. The attorney informed him that this could be done by recording the mortgage to the mother before the one to the bank. The mortgage to Mrs. Hodgkin was accordingly taken by the attorney to the recorder's office the afternoon of the twelfth of November, and filed for record. And on the next morning, the mortgage to the bank was, in like manner, filed for record. At the time of the signing and filing for record of these instruments, neither of the mortgagees knew of the signing of the same. On or about the fourteenth of November, 1883, the president of the bank, having learned of the execution of a mortgage to the bank, sent one of the employes of the bank to the recorder's office to make inquiry concerning the same; and the recorder informed him that two mortgages had been filed: one to Mrs. Hodgkin, and one to the bank. A few days after the recording of the mortgage to Mrs. Hodgkin, she was informed by letter of its execution. Upon part of the complainant, it is claimed that neither mortgage took effect until a complete delivery had been made to the mortgagee; that, under the doctrine laid down in *Cobb v. Chase*, 54 Iowa, 253, S. C. 6 N. W. Rep. 300, the fact that the mortgage was recorded for the benefit of Mrs. Hodgkin, and knowledge of its execution communicated to her, would not, without affirmative action upon her part, amount to an acceptance of the instrument, so as to complete the delivery of the mortgage.

In the case of *Cobb v. Chase* it appeared that there was an agreement that a mortgage should be given upon a certain kind of property, to-wit, live-stock, but the number, nor the specified animals, was not agreed upon; and under this state of facts the supreme court held that the previous agreement could not be construed as equivalent to an acceptance of the mortgage.

In the case of *Everett v. Whitney*, 55 Iowa, 146, S. C. 7 N. W. Rep. 487, a similar question came before the same court, and it was

held that a delivery would be held to have taken place because it had been agreed that the mortgagor was to select the property to be mortgaged, and was to deliver the mortgage to the recorder.

In the case now before the court the agreement between Mrs. Hodgin and her son was that a mortgage was to be executed upon his return to Des Moines upon his stock in trade kept in his store at Des Moines. And this was the identical property included in the mortgage. The facts in this case tend more strongly to prove a delivery and acceptance of the mortgage than those held sufficient in *Everett v. Whitney*. Many cases hold that the passing of a deed or mortgage from the actual control of the grantor into the hands of a third party, the conveyance being beneficial to the grantee, raises a presumption of delivery and acceptance. *Tompkins v. Wheeler*, 16 Pet. 118; *Robinson v. Gould*, 26 Iowa, 89; *Mitchell v. Ryan*, 3 Ohio St. 377.

As it appears from the evidence that the mortgage to Mrs. Hodgin was executed in pursuance of a previous agreement, and that she has recognized its validity by taking possession of the property under it, there can be no question that it is binding and in force between the mortgagor and the mortgagee; and that, as between them, it took effect at the time it was delivered to the recorder. The bank holds under a mortgage, which it clearly appears was intended by the mortgagor to be subject to the mortgage executed to Mrs. Hodgin. When knowledge of the execution of the mortgage to the bank was given to the officers of the bank, they knew that a mortgage had been executed to Mrs. Hodgin, and filed for record the day before the filing of the one to the bank. This was notice to the bank that the mortgage to it was intended to be the second lien upon the property. The bank was not bound to accept this mortgage. Had it refused to accept the second mortgage, and obtained a lien, by attachment or execution, upon the property, it could then have presented the question of its rights as against the mortgage to Mrs. Hodgin, upon the theory that it had acquired a lien upon the property before a complete delivery of the mortgage to Mrs. Hodgin. Instead of so doing, however, the bank accepted the mortgage, and claimed only the rights conferred thereby.

The evidence shows that the mortgagor intended to create a second lien upon the property by the delivery of the mortgage to the bank. There is nothing disclosed in the evidence which creates an equity in favor of the bank as against Mrs. Hodgin, and consequently there is nothing which would justify the court in defeating the intent of the mortgagor in the execution of the two mortgages. The mortgagor intended to give the first and paramount lien to Mrs. Hodgin. She has accepted the mortgage as executed, and taken possession of the property under it. The mortgagor intended to create a second lien upon the property in favor of the bank, and with that intent executed the second mortgage. The bank has accepted the mortgage, and, under the facts of the case, must be held to have accepted it as it was in-

tended by the mortgagor. The evidence shows that the property included in the mortgages has been sold, pending this litigation, by consent of all interested, and that it did not realize enough to pay the amount secured by the first mortgage.

As complainants could only reach any surplus left after payment of the prior lien, it follows that there is nothing left to be decreed to complainants, and the bill therefore must be dismissed; and it is so ordered.

SUN MUT. INS. CO. v. BOARD OF LIQUIDATION OF THE CITY OF NEW ORLEANS.¹

(Circuit Court, E. D. Louisiana. May 14, 1885.)

1. LEGISLATIVE POWERS.

Where there are two classes of creditors with already existing debts, a legislative act could not, by transfer or appropriation of a debtor's property, give to one class a preference, to the exclusion of the other class, to such a degree as to give to one class an immediate and annual source of payment, and postpone to the other all payment for, possibly, a period of 40 years. See *Succession of Taylor*, 10 La. Ann. 510; *Milne v. Schmidt*, 12 La. Ann. 553. It is no more in the power of law makers than of debtors to effect an unequal distribution of the debtor's estate by making an application or transfer thereof among creditors already existing. *Atchafalaya Co. v. Bean*, 3 Rob. (La.) 415.

2. MUNICIPAL BONDS OF THE CITY OF NEW ORLEANS—ACTS OF LA. NO. 58 OF 1882, AND NO. 67 OF 1884, CONSTRUED.

Whatever provisions are contained in the act of 1882 subjecting any property or means of payment, which could be lawfully appropriated, to the payment of the extended bonds or coupon certificates, having been assented to on the part of the holders by accepting of the extension, is a contract which cannot be varied by any change or substitution, no matter how minute, and will continue in its operation upon whatever has been so appropriated till the obligations thereby secured shall have been fully paid. If the language in the act of 1882 did include the excess of the premium bond tax and the other property included in the grant under the act of 1884, while it would be valid as a contract between the complainants, the holders of the new obligations, and the city, it would be void so far as concerns the judgment creditors whose judgments are for debts existing antecedently to the passage of the act of 1882, under which the complainants claim, up to the point of the said judgment creditors being admitted to a proportionate or ratable share of such excess and other property.

In Chancery. On rule for an injunction.

Henry J. Leovy, E. D. White, and Eugene D. Sanders, for complainant.

Henry C. Miller, for defendant.

BILLINGS, J. This matter is submitted upon a bill of complaint, and affidavits and exhibits, on behalf of the complainants, and affidavits and documents on behalf of the respondents, upon an application for an injunction. The complainants are holders of "extended

¹ Reported by Joseph P. Horner, Esq., of the New Orleans bar.

bonds" and of "coupon certificates," under the act of 1882, and as such holders they seek to enjoin the respondents from issuing the bonds provided for under the act of 1884 to judgment creditors, upon the ground that the means provided for the payment of the latter are more or less identical with those set apart for the payment of the former. After a consideration of the arguments which were urged with such ability upon this question, it seems to me to be unnecessary to pass upon it. Without passing upon this question, even if the construction of the two acts be such as is contended for by complainants, there is, nevertheless, an impediment in the way of enforcing the grant of the act of 1882, so far as relates to the judgment creditors included in the provisions of the act of 1884. Both acts relate to the surplus arising under or out of the taxes levied in pursuance of the act creating the premium bond system and other property. Since this surplus is an annual result for a great number of years, wrought out by the fact that only a portion of the bonded creditors became participants in the scheme, it is in its nature and capacity to be disposed of either by the legislature or by the debtor, subject to the same legal limitations and rules as any other property. Until the legislature had given to a creditor a grant or legislative permission to share in this property, it might have been impossible for him to present the question of his right to a share in this residue of a tax; but by the act of 1884 judgment creditors have been placed in such a situation that they can lawfully present the question of their right to a participation in this residue to the extent which this act recognizes their right.

It is to be observed that the act of 1884, under which the judgment creditors claim, includes only such judgments as had been or should be obtained against the city of New Orleans for debts which had an existence prior to the year 1879. It relates, therefore, only to debts owed antecedently to its passage, and has no reference to debts thereafter arising. The debts represented by the extended bonds and the coupon certificates which form the basis of the claim of the complainants were also pre-existing, having been owed by the city for many years. The debts on both sides of this controversy, therefore, were debts in existence antecedently to the passage of the act of 1882.

The article No. 8,150 (old) of the Civil Code had been in force as a part of the law of the state since the year 1825. That article is as follows: "The property of the debtor is the common pledge of his creditors." So far as the legislature allows municipal corporations to become debtors they are, equally with individuals, within the dominion of this law. Since the power of taxation is vested in the legislature so far as concerns the fresh levy of taxes, this rule, however binding in equity and upon the conscience of the legislators, could not be enforced. So far, also, as future debts are concerned, the legislature could to any extent exclude their holders from participation in the property of a debtor. But so far as pre-existing debts are con-

cerned, and so far as relates to any revenue which, though springing from a tax, had come to have the qualities of property,—i. e., so far as relates to this surplus, and the other property about which this contention is made,—the legislature had no power to make any transfers or assignment which should not be ratable among all the creditors similarly situated as to the absence of liens. This provision of the statute guarantying to all the creditors this impartial distribution had entered into all these transactions on both sides, both as a limit and a guaranty, and had the force and effect of a paramount law, and restricted the old bondholders from taking, merely by virtue of the act authorizing the issue of these new obligations, any portion of the property of the debtor, which would leave any class of creditors then existing without a proportionate provision or means of payment out of the debtor's property.

Did the act of 1882, if construed as it is contended for by the complainant, do this? Using words in a general sense, the debtor had no property upon which a writ of *feri facias* could operate. The act of 1876 had, so far as the matter was capable of legislative restriction, limited the authority of the city to levy taxes to 15 mills on the dollar. Five mills of this had been devoted to the premium bonds. By the act of 1882 five mills, if necessary, had been devoted to these extended bonds and coupon certificates. The alimony of the city, using that word to include only the expenses absolutely necessary to enable the city government to discharge its purely public functions or duties, has been abundantly established to consume at the very least five mills.

The judgment creditors had been deprived by article 1 of the miscellaneous ordinances, subdivision 3, of the constitution of 1879, of all opportunity of using their judgments in the payment of taxes. The hollow and delusive provisions of the act of 1870, No. 5, had been judicially declared to be satisfied by the annual devotion on the part of the city of an amount merely nominal for the payment of hundreds of thousands of dollars of judgments. Unless, then, the judgment creditors could participate in that portion of the five-mill premium bond tax which remained after all who had any right thereto had been paid, they were left with a debtor who had been stripped of every means of paying any portion of these judgments. If, then, it was the intention of the legislature, as is contended by the complainants, by the act of 1882 to transfer to the extended bond and coupon certificate holders all of this surplus, and that intention should have operation, it would result that where there were two classes of creditors, with already existing debts, the legislative act could, by a transfer or appropriation of a debtor's property, give to one class a preference to the exclusion of the other class, to such a degree as to give to one class an immediate and annual source of payment, and postpone to the other all payment for possibly a period of 40 years. I think the judicial decisions of all courts, and especially of our own, have

declared such a preference prohibited. For the doctrine of the statute compelling equal distribution or provision among or for co-existing creditors, i. e., to prevent any partial appropriation by the debtor, see *Succession of Taylor*, 10 La. Ann. 510, and an affirmation of the law of that case in *Milne v. Schmidt*, 12 La. Ann. 558. This statutory rule operates upon the legislature as well as upon the debtor. It is no more in the power of law-makers than of debtors to effect an unequal distribution of the debtor's estate by making an application or transfer thereof among creditors already existing. This also has been judicially declared. In *Atchafalaya R. & Banking Co. v. Bean*, 3 Rob. 415, the court says:

"I think it clear that the legislature cannot constitutionally, by act subsequent to the creation of a debt, interfere to change or disturb the relation between debtor and creditor, or the relative rank of creditors *inter se*, and that two creditors who stood equal originally in the eyes of the law, and had an equal privilege to be paid, neither having any special lien or privilege over the other, must remain forever equal, notwithstanding any act of the legislature sanctioning a different doctrine."

Unless, then, the old bondholders have some privilege upon the excess, it could not be *in toto* given by the act of 1882 to the exclusion of already existing judgment creditors. But the old bondholders had no privilege upon this excess. By the acts under which the different series of bonds were authorized, a right to a tax was given, which remains in all its original force, except as waived by the holder's own volition. But this is altogether distinct from any premium bond excess, and if it was to be considered at all, would be an obstacle rather than aid to the complainants; for it would present the case of a complainant with a perfect security asking to have a preference in his favor maintained as against another creditor who had no security whatever. Until the old bondholders assented to the premium bond plan, by an exchange of his bond, he could claim nothing under it. Till such acceptance the premium bond act stood as an unaccepted and therefore inoperative offer. The provision that the drawn premium bonds should be applied to the purchase of the old bonds, until in some way assented to by the holders, was, so far as relates to such holders, a mere legislative provision, having no quality of a contract. In fact, the act of 1880 had altogether recalled this provision.

It was urged, *arguendo*, that section 10 of the act of 1882 guaranteed the continuous application of the drawn premium bonds to the purchase of the old bonds, according to sections 11 or 5 of the premium bond act. But the carefully selected words of that section of the act of 1882 exclude such an interpretation, and merely declare the whole act a contract, which may be enforced by "every judicial process then in force, or in force at the time of the creation of the debt;" i. e., the rights to be enforced were those created by the act of 1882. The process for their enforcement should be that in force in 1882, as well as that in force at the time of the issuing of the

bonds. This section defines and secures the means of enforcing the rights of the holders of the new securities, but does not enlarge those rights. The act of 1882 correctly assumes that its own force alone was to operate to transfer this surplus, and if it was not in the power of the legislature at that time to exclude the judgment creditors from an equal participation in it, then the complainants have failed to establish their case.

The conclusions which followed from the facts and the law of the case are:

1. That whatever provisions are contained in the act of 1882 subjecting any property or means of payment, which would be lawfully appropriated, to the payment of the extended bonds or coupon certificates, having been assented to on the part of the holders by accepting of the extension, is a contract which cannot be varied by any change or substitution, no matter how minute, and will continue in its operation upon whatever has been so appropriated till the obligations thereby secured shall have been fully paid.

2. If the language in the act of 1882 did include the excess of the premium bond tax and the other property included in the grant under the act of 1884, while it would be valid as a contract between the complainants, the holders of the new obligations, and the city, it would be void so far as concerns the judgment creditors whose judgments are for debts existing antecedently to the passage of the act of 1882, under which the complainants claim, up to the point of the said judgment creditors being admitted to a proportionate or ratable share of such excess and other property.

3. It follows, therefore, that the act of 1884 authorizes the issuance of bonds only to creditors who have obtained judgments for debts existing antecedently to the time of the passage of the act of 1882. The injunction must be refused.

APPENDIX.

Amount of coupons funded into coupon certificates due within 10 years, under section 4 of act of 1882, - -	\$1,913,617 50
Amount of bonds extended 40 years under section 3, -	2,695,600 00
Both coupon certificates and extended bonds are payable at any time, at option of the city.	
Six per cent. on coupon certificates, - - - -	\$114,817 00
Six per cent. on extended bonds, - - - -	161,736 00
Total interest, - - - -	\$276,553 00
Value of property subject to taxation in New Orleans, -	\$115,000,000 00
Five mills upon each dollar gives - - - -	575,000 00
Deduct ordinary shrinkage, 20 per cent., leaves 80 per cent., - - - -	460,000 00
Deduct amount necessary to pay total of first year's interest, - - - -	276,553 00
Leaves to be applied to bonds and certificates, - - - -	183,447 00
Say in round numbers, - - - -	180,000 00

So that amount reduced in 1885 would be		\$180,000 00
In 1886,	- - - - -	190,000 00
In 1887,	- - - - -	202,000 00
In 1888,	- - - - -	227,263 00
In 1889,	- - - - -	240,898 00
In 1890,	- - - - -	255,351 00
In 1891,	- - - - -	270,672 00
In 1892,	- - - - -	286,914 00
Total,	- - - - -	\$2,068,818 00

So that prior to January 1, 1893, which is the day of the maturity of the coupon certificates, they would be paid and wholly withdrawn. There would be left thereafter the entire net proceeds of the five-mill tax, *i. e.*, \$460,000, to be applied annually, in the first place to the payment of the interest of the extended bonds, and secondly to the payment of the extended bonds.

Net amount of tax, deducting 20 per cent. for shrinkage,		\$460,000
In 1893—First year's interest on extended bonds,	- - -	161,736

Balance for payment of extended bonds,	-	\$298,264
In 1894,	- - - - -	316,259
In 1895,	- - - - -	335,133
In 1896,	- - - - -	355,243
In 1897,	- - - - -	376,558
In 1898,	- - - - -	399,151
In 1899,	- - - - -	427,100

Total,	- - - - -	\$1,507,710
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So that prior to January 1, 1899, just 23 years before the extended bonds are compulsorily due, both the extended bonds and the coupon certificates would be wholly paid and withdrawn.

(Extracts from Act No. 58 of the Legislature of Louisiana of 1882, Above Referred to.)

Section 1. Be it enacted by the general assembly of the state of Louisiana, that the city of New Orleans, acting through the board of liquidation of the city debt, or other duly-authorized officers, be, and she is hereby, authorized and empowered to extend the bonded indebtedness of said city, other than premium bonds outstanding at the passage and promulgation of this act, for the period of forty years, from January 1, 1883, at a rate of interest not exceeding six per cent., provided the city shall have the right to call in said bonds, so renewed or extended, for payment at par after the year 1895, upon giving notice to that effect during a period of three months.

Sec. 2. Be it further enacted, etc., that the provisions of the foregoing section be, and they are hereby, extended to all bonded obligations of the city, except premium bonds, whether due or to become due, including such as may have been merged into judgments, but for which no tax, special or otherwise, has yet been levied: provided, nothing in this act shall be considered as a waiver of prescription which may have accrued or may accrue on such bonds in favor of the city.

* * * * *

Sec. 6. Be it further enacted, etc., that all funds now, or that may be at the time of the passage of this act, in the hands of the board of liquidation of the city debt, under existing laws, shall be deposited with the fiscal agent of

the board, to the credit of the account known as the city debt fund, which fund shall be applied exclusively to the purchase, on the most favorable terms, not exceeding par, of face value of any of the outstanding bonds or coupons, and the certificates therefor, of said city, which are extended to be retired under the provision of this act: provided that said city debt fund shall be used first to provide for and pay the interest on the bonds and certificates contemplated herein. And it shall be the duty of the council, in its annual budget, to make an appropriation to carry out the provisions of this act.

• • • • •

Sec. 10. Be it further enacted, etc., that this act, in all its parts, provisions, terms, conditions, obligations, and limitations, is to be deemed and to constitute a valid, binding contract between the state of Louisiana, the city of New Orleans, its residents, citizens, and tax-payers, and the holders of the bonds herein authorized to be extended, and the judicial process of the state of Louisiana, now authorized by law, or in force at the creation of said bonded debt as aforesaid, may be resorted to, and is to be recognized and applied to the judges thereof, for the enforcement of its provisions in favor of any party having and showing just cause for complaint or injury, or a violation of any of the provisions thereof.

(Extract from Act No. 67 of the Legislature of Louisiana of 1884, Above Referred to.)

Section 1. Be it enacted by the general assembly of the state of Louisiana, that section 2 of act No. 133, approved April 10, 1880, be amended and re-enacted so as to read: That the commissioners of the consolidated debt, or the city officers, provided and named in section 1 of this act, and the syndicate hereby created, shall constitute a board of liquidation of the city debt, and the said board shall have exclusive control and direction of all matters relating to the judgment and bonded debt of the city of New Orleans. The board of liquidation shall cause to be prepared bonds of the city of New Orleans, which bonds shall only be used for the purpose of negotiation or exchange, as hereinafter provided. The said bonds shall be signed by the mayor and treasurer of the city of New Orleans, and countersigned by the comptroller of said city; they shall be dated June 1, 1884, and be made payable in fifty years from said date, or sooner at the option of the city, and bear interest at the rate of five per cent. per annum from the date of said bonds, payable semi-annually on the first days of June and December of each year; said interest to be represented by one hundred coupons annexed to each bond. The said bonds and interest coupons annexed may be issued for such sums as may be deemed most convenient by the board of liquidation, and be made payable at such place or places as may be designated in the bond; but the said bonds shall be made payable, interest and principal, in lawful money of the United States.

Sec. 2. Be it further enacted, etc., that section 3 of act No. 133, approved April 10, 1880, be amended and re-enacted so as to read: That the said board of liquidation of the city debt be, and it is hereby, authorized and required, and it is made the duty of the said board, to retire and cancel the entire debt of the city of New Orleans now in the form of executory judgments and registered under the provisions of act No. 5 of 1870, and that which hereafter may become merged into executory judgments and likewise registered, except the floating debt or claims created for and against the year 1879 and subsequent years; that it is the full intent and meaning of this act to apply solely the privileges thereof to executory judgments at present rendered against such city, and to such floating debt or claims against said city for 1878, and previous years, merged and to be merged into executory judgments, whether

absolute or rendered against the revenues of any particular year or years previous to the year 1879; that, for the purpose of retiring and canceling said judgment debt, the said board is authorized and required either to sell the bonds to be issued under this act, at not less than their par value, and apply the proceeds thereof to the payment of the said judgments, as above specified, or issue said bonds in exchange for said judgments.

Sec. 3. Be it further enacted, etc., that section five of act No. 133, approved April 10, 1880, be amended and re-enacted so as to read: That it shall be the duty of the city of New Orleans to turn over and transfer to the board of liquidation, immediately after the passage of this act, all property of the city of New Orleans, real and personal, not dedicated to public use: provided, that in the sale of batture property, which is herein included, the right of the city to all future accretions shall be reserved; all assets of said city realized, and to be realized, except such assets and revenues as pertain to the administration of said city, and necessary for the support of the same as at present authorized; all uncollected revenues of said city anterior to the year 1879, when collected; and the said board is hereby authorized and required to dispose of said property and assets, other than stock held in corporations, on such terms and conditions as said board may deem to be to the best interests of the city, and apply the proceeds thereof, together with the uncollected revenues above mentioned, when the same are collected—*First*, to the payment of the interest on the bonds authorized herein, in the event that the tax authorized by section eleven of said act No. 133, approved April 10, 1880, be not levied; *second*, to the redemption and cancellation of the said bonds: provided, that bids for the sale of the same shall be by sealed proposals, and that preference shall be given to the lowest bidder: and provided further, that no bids above the par value of said bonds shall be accepted.

ALLEN and others v. JONES and others, Intervenor.¹

(Circuit Court, E. D. Louisiana. May 14, 1885.)

1. BILLS OF LADING AND WAREHOUSE RECEIPTS.

The acts of Louisiana, No. 150 of 1868 and No. 72 of 1876, mean that the bills of lading and warehouse receipts for property shipped or warehoused shall fully represent the property, so that a transfer of those paper titles shall vest in the transferee the property as fully as the delivery of the property itself.

2. LIEN OF VENDOR OF AGRICULTURAL PRODUCTS.

Article 3227 of the Civil Code of Louisiana gives the right to the vendor to seize the things sold in whatsoever hands or place they may be found, and to enforce his lien for the price with preference over all other claims, as well against those who hold under title acquired through bills of lading as against those whose title is evidenced by actual delivery.

At Law.

Charles S. Rice, for plaintiffs.

Thomas L. Boyne and George Denegre, for intervenors.

BELLINGS, J. This cause having been tried without a jury, the same having been waived, the court finds the following as the facts of the case:

The plaintiffs sold to the defendants on the third day of June, 1884, 268 bales of cotton, for the sum of \$12,665.25, the terms of the sale being for

¹ Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

cash. On the following day the cotton was delivered to the said defendant, through the warehouseman, where the same was stored. On the sixth of June the said defendants paid upon this purchase the sum of \$1,800, which they derived by or from advances made by intervenors on bill of lading for the cotton, leaving unpaid the balance of the price of the cotton, viz., the sum of \$10,865.25. The cotton was an agricultural product of the state of Louisiana, and the sale was made to the defendants by the plaintiffs in the city of New Orleans. On the sixth of June all of the cotton was either laden on board or delivered in the possession of the steam-ship Counsellor, bound for Liverpool, and bills of lading in regular form were on that day issued for said cotton by the master of said steam-ship, and were on the same day transferred by the usual indorsement to the intervenors, Brown Bros. & Co., who paid for the same the sum of £2,680, in the currency of the United States \$13,400, the full value of the cotton. On June 7th the plaintiffs instituted this suit, claiming a vendor's lien for the unpaid balance of the price of the cotton, and on the same day sequestered the cotton and took it out of the possession of the master of the said steam-ship Counsellor, who held the same for shipment, having given the said bills of lading therefor.

As the conclusions of law, drawn from these facts, the court finds:

(1) That the acts of 1868, No. 150, and of 1876, No. 72, mean that the bills of lading and warehouse receipts for property shipped or warehoused shall fully represent the property, so that a transfer of those paper titles shall vest in the transferee the property as fully as a sale accompanied by a delivery of the property itself. (2) That the acts of 1854 and 1855, now found in Civil Code, art. 3227, since they give the right to the vendor to seize the thing sold *in whatsoever hands or place* they may be found, and enforce his lien for the price, which the statute declares shall have preference over all other claims, operates as well against those who hold under purchase through bills of lading as well as by transfer and actual delivery. (3) That the plaintiffs' claim must prevail over that of the intervenors'.

Therefore the plaintiffs must have judgment enforcing their rights upon the cotton to the extent of the unpaid price. To that extent the intervenors' claim is dismissed; beyond that, allowed. Plaintiffs must have judgment against the defendant for all costs prior to the intervention, and all costs subsequent to the intervention must be paid out of the cotton sequestered.

(Extract from Act No. 150, of the Legislature of Louisiana of 1868, Referred to Above.)

Sec. 6. Be it further enacted, etc., that cotton-press receipt given for any goods, wares, merchandise, grain, flour, or other produce or commodity stored or deposited with any cotton-press, wharfinger, or other person, or any bill of lading given by any forwarder, boat, vessel, railroad, transportation or transfer company, may be transferred by indorsement therein, and any person to whom the same may be transferred shall be deemed and taken to be the owner of the goods, wares, merchandise, grain, flour, or other produce, or commodity therein specified, so far as to give validity to any pledge, lien, or transfer made or created by such person or persons; but no property shall be delivered, except on surrender and cancellation of said original receipt, or bill of lading, of the indorsement of such delivery thereon. In case of partial delivery, all cotton-press receipts, or bills of lading, however, which shall have the words "not negotiable" plainly written or stamped on the face thereof shall be exempt from the provisions of this section.

(Extracts from Act No. 72 of the Legislature of Louisiana of 1876, Referred to Above.)

Sec. 4. Be it further enacted, etc., that parties who may borrow money on the faith of warehouse receipt, representing property in store, shall file their affidavit with the pledgees that such property is theirs, the pledgeors' personal property, or that it is the property of some party for whom the pledgeor is acting as agent, factor, commission merchant, or in any other fiduciary capacity; and that said party is justly and truly indebted to the pledgeor in an amount equal in value to the value of the property pledged, as specified in the warehouse receipt, for moneys paid to him or paid by his order and for his account by the party or consignee making the pledge. The cashier of a bank, or the secretary of any insurance company incorporated or working under any law in the United States or of this state, is hereby authorized to administer the oath contemplated under the provisions of this act. Any deviation therefrom shall render the party or parties so deviating liable for the value of the property, or any excess in value over and above the amount for which it may have been pledged in any manner specified in section one of this act, and to prosecute for perjury, and also for obtaining money under false pretenses.

Sec. 5. Be it further enacted, etc., that the vendors' lien of five days privilege, now allowed in commercial transactions for the payment of the purchase price, shall not be affected by the provisions of this act, except in case in which a warehouse receipt has been pledged as collateral for money borrowed. The holder of the warehouse receipt shall be considered and held as the actual owner of the property described in the receipt, and no clause of this act shall operate to the detriment or injury of the holder of a warehouse receipt, to the extent of the value of the property specified, made and issued in accordance with and under the provisions of this act: provided, that where the factor, agent, or pledgeor may have wrongfully pledged, in violation of this act, any property, the lien of the owner shall be valid even against the third holder of the warehouse receipt.

Sec. 8. Be it further enacted, etc., that all warehouse receipts, as by this act provided, shall be negotiable by indorsement in blank, or by special indorsement in the same manner and to the same extent as bills of exchange and promissory notes now are.

(Extract from the Civil Code of Louisiana, Referred to Above.)

Art. 3227. He who has sold to another any movable property which is not paid for has a preference on the price of his property over the other creditors of the purchaser, whether the sale was made on a credit or without, if the property still remains in the possession of the purchaser. So that, although the vendor may have taken a note, bond, or other acknowledgment from the buyer, he still enjoys the privilege. Any person who may sell the agricultural products of the United States in the city of New Orleans shall be entitled to a special lien and privilege thereon to secure the payment of the purchase money for and during the space of five days only after the day of delivery, within which time the vendor shall be entitled to seize the same in whatsoever hands or place they may be found; and his claim for the purchase money shall have preference over all others. If the vendor gives a written order for the delivery of any such products, and shall say therein that they are to be delivered without vendor's privilege, then no lien shall attach thereto.

WEILL v. THOMPSON and others, Intervenors.¹*(Circuit Court, E. D. Louisiana. January 20, 1885.)***IMMOVABLES BY DESTINATION—MORTGAGE.**

Machinery attached to a plantation, and used for plantation purposes, though included in a mortgage, if purchased and removed, even during the pendency of a suit to enforce the mortgage, were withdrawn from the operation of the mortgage. When machinery is removed from a plantation, it again becomes a movable, and as such could not be susceptible of mortgage, even if the purchaser was in bad faith; that is, purchased with knowledge of the mortgage. *Citizens' Bank v. Knapp*, 22 La. Ann. 117.

At Law. On trial of interventions.

C. B. Singleton, R. H. Browne, and B. F. Choate, for plaintiff.

Joseph P. Hornor and Francis W. Baker, for intervenors.

BILLINGS, J. The question submitted is upon the intervention. Defendant executed a mortgage to plaintiff of a plantation. At the time of the execution of the mortgage, the mules and machinery in question were upon the plantation, and in use in connection with it for the purpose of working it. Subsequently, and with knowledge of the mortgagee, the intervenors purchased these articles; they were severed from the plantation, and were in the possession of intervenors when the proceedings to foreclose the mortgage were instituted. That mules and machinery so situated were by destination immovables, is determined by Civil Code La. art. 468.

The case of *Citizens' Bank v. Knapp*, 22 La. Ann. 117, holds that machinery attached to a plantation and used for plantation purposes, though included in a mortgage, if purchased and removed, even during the pendency of a suit to enforce the mortgage, were withdrawn from the operation of the mortgage. The ground upon which the conclusion of the court is placed, is that, when detached from the sugar-house and removed from the plantation, the machinery became again a movable, and as such could not be susceptible of mortgage; that this would be true even if the purchaser was in bad faith; that is, purchased with knowledge of the mortgage.

A strong argument, both at the trial and subsequently by brief, was made in favor of the destination which the law had given to the mules and machinery, continuing so long as the persons dealing with the property knew of the mortgage. But in cases not involving any provision of the constitution of the United States, and not springing out of negotiable paper, (which last are ranked among causes governed by the general law-merchant and not by the local law,) the construction given by the court of last resort of a state, and not qualified by any subsequent decision, as to the meaning of a statute, is a part of the statute, and is binding upon the federal courts.

¹ Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

In *Leffingwell v. Warren*, 2 Black, 603, the supreme court says:

"The construction given to a statute of a state by the highest judicial tribunal of such state is regarded as a part of the statute, and is as binding upon the courts of the United States as the text."

There is no ambiguity in the opinion of the supreme court, (*Citizens' Bank v. Knapp*), nor has it been at all qualified by any subsequent decision of that tribunal. The question submitted is not one of those where the federal courts may act independently of the judicial construction of the highest tribunal of a state. The reported case is even stronger than this, for the severance of the property from the plantation was effected even after the institution of the suit to foreclose. The knowledge there was certainly as clear as here. This case is, therefore, paramount with this court, and leaves no latitude, except to ascertain carefully what the views of the court, as expressed, are. These close the case against the plaintiff and require a judgment in favor of the intervenors, with a reservation to the plaintiff to sue for all damages if the property mortgaged shall not or has not realized a sufficient amount to pay the mortgage. Let there be judgment accordingly.

HARTINGER and others v. FERRING and others.¹

(Circuit Court, N. D. Iowa, E. D. June 9, 1885.)

PARENT AND CHILD—INHERITANCE BY ILLEGITIMATE CHILD—PROOF OF PATERNITY AND RECOGNITION—CODE IOWA, § 2466.

To enable an illegitimate child to inherit, under section 2466 of the Iowa Code, it must appear that the recognition or proof of paternity relied upon, occurred after the passage of the act by the legislature.

At Law. Demurrer to petition filed by Justina Kahl, intervenor.
Longueville & Lenehan, for plaintiffs
Utt Bros., for intervenor.

SHIBAS, J. In January, 1881, one Joseph Koetzl died intestate at Dubuque, Iowa. The defendant Peter Ferring was appointed administrator of the estate by the circuit court of Dubuque county. After the payment of all claims against the estate, there was left in the hands of the administrator the sum of \$3,765, which he was ordered by the circuit court to pay over to the heirs of the decedent. The plaintiffs herein brought this action against the administrator, for the purpose of establishing their right to the fund as next of kin and heirs at law of Joseph Koetzl. The intervenor, Justina Kahl, with leave of the court, filed a petition of intervention, wherein she asserts that she is the illegitimate daughter of Koetzl; that she was born in the kingdom of Bavaria on the eleventh of April, 1834, and has

¹ Reported by Robertson Howard, Esq., of the St. Paul bar.

ever since been and is now a resident of Bavaria; that "said Joseph Koetzl in his life-time, to-wit, from the time of her birth up to the year 1850, in the kingdom of Bavaria, recognized her, said Justina Kahl, as his child, and that such recognition was general and notorious; that on the fourteenth day of May, 1834, in certain proceedings had before the royal Bavarian county court, it was determined and adjudged that said Justina Kahl was the illegitimate daughter of said Joseph Koetzl; and the intervenor claims that such recognition and adjudication enable her to inherit her father's property under the provisions of section 2466 of the Code of Iowa, which enacts that illegitimate children "shall inherit from the father, whenever the paternity is proven during the life of the father, or they have been recognized by him as his children; but such recognition must have been general and notorious, or else in writing."

To this petition the plaintiffs interpose a demurrer on the ground that the alleged adjudication by the court in Bavaria was had, and the acts of recognition took place, before the Code of 1851 took effect; and that previous to that time, under the laws of Iowa, an illegitimate child could not inherit the estate of the father, even though the paternity had been fully established or recognized.

Previous to the adoption of the Code of 1851, the provisions of the statute in force did not change the rule of the common law that an illegitimate child could not inherit the estate of the father. The Code of 1851 enacted that illegitimate children should "inherit from the father, whenever they have been recognized by him as his children; but such recognition must have been general and notorious, or else in writing." By the Code of 1873 it is provided that such children may also inherit "from the father whenever the paternity has been proven during the life of the father."

The question presented for determination is whether the adjudication of paternity and recognition of the relationship had and performed before the enactment of the Codes of 1851 and 1873, should be held sufficient, under these statutes, to confer the right of inheritance, or whether the intervenor must show a recognition since the adoption of the Code of 1851, or an adjudication since the passage of the Code of 1873. This question was before the supreme court of Iowa in the case of *Crane v. Crane*, 31 Iowa, 296, but was not ruled upon; and my attention has not been called to any other case in which the question has been determined by the supreme court of Iowa.

On part of the intervenor it is claimed that the rule of inheritance is always subject to legislative control, and may be changed at any time, and that such change will affect the *status* in all cases save those wherein vested rights have accrued. It cannot be questioned that the mere expectation of inheriting property is not deemed to be a vested right, and the rules of descent may be lawfully changed, and such change may affect all estates not already passed to the heir by the death of the owner. Under this doctrine it is clear that it was

within the power of the legislature, when adopting the Codes of 1851 and 1873, to modify or change the rules of descent previously in force, and such changes would be applicable to all estates vesting after the taking effect of these Codes. Thus, if the legislature had, in 1851, enacted that illegitimate children, if their paternity was thereafter acknowledged in writing, should inherit equally with legitimate issue, it could not be questioned that the rule thus established would control in all cases to which it was applicable, and in which the estate had not vested before the taking effect of the legislative enactment.

The question to be determined in this cause, however, is not so much the right or authority of the legislature to change the rules of descent, as it is the true meaning of the enactment; that is to say, whether it was the intent of the legislature to provide that a past recognition of paternity should have the effect of conferring rights of inheritance, or must such recognition have been made after the passage of the act? It is clear from the very language of the statute that it was not intended to confer the right of inheritance upon all illegitimate children. The Code of 1851 makes the right of inheritance in case of illegitimacy depend upon the performance of certain acts by the father. After the adoption of the Code of 1851, the acts of recognition contemplated in the statute had attached thereto certain legal consequences, and the presumption legally arises that the father recognizing his illegitimate children in the modes pointed out by the statute intends, by such recognition, to confer upon them the right of inheritance. If, however, it be held that the statute is intended to give force to acts of recognition performed before the adoption of the Code, then we give an effect to an act which it did not legally have when performed. The statute would thus be given a retroactive effect, and an act which, when done, had no legal significance, and was not intended nor understood by the parties to it to affect any right of inheritance, would be held to confer such a right. Whatever may be said of the power of the legislature to thus attach to an act done a legal significance which it did not possess when done, it is clear that it will not be presumed that it was the intent of the legislature to make the statute retroactive in this particular, unless such intent is clearly established by the language of the statute. The ordinary presumption is that statutes are intended to be prospective alone in their operation.

There is nothing found in the section of the Code in question, nor in the context, which indicates any purpose to make the statute retroactive. The better rule would seem to be, therefore, to hold that, to enable an illegitimate child to inherit under this section of the Code, it must appear that the recognition or proof of paternity relied upon, occurred after the passage of the act by the legislature; it being, in the language of the supreme court in *Stevenson's Heirs v. Sullivan*, 5 Wheat. 260, "most reasonable so to construe the law as to enable the father to perceive all the consequences of his recognition at the

time he made it." The reasoning in the case just cited, and in that of *Brown v. Belmarde*, 3 Kan. 53, is directly applicable to the question involved in this cause, and supports the conclusion reached.

The demurrer to the intervening petition is therefore sustained.

FARWELL and others v. SPALDING.

(Circuit Court, N. D. Illinois. May 26, 1885.)

CUSTOMS DUTIES—ADDITIONAL DUTY ON GOODS IN WAREHOUSE MORE THAN ONE YEAR—DATE OF ORIGINAL IMPORTATION.

Held that, as to goods which have been transported from an exterior port on first arrival to an interior port of transportation, the words "date of original importation" (section 2970, Rev. St.) mean the date of arrival of the goods at the interior port of destination.

At Law.

Percy L. Shuman and Jo. H. Defrees, Jr., for plaintiff.

Chester M. Dawes, Asst. U. S. Atty., for defendant.

BLODGETT, J., (*orally*.) The plaintiff in this case imported a quantity of goods by way of the port of New York, from whence they came under bond to the port of Chicago, and within a year after their arrival in Chicago, but more than a year after their arrival at the Atlantic port, plaintiffs offered to pay the duties and charges, but the customs officers here assessed an additional duty of 10 per cent. on the amount of duties and charges due thereon. Heyl, pt. 1, p. 57, § 2970. The plaintiff paid this added duty under protest, and now brings suit to recover the same.

The law under which it was claimed this additional duty had been incurred, reads as follows:

"Sec. 2970. Any merchandise deposited in bond in any public or private bonded warehouse may be withdrawn for consumption within one year from the date of original importation, on payment of the duties and charges to which it may be subject by law at the time of such withdrawal; and after the expiration of one year from the date of original importation, and until the expiration of three years from such a date, any merchandise in bond may be withdrawn for consumption, on payment of the duties assessed on the original entry, and charges, and an additional duty of 10 per centum on the amount of such duties and charges."

The only question in this case is, when does the year begin to run as to goods transported from an exterior to an interior port, and warehoused in bond at the interior port? Does it begin to run from the date of the arrival of the goods at the exterior or interior port? The statute says, "within one year from the date of original importation." A careful examination of the legislation by congress, out of which has been developed our present system of transporting goods in bond from their port of first arrival to their interior port of destination, and there

allowing them to be warehoused, satisfies me that it was the intention of congress to place importers at the interior ports upon the same footing, and give them the same time for the payment of their duties, as is allowed to importers at exterior ports; and that, as to goods which have been transported from an exterior port of first arrival to an interior port of destination, the words "date of original importation," as used in this section, mean the date of the arrival of the goods at the interior port of destination. It therefore seems to me that, inasmuch as the importer in this case offered to pay the duties and charges upon the goods in question within one year from the time the goods arrived at Chicago and were warehoused there, the additional 10 per cent. was improperly and illegally imposed upon them.

The issue is found for the plaintiff.

COHN and others v. SPALDING.

(Circuit Court, N. D. Illinois. May 26, 1885.)

CUSTOMS DUTIES—UNMANUFACTURED TOBACCO.

Certain tobacco, known to the trade as "scrap tobacco," composed of fragments or pieces broken or cut off in the manufacture of cigars, held to be dutiable as unmanufactured tobacco.

At Law.

Percy L. Shuman and Jo. H. Defrees, Jr., for plaintiff.

Chester M. Dawes, Asst. U. S. Atty., for defendant.

BLODGETT, J., (*orally*.) The plaintiff in this case imported a lot of tobacco and entered it as "unmanufactured or scrap tobacco." It was classed by the appraisers as manufactured tobacco, and assessed at a duty of 40 cents per pound. Heyl, pt. 2, p. 15, cl. 249. The only question in the case is whether this is manufactured or unmanufactured tobacco. The proof in the case shows that it is known to the trade as "scrap tobacco," being composed of fragments or pieces broken or cut off in the manufacture of cigars, and scraps from the tables of the cigar rollers, and that it has yet to undergo some process by which it can be put into form for consumption. The proof in the case shows that it is used either as filling for cheap cigars, or worked into some kind of smoking tobacco, or into cigarettes; and therefore it should be treated, for the purposes of duty, as "unmanufactured tobacco." It was contended at the trial that this tobacco came within the provisions of clause 249 as "stemmed tobacco," but I am of opinion that this designation is used to describe leaf tobacco from which the stems had been removed, and not these sweepings of a cigar factory.

The issue is therefore found for the plaintiff.

GLANZ v. SPALDING.

(Circuit Court, N. D. Illinois. May 26, 1885.)

1. CUSTOMS DUTIES.

Section 7, act March 3, 1883, as to dutiable value of merchandise, construed.

2. SAME—SEAL-SKINS, DUTY ON.

Certain skins bought "undressed," or "in salt," brokerage, commissions, and packing charges on, not part of dutiable value.

At Law.

Percy L. Shuman and Jo. H. Defrees, Jr., for plaintiff.

Chester M. Dawes, Asst. U. S. Atty., for defendant.

BLODGETT, J., (*orally*.) The plaintiff imported four lots of dressed seal-skins, and the inspector, for the purpose of determining the dutiable value, added brokerage, commissions, fire insurance, cost of dressing, dyeing, and warehousing, which the plaintiff paid under protest, and appealed. There was an adverse decision on the appeal, and this suit was brought in apt time to recover the money thus paid.

The proof shows that the skins in this case, as in the usual course of trade in this class of goods, were bought "undressed," or "in salt," as it is called in London, at auction, and in this case the dyer or dresser of these goods acted as the plaintiff's agent in the purchase, and bid off the goods at the auction. He then dyed and dressed the goods, "machined them," as it is called,—that is, passed them through a process by which the coarse hairs were taken out,—got them insured during the process of dressing and dyeing, and, when finished, packed and shipped them to the plaintiff, so that the cost to the importer of these goods was made up of the price paid for the green skins at the auction; the auctioneer's commissions, called "lot money;" the cost of dressing, dyeing, machining, fire insurance during the process of dressing, and the interest on the money advanced by the agent and his commissions, and the cost of packing.

Sections 2907 and 2908 authorized brokerage, commissions, cost of transportation from the place of purchase to the port of shipment, cost of packing, etc., to be added to the cost of the goods at the place where purchased, to make up the dutiable cost; but the act of March 3, 1883, repealed this section. The claim made to recover back the fire insurance item was abandoned on the trial, and the only question, therefore, in this case is as to the items of brokerage, commissions, and packing.

I find that the brokerage, commissions, and packing were improperly added to the cost of the goods, since the repeal of sections 2907 and 2908, and the plaintiff should, therefore, have a finding in his favor for the amount of these items.

YANADA v. SPALDING.

(Circuit Court, N. D. Illinois. May 26, 1885.)

1. CUSTOMS DUTIES—MERCHANT APPRAISAL UNDER SECTION 2930, REV. ST.

The appraisement of the merchant appraisers shall be final, and deemed to be the true value, and the duties shall be levied thereon accordingly, and an importer is not estopped from going below his entry value on any single item of his invoice; and duty should be assessed upon the value returned by the merchant appraisers.

2. SAME—ADDITIONAL DUTY OF TWENTY PER CENT.

Under the circumstances of this case penal duty was improperly assessed.

At Law.

Percy L. Shuman and Jo. H. Defrees, Jr., for plaintiff.

Chester M. Dawes, Asst. U. S. Atty., for defendant.

BLODGETT, J., (orally.) In 1883 and 1884 plaintiff imported three lots of Japanese "curios," which, as I understand from the proof, means rare or curious goods of Japanese manufacture. These goods were entered for duty upon the statement of their market value or cost "in the country from which they were imported," but the collector of the port of Chicago, not being satisfied with the value as entered by the importer, caused the actual market value to be appraised, pursuant to the provisions of section 2900, Rev. St.; whereupon the importer gave notice of his dissatisfaction with the collector's appraisal, and called for the appointment of merchant appraisers, pursuant to the provisions of section 2930, Rev. St. Such merchant appraisers were duly appointed, and examined and appraised the goods; whereupon the collector, upon their report, assessed an additional duty on such appraised value of 20 per cent. *ad valorem*, on the ground that the appraised value exceeded the entry value by 10 per cent. or more.

It appears from the proof that the merchant appraisers reported many of the items of the goods in the invoices at prices below the entry value, and that their appraisement, taken as a whole, did not make the value of the goods equal to 10 per cent. in addition to the entry value; but the collector, for the purpose of assessing the duty, disregarded all the valuations of the items in the invoices by the merchant appraisers, where they made the same lower than the entry value, and took, as the basis of duty, the entry value on all goods appraised below the entry value by the merchant appraisers, taking only the merchant appraisers' value where they had raised the valuation above that of the entry value; and upon this basis the appraised value would exceed the entry value by 10 per cent.

The only question in the case is whether the importer is bound by his own entry value of each item in his invoice, or whether, when he calls for merchant appraisers, they are to examine the goods and put their valuation upon them without regard to the entry value. Section 2930, by its last clause, declares that the appraisal—that is, the

appraisement of the merchant appraisers thus determined—"shall be final, and deemed to be the true value, and the duties shall be levied thereon accordingly." I cannot put any other construction upon this language than that merchant appraisers are given plenary discretion to value all the goods in the invoice, and that their valuation is to be binding, and the guide by which the duties are to be assessed. It seems to me that when the importer is dissatisfied with the appraisal put upon the goods by the collector, and calls for merchant appraisers, this tribunal acts, without regard to the entry value, for the purpose of assessing the duties, and that the importer is not bound to pay duties on any article in the invoice at the entered value where the appraisers report a less value.

In this case, I think the collector erred in assuming that the importer was estopped from going below his own entry value on any single item of his invoice; but, on the contrary, should have assessed the duties on the invoice, as a whole, as appraised and valued by the merchant appraisers, and therefore that the additional 20 per cent. duty was improperly assessed.

The issue is found for the plaintiff.

YOUNG and others v. SPALDING.

(Circuit Court, N. D. Illinois. May 26, 1885.)

CUSTOMS DUTIES—SPECTACLE LENSES OF BRAZIL OR SCOTCH PEBBLE, WITH ROUGH EDGES, DUTY ON.

Spectacle lenses manufactured from Brazil or Scotch pebbles, imported with rough or unfinished edges, and commercially known as "pebbles for spectacles, rough," are free goods.

At Law.

Percy L. Shuman and Jo. H. Defrees, Jr., for plaintiffs.

Chester M. Duwes, Asst. U. S. Atty., for defendant.

BLODGETT, J., (orally.) The plaintiffs imported a quantity of spectacle lenses with raw, or unfinished, edges. They were classed "as a manufacture of glass, or of which glass is the component material of chief value, not otherwise specially enumerated or provided for," and a duty of 45 per cent. *ad valorem* was assessed against them. Heyl, pt. 2, p. 7, cl. 143. The plaintiff contended that these goods should be admitted under the free-list as "Brazil pebbles for spectacles, and pebbles for spectacles rough." Heyl, pt. 2, p. 38, cl. 665. The proof shows that the goods in question are made by sawing the Brazil or Scotch crystals into slabs or plates, from which they are finished in flat, concave, or convex surfaces, for the purpose of being used as spectacle lenses; but the edges are left unfinished, so that they may be fitted to the size or shape of the bows or rims in which they are

to be worn. They are known to the trade as "pebbles for spectacles rough;" although the proof also shows that upon an order for pebbles for spectacles, whether the word "rough" is used or not, goods like these would be sent. Upon the question of fact, the proof is so clear that these goods are what are commercially known as "Brazil pebbles," or pebbles for spectacles, that I can have no doubt they come strictly and readily within the designation of this class of goods in the free-list. They were, therefore, improperly classed as "manufactures of glass," and made dutiable at 45 per cent. *ad valorem*. The plaintiff is entitled to recover the duties paid under protest in this case.

WASHBURN & MOEN MANUF'G Co. and another v. GRINNELL WIRE Co.
and others.

(Circuit Court, S. D. Iowa, C. D. May 26, 1885.)

1. PATENTS FOR INVENTIONS—GLIDDEN BARBED-WIRE FENCE—INVENTION.

The patent granted in November, 1874, to J. W. Glidden, for barbed wire, examined, and *held* valid.

2. SAME—ANTICIPATION.

On examination of the evidence in this case, and a comparison of the Freeman, Merrill, Stone, Schone, and Delhi Fair fences with the Glidden patent, *held*, that the Glidden patent was not anticipated thereby, and is valid.

3. SAME—MACHINES FOR MAKING BARBED WIRE—INFRINGEMENT.

On comparison of the Putnam and Penny machines for making barbed wire, *held*, that the Putnam machine is not infringed by Penny's invention.

In Equity. Opinion on final hearing.

Offield & Towles, Coburn & Thacher, and B. K. Thurston, for complainants.

Wright, Cummins & Wright and Munday & Evarts, for defendants.

BREWER, J. I may say that this is one of the hardest cases I have ever had to try. It has been difficult for me to arrive at a conclusion on the primary question, and though I have given it a great deal of examination and study, my mind does not rest with any satisfaction on the result. That primary question is this: Is this Glidden barbed wire really entitled to a patent? Is there in it enough of invention to make it patentable, or is it simply a mere matter of mechanical skill? Perhaps a brief historical statement may be in order. The first barbed-wire patent was issued in July, 1867, to Hunt, and was for this form, [referring to model,] which, as you see, consists of a mere serrated wheel. The next was to Lucian B. Smith, also in 1867, and for this, [referring to model,] in which the barb is like the hub of a wheel with spokes. That was followed by one to Kelly, in 1868, and covers this, [referring to model,] in which, as you see, the barb is a diamond plate, the lateral wire passing through a hole punched in the middle. Mr. Kelly, in his specifications, also suggested that this

diamond might be placed upon cord; also that two strands might be twisted to keep the diamond barb in place. Then follows the patent to Mr. Glidden. Mr. Glidden's application was dated in October, 1873, and the patent issued thereon in November, 1874. This patent was for this form of fence wire, [referring also to model,] which is the form of barbed wire now in common use. Intermediate the application and patent, in the spring of 1874, Mr. Glidden filed an application for another patent, covering this form of fence wire, [referring to model,] in which he suggested the placing of slotted tubes between the two lateral wires, extending them thus, [pointing to model,] giving, as he thought, greater firmness to the fence. Upon this application he received a patent also, in the spring of 1874. In his application of October, 1873, Mr. Glidden names a twisted fence wire,—a transverse wire coiled about one of the strands of lateral wire, with its two ends projecting in opposite directions and perpendicular to the fence wire; the other lateral wire serving to keep the barbs in position, and preventing lateral as well as vibratory motion. It is, of course, obvious that all of the elements that enter into this Glidden barbed wire were not new with him. The idea of protecting a smooth wire with some kind of a barb to prevent cattle from rubbing against and breaking a fence down, appears in the first patent issued. Then, in Kelly's patent, was the twisting of the two wires; but the coil of the transverse wire between its ends, for the purpose of forming the barb, was, so far at least as its application to fencing purposes, first expressed in the application of Mr. Glidden.

It is true that this coiling of the wire is by itself considered nothing new, it having been of frequent use,—as, for instance, in the springs of door-locks; and it is also claimed by the defendants, that it is nothing but the mere equivalent of the diamond barb of Kelly. But the use of such a coil for the purpose of a barb upon fence wire, and its combination with the other elements in this present structure, was new with Glidden. It is also true that the entire combination—this Glidden barbed fence wire—is a very simple thing, and it looks as though it was going a good ways to give to such a simple structure the rights and protection of a patent; but, simple, though it is, Mr. Glidden first introduced it to the world, and if it has been found of value in the uses of the world, it would also, on the other hand, seem as though he should be entitled to the benefit of the value of that which he has thus contributed.

I am much impressed by the language of Judge BLODGETT in the case tried before him in Chicago, between these same plaintiffs and Jacob Haish, that it is very difficult to draw the line between manifestations of mere mechanical skill and those of invention; yet that this is an invention, and while coming very near to such border line, it is still on the side of patentability. It is true, when we take this structure to pieces, and examine its separate elements, as counsel have in their arguments, it has been, to my mind at least, very diffi-

cult to say that any element was not found, substantially or nearly so, in some one or other of these prior barbed wires. Still, looking at it as a whole, it is unquestionably new, and I think must be held to be the product of invention rather than of mere mechanical skill. As, from time to time during my examination, I have looked at these models of the various forms of wire, I have been reminded of the story told in my early days of Rufus Choate and Daniel Webster. They were engaged in a trial in reference to some patent wheel. After Choate had, in an elaborate argument, noticed, as he thought, all the alleged differences between it and wheels in prior use, and showed that there was nothing to distinguish it from such wheels, Webster rose and said, "If your honor please, there is the wheel." And the more I have looked at this model, the more I have been impressed that there was in this Glidden structure something new, something that required inventive skill to devise, and something that has made the structure of great utility. Following also the line of argument noticed by the supreme court in two or three cases where the actual result demonstrated the great utility, I may add that while such fact is not conclusive, yet it is fair matter of consideration in determining, in questions of doubt, the fact of patentability; and if we look at the history of barbed wire there can be but this one conclusion: that of all the structures and devices this has been the one that has met the want of the public. It is the barbed wire of almost universal use to-day.

Judicial investigation of this question has been but limited. Before Judges BLODGETT and DRUMMOND one case was tried,—the one to which I alluded a few moments since,—and in that the patentability of Glidden's invention was affirmed. It is true, this particular patent now before me was not the one then considered; but still this express point was decided. The cases which were tried before Judges TREAT and McCARY were not based upon this patent, and were decided upon the ground of the invalidity of the reissue of the patent of the spring of 1874, so that the only direct adjudication has been in accord with the views I have expressed. I do not know that I can add anything to express my views and conclusions more clearly or satisfactorily. As I said in the beginning, this question has troubled me greatly. I am no mechanic; have no taste for mechanics; no mechanical turn of mind. And it has been very hard for me to weigh or appreciate the reasons and arguments based upon the facts and laws of mechanics, and I can only say, in concluding this branch of the case, that I have done the best I could.

Passing that, we go to a line of inquiry that is rather more congenial to me. That is as to prior uses; the instances given being some five in number,—being the Freeman, Merrill, Stone, Schone, and Delhi Fair fences. Some of them I do not think present questions of any difficulty.

The Delhi County Fair fence discloses this state of facts: That about

1858 or 1859, some 25 years ago, at a county fair held at the county seat, there was exhibited a fence which, according to the recollection of some of the witnesses, consisted of three strands of wire, on which were fastened barbs like those on the Glidden, and also a board below the wire for the purpose of attracting the attention of the cattle. While several witnesses testify to their recollection of such a fence, and the similarity of the barbs thereon to the Glidden style of barb, other witnesses, including therein the officers of the fair association during those years, have no recollection of anything of the kind. That, of course, is to some extent negative testimony; yet of value. Then there is a line of testimony to show that there was a model of a fence, essentially different from anything in controversy here, circulated in that vicinity and exhibited at that fair. But take the testimony of the defendants alone in reference to the fence. Can you rely on the recollection of witnesses reaching back over 25 years as to the particular form in which a fence seen but for a day or two was constructed? It would be strange if that recollection was so clear and distinct as to the manner in which those wires were barbed or protected by prick-ers, that the court would be justified in relying very much thereon. The infirmities of human memory are such that it does not seem to me that, even if there was no contradictory testimony, their testimony alone would enable the court to say that it was clear that away back in 1858 or 1859, somebody—who he was is not disclosed, and whence he came, or whither he went, nobody knows—presented there a model of a fence with the combination contained in the Glidden patent. I do not have any trouble with that question.

The Freeman fence was also not difficult to my mind. He testified that many years ago, on his father's farm, finding that a single wire on a smooth wire fence had broken, he tried to patch it. The wire being broken, he could not well fasten the two ends together, so he took a link or strip of wire, making a loop in each end of the broken wire, and fastening the link or piece of wire to these two loops, and twisting the ends of the linking wire around the loops. I had before me as an exhibit a couple of links which he claims to have taken from the fence a few years ago, after inquiry arose in regard to it. It is so essentially different in its construction and idea from this barbed wire of Glidden's, that I do not think it is worth much consideration. I do not doubt the substantial truth of his testimony, for I suppose that that which he says he did has been done, wherever wire has been broken, ever since it has been used for fencing. He found it so efficient in keeping cattle away that he said he made quite a string of it. But the whole idea expressed by that form of preparation of wire is so foreign to that of this Glidden patent, that, after I had looked at his links and read the testimony through, I had no difficulty about that.

The Schone fence is a little more difficult of determination, taking them in the order of their magnitude. The Schone fence is this:

Schone, a blacksmith in Brooklyn, in this state, prior to the war, having a window in his shop near which horses were fastened, and finding they broke the glass, first put a link of smooth wire, as he says, across the window to prevent the breaking of the glass; others say it was a rod of iron, and not a piece of wire. At any rate, he put something across there to keep the horses from breaking the glass. Finding that not sufficient, he took some horseshoe nails, sharpened the blunt end, and twisted them around the wire or rod. Finding that those horseshoe nails thus twisted around were not stationary, he wrapped a little piece of wire around to hold them in position. Succeeding with the experiment, as he says,—his blacksmith shop being at one corner of the lot and his house at the other,—he found the boys going over the fence between, and in order to prevent that, as well as to prevent horses from gnawing at the upper board, he put wire on that board, and that wire he protected in the same way with pricklers or barbs of horseshoe nails. He did the same thing on the alley side of his lot, between his shop and stable, and also on the street side south or back of his house, where there was a little swale in the ground. As I read his testimony in regard to the form of the wire, and examined the model which he presented, it did present a form of fence wire which certainly would raise close attention as being very like the Glidden wire, and combining substantially all its elements. This was in 1858. Besides this, defendants introduced several witnesses who testified to seeing the wires upon which were barbs or pricklers, and mentioning the times and the circumstances under which they were at this blacksmith's shop; and, while not so distinct as to the form of the barbs, yet, so far as their recollections went, it was in the line of supporting his testimony. As against that, complainants introduced the testimony of quite a number of witnesses, among others, Mr. and Mrs. Suits, who were in the habit of going into Mr. Schone's premises for the purpose of drawing water from his well, and, so far as Mrs. Suits is concerned, she frequently riding on horseback up the alley where he claimed to have one of these strips of fence wire; the carpenter who tore down, three or four years after, this entire fence, and replaced it with a picket fence; several persons who lived back of Schone's premises and frequently passed, going to and fro, from their places of business to their homes, and all of whom testified that there were no barbed wires of any kind on his fences. Complainants also introduced some witnesses who were in the habit of going to his shop for the purpose of having their horses shod, and who testified that there was simply a bar of plain iron across the windows, and that along the fence between his shop and house, upon which he claims to have put barbed wire as a protection against boys and horses, there was a heap of rubbish scattered, which would prevent horses from being fastened to the fence, and that there were posts outside of this rubbish to which horses were hitched. Now this is the range of the testimony on both sides. It is true that the tes-

timony of those who did not see is somewhat negative in its character, and such testimony is not really of the same value as the positive testimony of those who did see. Yet it was the testimony of those so situated that it seems very probable that if there had been so much of barbed wire as Mr. Schone claims, it must have arrested their attention. I am inclined to think that, upon a mere balancing of the testimony of these various witnesses, the preponderance is in favor of the defendants, as to the existence of some form of barbed wire; but, putting yourself in Mr. Schone's place, and with the purpose which he says he had in view, what might it be expected you would do? No man takes unnecessary labor. He says he sharpened the blunt end of the horseshoe nails; but what for? Would not every purpose he had in view have been accomplished by simply bending the nail around the wire, and pounding the two ends together? That would furnish a barb or pricker, and would be easily made, and it seems more reasonable and easy of belief that this, which could be done so easily, and which would answer every purpose, was that which this village blacksmith did; and that it is scarcely probable that he would take the pains of sharpening the blunt end of the horseshoe nail and then coiling this nail around the wire. Putting this consideration along with that of the conflict in the testimony, I do not think that it can be said to be clearly or satisfactorily shown that the Glidden barbed wire was anticipated by this horseshoe nail barb of Mr. Schone.

The next fence is the Merrill fence. The facts are these: Two brothers by the name of Merrill, living on Turkey creek, west or northwest of Dubuque, in a timber country, claim that in September or October, 1873, they invented a barbed-wire fence of substantially the same form as that of Mr. Glidden. The question of time becomes very material, for in the latter part of October, 1873, Mr. Glidden filed his application and thus made public his alleged invention. So far as the testimony discloses, the Merrills did not make public or disclose their invention until 1874. It appears that one of the Merrill brothers became insane from religious excitement in the forepart of 1874, and was for a short time confined in an asylum. Immediately thereafter he went east, to New Hampshire, to visit friends, and, returning in the forepart of the summer, stopped a short time with a brother in Illinois, who lived a short distance from the home of Mr. Glidden. While there, conversing with his brother in reference to some barbed-wire fence, he said to him that he could furnish a model of a better fence, and that he would do so on his return home; and on his return home, in July or August, he sent to his brother in Illinois a model of a fence substantially like that of Mr. Glidden.

Now, while it may be true that this was not the first time that the Merrills were working upon designs for barbed-wire fence, and while, probably, prior to the insanity of this one, their attention was di-

rected to this matter, yet I cannot find any satisfactory and convincing testimony of any invention prior to the forepart of 1874. I mean, of course, outside of the testimony of the two Merrills. What they did or what they invented in 1873 rests almost exclusively on their unsupported testimony. They say they did not disclose what they had invented because they desired to obtain a patent, and did not know the exact procedure therefor. It is obvious that the condition of the country in which the Merrills lived, being a timber country, would not attract their attention to the necessity or value of wire fencing, and that matters outside of home surroundings must have first suggested the question to them. Putting that significant fact together with their undisputed silence in reference to their experiment and inventions, and ignoring all the contradictory and opposing testimony, I cannot think that it is at all satisfactorily shown that prior to October, 1873, when Mr. Glidden made public by his application his invention, these Merrill brothers had devised and constructed a fence wire of similar form. Obviously, where by one man a public disclosure is made of his alleged invention, in a given month, he who claims that during that or the prior month he invented the same thing, should make the matter of time and the certainty of the invention clear and distinct, and at the same time furnish satisfactory explanation of his concealment of the same. I do not think this has been done by the Merrill brothers, and while it is doubtless true that in the forepart of 1874, and possibly in 1873, they were experimenting with different forms of barbed wire, and while there is no positive testimony that the one visiting his brother in Illinois in the summer of 1874 there saw any specimen of the Glidden wire, yet the combination of circumstances is such as to leave a very strong impression on my mind that there this particular form was first suggested to the Merrill brothers. At any rate, I do not think a prior invention is clearly shown.

The remaining fence is what is called the "Chester D. Stone Fence," and this is the one which has left in my mind the most doubt. The facts are these: Chester D. Stone, from 1870 onward, lived a few miles from the village of Delhi, in this state, and within half a mile of the line of the Chicago, Milwaukee & St. Paul Railroad. His brother-in-law, a man by the name of Bidwell, in 1870 and 1871 rented a piece of land about three-quarters of a mile from Stone's residence. Around that tract was a smooth wire fence. Mr. Bidwell went away and left the tract in charge of Mr. Stone. Prior to its inclosure with this wire fence, it seems a traveled way had run across the north-east corner. After its inclosure this fence at the north-east corner was frequently broken down, and Mr. Stone testifies that in 1871 he barbed the wire in this way: Taking a number of staples, and with the assistance of a son of Mr. Bidwell, a boy of six or seven years of age, he coiled these staples in the form of a barb around the fence wire. The instruments which he had were a hammer and a

wedge. He first pounded the staples firmly onto the wire, then separated the two extremities of the staple by means of the wedge, and by use of the hammer upon the wedge coiled these two ends of the staple around the fence wire. Prior to putting on these staples, some of the posts in that corner being rotten, he substituted some new ones. The fence wire, instead of being fastened by staples to the posts, was run through holes bored in them. His brother giving up this tract, Mr. Stone, desiring to use a portion of the fence for the purpose of building a fence from the railroad track eastward, and so as to inclose a pasture adjoining the track and opposite his own residence, in 1873 took some 20 rods of this fence, with the posts, away from this northeast corner up to this pasture and made the cross-fence. A portion of the wire from this cross-fence was produced as an exhibit, and, with the staples coiled around the wire, presented substantially the same structure as the Glidden fence. His testimony was positive as to the identity of the exhibit with this cross-fence, and as a part of the fence made in 1871 and removed in 1873 from the Bidwell tract. This, of course, presents a very strong showing of prior invention.

In support of his testimony, the defendant introduced the testimony of sundry witnesses to the effect that in 1871 and 1872 they saw certain barbs on the Bidwell fence, and also to the fact that this cross-fence was placed adjacent to the railroad track in 1873. Further, Mr. Stone, having testified to placing some of these coiled staples on other parts of the fence around the Bidwell tract, a woman, occupying the tract south thereof, testified that in 1871 she was in the habit of taking her child, crawling under the wires of this fence, going up unto a little rise and sitting there with her child; that she noticed these barbs upon the fence; also the testimony of a witness that, riding home one night with his brother-in-law, a portion of this wire fence got entangled with the wheels of their conveyance and was carried home, and on examination the next morning they discovered these barbs. As against these two last items of testimony was the testimony of the brother-in-law, squarely contradicting, explaining how a portion of the wire was carried home, and stating that there were no barbs on it; also of the lessor of the tract occupied by the woman above named, tending to show that the lease under, which she was occupying terminated very early in 1871, and rendering it very improbable that prior thereto, in that season, she could ever have gone into the Bidwell tract in the manner or for the purpose she stated. Further, the complainant introduced the testimony of witnesses familiar with the Bidwell tract, who denied the presence of any barbs, of the parties who leased and occupied it the year after Mr. Bidwell gave it up, and who testified that the fence at this northeast corner was still complete, and that no part had been removed; of the section boss on the railroad, who testified that this cross-fence was not placed there until after 1876; of other witnesses working or residing on adjacent tracts, who gave similar testimony.

I cannot state in detail all the various items of testimony of this kind, for there is a great volume of it, coming from many witnesses, and on both sides. Two or three matters, I may state, have led me to doubt seriously the truthfulness of Mr. Stone's statement: *First*, the great difficulty of coiling staples around the fence wire in the manner and with the instruments that he had. I have tried, and had tried, this matter experimentally before me. While it may be done, yet the process is exceedingly slow and difficult,—so slow and difficult that I think no man would pursue it except under the most imperative need. Again, Mr. Stone's explanation of the reason for doing it is, to say the least, an improbable one. He says that he did it in order to make the people living on the adjacent tract believe that he thought cattle broke the fence down. I do not think it probable that any man would take such pains to impress his neighbors with any conviction as to his own beliefs. There was also another matter in his testimony which, for the moment, has escaped my recollection, but which, as I studied it, led me seriously to doubt his veracity. Of course, striking his testimony out as not entitled to credence, the defendants' case must fail in this respect; and, while I am reluctant to impugn the veracity of any witness, I must confess that his own testimony carried discredit to my mind. The complainant presented what was testified to be an accurate model of the cross-fence in its present condition, and their counsel argued that it carried on its face a perfect demonstration of the falsity of Mr. Stone's testimony. I could not see the force of this alleged demonstration, and yet, for the reason above named, I felt, after studying the matter, that Mr. Stone's testimony was not entitled to belief. So, with some hesitation, I concluded that a case of prior use was not satisfactorily proved. These are the only instances of prior use alleged. In none of them do I see that which would justify me in holding that Mr. Glidden's invention was anticipated. That disposes of these cases, and the decree will go for the complainants.

Passing now to the case in which the Putnam machine is claimed to be infringed by the Penny machine, I will briefly state the results of my examination. I ought to have the models here, for I could explain my views much more easily with them before me. In the elaborate argument made by Mr. Thurston, and which was subsequently printed for my examination, it was strenuously insisted that Putnam occupied the position of a primary inventor; that he was the first man who constructed an automatic machine for making barbed wire, and that, by reason of his position as a primary inventor, questions of doubt as to the facts of infringement should be resolved most liberally in his favor; and though a subsequent machine was composed of different mechanisms, yet, if they each performed the same function as those in his machine, it should be treated as an infringement. He was compared to Prof. Bell, the inventor of the telephone. It does not seem to me that the comparison is just, and for this reason, which,

perhaps awkwardly, I express in this way: When Mr. Putnam began to construct his machine the problem was all stated before him. The barbed wire had been constructed by hand-machines; the various steps to the process were well known. He invented no new mechanism, but, simply taking familiar mechanisms for doing the separate parts of the work, he combined them in one machine. Thus he knew that an intermittent motion must be given to the lateral wire, in order that the barbs might be placed on it at regular intervals, and he used a familiar mechanism for accomplishing such motion. In the same way the transverse wire had to be moved intermittently across the lateral wire, and he took a vibratory arm to accomplish this result; so with the other steps in the process. Of course, there was invention in putting these various mechanisms together, and he should be protected in his invention; but he did not, as I said, himself state the problem which he thus worked out. He stepped in after the different processes to be accomplished were known, after hand-machines were in existence for performing these various processes, and thus, I think, occupies no such position as the inventor of the telephone, who, so to speak, both stated his problem and worked it out.

Now, the Penny machine, which is also an automatic machine for the manufacture of barbed wire, does its work by mechanisms, almost every one of which is essentially different from those employed by Mr. Putnam. Instead of a vibratory arm to move the transverse wire across the lateral wire, Mr. Penny has two wheels with segmental faces, which, when in the revolution of the wheels the segmental faces come together, clasp the transverse wire and push it forward onto the lateral wire, loosing their grasp of this transverse wire when the contact of the segmental faces ceases; and a similar difference exists as to almost all the other mechanisms of the two machines. The difference between the two machines is so marked,—and, indeed, I understand that to be conceded by counsel,—that, unless Mr. Putnam is entitled to the position of a primary inventor, his machine is not infringed by Mr. Penny's. I have had the models of these machines in my office at Leavenworth, and I have invited mechanics and others to examine the two and give me their views. That is not exactly like submitting an equity case to a jury for the purpose of informing the conscience of the chancellor, but, to one as little versed in mechanics as I, it was, I think, helpful to get the views of others more proficient in mechanics. Only two views have been expressed to me by these various gentlemen. One was,—and a very common expression,—“I know nothing about it and can tell nothing about it;” while the other was that the differences between the two machines were as great as could be found in any machines constructed with the intention of accomplishing the same result. So I think that the claim of infringement in this case is not made out, and a decree will be entered dismissing the bill.

THE CITY OF MEXICO.¹

(District Court, S. D. New York. May 11, 1885.)

FORFEITURE—BREACH OF NEUTRALITY LAWS—REV. ST. § 5283—TRADE WITH BELLIGERENTS—LAW OF NATIONS.

The steamer *City of M.* was chartered to a reputable merchant at New York to carry some arms and munitions of war from New York to the port of Savanilla, United States of Colombia, in fulfillment of an order for them from a merchant at Baranquilla. She also took lumber and specie to procure a return cargo of fruit for another New York merchant from Bocas del Toro. Savanilla was at the time in the possession of insurgents against the regular government of the state of Bolívar, to whom belligerent rights had been accorded. The warlike material was probably intended for their use, as an agent of the insurgent government brought the order and aided in expediting the business. After arriving at Savanilla and delivering this part of the cargo, the captain of the *City of M.* contracted with the insurgents to transport about 250 passengers from Savanilla to Rio Hacha. The latter port was in possession of the regular government; but it appeared that the captain was informed and believed that it was held, like Savanilla, by the insurgents. About 150 passengers came aboard under this contract, who turned out to be soldiers of the insurgent government. When the steamer arrived at Rio Hacha, the collector of the port and some of his men came along-side the steamer and were seized by the soldiers, against the earnest remonstrance of the captain and officers of the *City of M.* The following morning an armed schooner, belonging to the lawful government, was despatched at a distance, to capture which the insurgents attempted to make use of the *City of M.*, but abandoned the project on the solemn protest of the captain, officers, and crew of the steamer, the chief engineer refusing to work the ship, and thereupon the captain steamed immediately to Savanilla, where the *de facto* government disavowed the acts of the soldiers, and the collector and his men were released. On the return of the *City of M.* to New York, proceedings were had to forfeit her for violating the neutrality laws, on the ground that she had been fitted out for the purpose of committing hostilities against a state with which the United States were at peace. Rev. St. § 5283. The court found that the trip from Savanilla to Rio Hacha was not intended when the vessel left New York. *Held*, that section 5283 prohibits warlike or hostile voyages only,—not commercial ventures; that the carrying of arms for the use of a belligerent to a port in its possession is not against our municipal law or the law of nations, but merely subjects vessel and goods to search and seizure by the other belligerent; that the voyage of the *City of M.* from New York was purely commercial and peaceable in intention; that the trip to Rio Hacha was an independent diversion undertaken by the captain on his own responsibility, and, whether hostile in intent or not, was not within section 5283, because not planned "within the limits of the United States;" that the shipment, moreover, being made on the order of a Baranquilla merchant, and no evidence appearing that he was not the immediate principal, the transaction could not be treated as one directly with the insurgents; and that, in either view, neither the shipment of arms from New York, nor the independent diversion by the captain in the trip to Rio Hacha, infringed section 5283, and the vessel was accordingly discharged.

In Admiralty.*Elihu Root*, for the United States.*W. W. MacFarland*, for the steamer.

BROWN, J. On the twenty-fifth of April, 1885, the libel of information in this case was filed for the forfeiture and condemnation of the steam-ship *City of Mexico*, for an alleged violation of the neu-

¹ Reported by Edward G. Benedict, Esq., of the New York bar.

trality laws of the United States, as enacted by section 3 of the act of April 20, 1818, (3 St. at Large, 448,) now section 5283 of the Revised Statutes. Briefly stated, the alleged offense consisted in carrying military supplies for the insurgent government at Savanilla, and there taking on board about 150 armed soldiers and proceeding thence to the loyal seaport of Rio Hacha, upon a hostile military expedition, during which the custom-house officers who boarded the ship at Rio Hacha were captured and brought back to Savanilla.

The steamer having been seized, and having remained without bonding in the custody of the government, the cause has been brought to immediate trial. Section 5283 provides for the forfeiture of every vessel fitted out or armed, "within the limits of the United States, with intent that such vessel shall be employed in the service of any foreign prince or state, or of any colony, district, or people, to cruise or commit hostilities against the subjects, citizens, or property of any foreign prince or state, or any colony, district, or people, with whom the United States are at peace."

The libel, in eight different counts, varying somewhat in form, charges, in substance, that the steamer, on or about the twelfth day of March, 1885, within the Southern district of New York, was fitted out with intent that she should be employed in the service of certain rebels, citizens of the United States of Colombia, then in insurrection against the United States of Colombia, to cruise and commit hostilities against the subjects, citizens, and property of the latter, with whom the United States were at peace. Some of the counts state that the alleged rebels then constituted a *de facto* government at the city and district of Baranquilla and Savanilla. The answer consists of a general denial.

The proofs show that during some months previous to the seizure of the steamer an insurrection had existed in the state of Bolivar, one of the states of the United States of Colombia, of which Baranquilla was the interior capital, and Savanilla, about 30 miles distant, was the seaport; that the insurgents were in possession of these cities, had established a *de facto* government there, and that the recognition of belligerent rights had been accorded them by the lawful government of that country, and a notification thereof made to our government on the twelfth of March, 1885. On the same day, the steamer City of Mexico, of about 660 tons, sailed from New York with a cargo consisting of 20 cases of guns, 50 cases of cartridges, 50 boxes of builders' hardware, 300 barrels of flour, 100 hemlock boards, 50 spruce scantlings, and two boxes containing \$1,540 in specie. The hardware, as well as the guns and cartridges, were military supplies consigned to Perez & Co., merchants at Baranquilla, upon whose account and order they had been purchased shortly before in this city by S. P. Triana, an established and reputable commission merchant here. The order for the goods and the funds to pay for them were brought from Baranquilla by one Gaitan, who was in fact a com-

missioned agent of the insurgent *de facto* government, and who was actively engaged here in expediting the purchase and the forwarding of these military supplies as quickly as possible. Endeavors were first made to send them by the Atlas Steam-ship Company, a line running between New York and the West Indies, which sometimes sends vessels directly to Savanilla, and sometimes forwarded goods thither by transshipment from Jamaica. Mr. Williams, the superintendent of that line, on being applied to, finding that he would have no vessel available that would not involve a delay of some two or three weeks in the shipment, introduced Mr. Triana to Messrs. Lord & Austin, the managers of the Provincial Steam-ship Company, a line ordinarily running between New York and Halifax, but which then had a spare steamer. They were informed by Mr. Triana that he desired to ship these military supplies to Perez & Co., Baranquilla, at once. Thereupon, on the fifth of March, a charter of affreightment of the City of Mexico was executed by Lord & Austin to Mr. Triana, for a voyage to Savanilla and back for the sum of \$5,000, prepaid. The charter provided for four lay days at Savanilla, and \$200 per day demurrage for any detention beyond that; that if homeward freight could be obtained from any port in South America, or the West Indies, to the United States or Canada, the charterers were to have one-half of the net freight; that the steamer was to carry to Savanilla two passengers for account of the charterers free of charge, who were to obtain the permission of the customs authorities at Savanilla to land the cargo; that on failure to obtain such a permit within the lay days named, the master was to proceed to Kingston and land the cargo, or bring it back to New York; and that in the event of any detention of the vessel by the authorities at New York that should prevent her sailing, the charter was to be canceled, and \$2,500 was to be returned to the charterers.

Before the vessel sailed an arrangement was effected to procure for the return voyage a fruit cargo for a house in New York from Bocas del Toro. That port is about 500 miles to the westward of Savanilla. The specie, scantling, and boards, part of the cargo shipped at New York, as above stated, were for the purchase and binning of the fruit to be obtained at Bocas del Toro.

The steamer sailed in the afternoon of the twelfth of March, arrived without incident off Savanilla on the 21st, commenced discharging that night upon lighters, and finished without any impediment at half-past 2 p. m. of the following day. The master on the same day went to Baranquilla and deposited the ship's papers with the American consul there. The next day Capt. O'Brien was introduced by Perez & Co., his consignees, to some agent or officer of the insurgent government, and on the twenty-fifth of March he made a contract with him by which he agreed "to take on board the steamer about 250 passengers, to be conveyed and landed at Rio Hacha, for the sum of \$400, and 100 tons of ballast to be put on board the

steamer, and a pilot provided; the time not to exceed three or four days." Under this contract, on Friday, the 27th, about 150 troops, with arms and military officers, were put aboard from a tug-boat; but, the necessary water and provisions not being supplied, the steamer did not leave Savanilla until the following day. Rio Hacha was at that time in the peaceable possession of the loyal government. It was from 150 to 200 miles from Savanilla, a trip of about 24 hours for the City of Mexico. Capt. O'Brien testifies that he was assured by Perez & Co., before leaving Savanilla, that Rio Hacha was in the possession of the insurgent party. The American consul at Baranquilla, on the 26th, gave Capt. O'Brien a clearance for Rio Hacha. The steamer arrived off Rio Hacha in the afternoon of the 29th, and came to anchor in shallow water about a mile and a half from land. At 7:40 p. m. the custom-house boat came along-side, containing the collector of the port and six other persons. The collector, on boarding the steamer, was seized by the direction of the general of the troops; and the other men in the small boat were compelled, by rifles pointed at them, to come on deck, when they were all put under guard by the troops, and the boat also was taken aboard. This proceeding was against the earnest remonstrance of Capt. O'Brien and the officers of the ship, who protested without avail. They lay off the port till daylight, when a schooner, said to be armed and to belong to the lawful government, being descried at a distance, the general and troops demanded that the steamer should be used to capture her, and seemed determined to take possession of the steamer for that purpose. The insurgent pilot sided with the general and the troops; but the captain, officers, and crew of the steamer all solemnly protested against the proposed attack of the schooner as an act of piracy under the American flag; and the chief engineer refusing to work the ship, the project was abandoned, though not without much excitement and ill-temper on the part of the general. Capt. O'Brien thereupon steamed towards Savanilla, where he arrived on the next morning, having on the way stopped for a few hours at Santa Marta, at the urgent desire of the general, to whose wishes it was deemed politic to this extent to defer. On arrival, the captain entered his formal protest before the American consul at Baranquilla. The *de facto* government disavowed the acts of the general and troops in making prisoners of the collector and his men, and declared that punishment should be inflicted for the offense; and the prisoners were released and sent back. On the first of April the steamer cleared for Bocas del Toro, where she arrived on the 4th, obtained a partial cargo of fruit, and then sailed for New York, where she arrived April 17th.

Does a voyage of such character infringe the provisions of section 5283 of the Revised Statutes above referred to? The offense under that act, it will be observed, is confined to cases in which the vessel shall be fitted out, etc., "with intent that she shall be employed to *cruise or commit hostilities*," etc. The expedition from Savanilla to

Rio Hacha, though anomalous and inexplicable in some of its features, was doubtless a hostile expedition in the intention of the insurgents; though there is no explanation in the evidence of what its plans were, and it accomplished nothing but the absurd and treacherous seizure of a few custom-house officials, who innocently boarded the steamer in the discharge of their duties. The captain's agreement was that "passengers" were to be taken aboard and landed at Rio Hacha; but the general and 150 soldiers, who came aboard as passengers, when they arrived off Rio Hacha, were not landed. They had not, apparently, any means of landing, nor any disposition to land; and the next morning their only anxiety seemed to be to appropriate the steamer to their use in an attempt to capture the distant schooner.

There is not sufficient evidence before me to determine properly to what extent Capt. O'Brien, in making the contract at Baranquilla to carry the 250 passengers to Rio Hacha, was chargeable with knowledge of its military and hostile character. There is nothing to contradict his testimony that he was assured and believed that Rio Hacha was in the possession of the insurgents, and that he had no idea of any use of his vessel other than as a peaceable transport. If it be said that Capt. O'Brien ought to have known, or to have ascertained, whether Rio Hacha was actually in possession of the insurgents or not, some allowance is certainly due to him from the fact that he was not accustomed to trade in that region, and that the political *status* of the provinces and cities of that coast is neither so stable nor so notorious that a captain, not having previous dealings with them, should have known their political affiliations. Some inferential support of his testimony may, perhaps, be found in the fact that the American consul at Baranquilla gave him a clearance for that port; although the whole force of this inference would be broken if it should appear, as may have been the fact, that the consul had no knowledge of the purpose of the trip. If Capt. O'Brien had no knowledge that any military demonstration was intended, but contracted only to transport insurgent troops from one port in their possession to another port supposed by him to be in their own possession, wholly unconnected with any particular military enterprise, it is certain that he committed no offense against our municipal law, and no offense even against the law of nations, save to subject his ship to capture by the other belligerents if caught during the voyage. But, however this may be, the contract to carry troops to Rio Hacha was not made "within the limits of the United States." It is only against designs formed within these limits that our statute is directed. Upon this trial, therefore, the Rio Hacha excursion has no importance, except in two respects: *First*, in case it was designed in this country; and, *secondly*, as regards the light, if any, that it may shed upon the general intent with which the ship was fitted out in New York.

There is no evidence that Rio Hacha formed any part of the orig-

inal destination of the ship. Nothing in the charter, or in the preparations in New York, countenances such an hypothesis. Every indication is to the contrary. The direction of the captain to observe the orders of the two passengers has evident relation only to the landing of the cargo of military supplies, concerning which there was ground for such precautions, because the supplies were liable to capture. There is no evidence and nothing to warrant the inference that the ship was designed, when she left New York, to be placed in the service of the insurgents after the landing of the military supplies at Savanilla. And the comparatively moderate compensation agreed on for the Rio Hacha trip, and the complete absence from the steamer of every kind of armament, forbid the assumption that the captain either intended to incur, or expected to incur, any of the hazards of a military enterprise. It was shown, moreover, that the diversion of steamers to transport troops upon short voyages like this was not uncommon upon that coast. The trip was expected to occupy but three or four days. The compensation was liberal, considered as an ordinary and peaceable commercial adventure, but preposterously low as a diversion of the steamer to a military and hostile use. The sequel, also, does not show any circumstances that Capt. O'Brien could be reasonably presumed to have been able to foresee, or to expect, that should have deterred him from accepting such a contract for transportation as a mercantile venture in behalf of his owners. The testimony of McCarthy, the first officer, so far as it tends to incriminate the captain, is not only opposed to the weight of other testimony, but is plainly inconsistent with, if not directly contradicted by, McCarthy's entries in the log kept by himself.

I must regard the excursion to Rio Hacha, therefore, as wholly disconnected from the fitting out of the vessel in New York, and as affording no ground for a proceeding against the ship under our municipal law, which has reference solely to plans formed and completed in this country. So strictly in that respect is the statute in question construed, that in the case of *U. S. v. Quincy*, 6 Pet. 445, the supreme court held that "the intention with respect to the employment of the vessel should be formed before she leaves the United States; and this must be a *fixed* intention." Accordingly, in that case, where the defendant was indicted for fitting out the Bolivar as a privateer at Baltimore, the court held that instructions should have been given to the jury that if, "when the Bolivar was fitted and equipped at Baltimore, the owner and equipper intended to go to the West Indies in search of funds with which to arm and equip the said vessel, and had no present intention of using or employing the said vessel as a privateer, but intended, when he equipped her, to go to the West Indies to endeavor to raise funds to prepare her for a cruise, then the defendant is not guilty;" also, "that if the jury believe that when the Bolivar was equipped at Baltimore, and when she left the United States the equipper had no fixed intention to employ her as a pri-

vateer, but had a wish so to employ her, the fulfillment of which wish depended on his ability to obtain funds in the West Indies for the purpose of arming and preparing her for war, then the defendant is not guilty." The Rio Hacha episode in this case was far more completely independent of any fixed intention of wrong-doing at the time the vessel sailed, than was the Bolivar's cruise when she left Baltimore.

In its other relations, the Rio Hacha incident, as one of the results of the interview between Capt. O'Brien and Perez & Co., the ostensible consignees of the military supplies at Baranquilla, does tend to give support to the inference which numerous other circumstances also indicate, viz., that these supplies were ordered for the direct and immediate use of the insurgent forces at Savanilla and Baranquilla; and that the insurgent government was probably the beneficial purchaser, acting through Perez & Co., as its agents only. On the latter point, however, there is no certain proof. It may be assumed that the military supplies were designed for the immediate use of the troops there, and that Gaitan, as agent of the *de facto* government, came to New York in its behalf to expedite as rapidly as possible the obtaining and shipping of these supplies. But it would not follow that because the insurgent government, as between it and Perez & Co., was the real principal, that Perez & Co., who ordered the supplies, can be ignored; or that Mr. Triana, in New York, in acting upon and filling the orders of Perez & Co., his supposed principals, and in shipping the goods to them from this port, is to be treated as dealing directly with the insurgent government. He has a right to stand upon the contract according to its form, because its form in such case is material. A contract of this kind stamps the transaction, so far as our own citizens are concerned, as a commercial venture only; because it is strictly and wholly, so far as our citizens are concerned, a purchase and shipment by one merchant here, upon the order and for the account of another merchant abroad. I do not include cases where the use of a foreign merchant's name by a belligerent is known to be a mere sham. But there is not sufficient evidence here to sustain that theory. All that can be legitimately inferred is that the supplies were intended for the immediate use of the insurgent government through the consignment to Perez & Co., and upon their order. The fact that Gaitan was in constant communication with Mr. Triana, and that he directed all the important arrangements for the dispatch of the goods, warrants that inference; but that is not enough, against Mr. Triana's testimony, to sustain the charge that the supplies were furnished directly to the insurgent government.

The case turns upon the construction to be given to the language of section 5283. The counsel for the government contends that, in substance, the steamer was engaged as a *transport* in the service of the insurgent government; and that she was fitted out in New York,

as such a transport, to carry military supplies upon account of the insurgent government, and for its use and benefit. It is urged that to carry supplies for one belligerent, and to engage in his transport service, is to take part in his military operations, and is, consequently, to "commit hostilities" against the other belligerent. It is, doubtless, true that, according to the established rules of international law, the transportation of stores and military supplies, even by a neutral, subjects them to capture and confiscation as prize by the other belligerent, (*The Commercen*, 1 Wheat. 382; *The Friendship*, 6 C. Rob. 420; *The Orozembo*, Id. 430; *The Carolina*, 4 C. Rob. 256;) and if the vessel herself is in the direct employ of a belligerent, she also, on capture, will be liable to condemnation.

It is impossible, however, to hold, in this case, that the City of Mexico was in the employ of the insurgent government or in its possession. She was never out of the possession of the Provincial Steamboat Company, her owners. She was not chartered to the insurgent government, nor to any of its representatives, but to Mr. Triana, a merchant of this city; and the charter itself was but a charter of afreightment for an outward voyage, and was manifestly for no other purpose than a commercial venture to carry these military supplies to Savanilla, for the ultimate use, it may be conceded, of the insurgent government, and thence to proceed to Bocas del Toro, to obtain cargo for her return voyage. But even if Perez & Co. were to be ignored, and the charter were treated as a charter for the delivery of the supplies directly to the insurgent government, it would have been none the less a commercial venture only. The law of nations does not prohibit the citizens of neutral states from carrying supplies, even contraband of war, to either belligerent; although those that engage in it run the risk of search, capture, and confiscation. Neither our laws, nor our treaties forbid such traffic.

Mr. Webster, in his letter to Mr. Thompson of July 8, 1842, upon this subject, observes:

"It is not the practice of nations to undertake to prohibit their own subjects, by previous laws, from trafficking in articles contraband of war. Such trade is carried on at the risk of those engaged in it, under the liabilities and penalties prescribed by the law of nations or particular treaties. If it be true, therefore, that citizens of the United States have been engaged in a commerce by which Texas, an enemy of Mexico, has been supplied with arms and munitions of war, the government of the United States, nevertheless, was not bound to prevent it,—could not have prevented it without a manifest departure from the principles of neutrality,—and is in no way answerable for the consequences. The eighteenth article (of the treaty between the United States and Mexico) enumerates those commodities which shall be regarded as contraband of war; but neither that article nor any other imposes on either nation any duty of preventing, by previous regulation, commerce in such articles. Such commerce is left to its ordinary fate according to the law of nations." Lawrence's *Wheat. Internat. Law*, 813, note 232; 6 *Webst. Works*. 452; Hall, *Internat. Law*, 70; *Seton v. Low*, 1 Johns. Cas. 1.

Mr. Layard, in the English house of commons in 1862, said:

"The law of nations exposes such persons to have their ships seized and their goods taken and subjected to confiscation; and it further deprives them of the right to look to the government of their own country for any protection. And this principle of non-interference in things which the law does not enable the government to deal with, so far from being a violation of the duty of neutrality, is in accordance with all the principles which have been laid down by jurists, and more especially by the great jurists of the United States of America."

Mr. Marcy, in his dispatch to Mr. Buchanan of April 13, 1854, (Cong. Doc. 33d Cong. 1st Sess. H. R. Doc. 103, p. 21,) says:

"As the law has been declared by the decisions of the courts of admiralty and elementary writers, it allows belligerents to search neutral vessels for articles contraband of war and for enemies' goods. If the doctrine is so modified as to except from seizure and confiscation enemies' property under a neutral flag, still the right to seize articles contraband of war, on board of neutral vessels, implies the right to ascertain the character of the cargo. A persistent resistance by a neutral vessel to submit to a search renders it confiscable, according to the settled determination of the English admiralty."

President Pierce, also, in his message to the first session of the thirty-fourth congress, speaking of articles contraband of war, says:

"The laws of the United States do not forbid their citizens to sell to either of the belligerent powers articles contraband of war, or take munitions of war or soldiers on board their private ships for transportation; and although in so doing the individual citizen exposes his property or person to some of the hazards of war, his acts do not involve any breach of national neutrality, nor of themselves implicate the government."

Kent, in his Commentaries, vol. 1, p. 142, sets it down as the established law that "neutrals may lawfully sell at home to a belligerent purchaser, or carry themselves to the belligerent powers, contraband articles subject to the right of seizure *in transitu*." And that "the right of neutrals to transport, and of the hostile power to seize, are conflicting rights, and neither party can charge the other with a criminal act." *The Santissima Trinidad*, 7 Wheat. 283, 340; *Richardson v. Maine Ins. Co.* 6 Mass. 113.

The provisions of section 5283, and of the neutrality act of 1818, are not directed against commercial adventures, nor against peaceable aid, however important, rendered by our citizens to either belligerent, so long as such aid arises indirectly only through commercial dealings, and in the ordinary channels of trade. The statute is directed solely against warlike enterprises. It does not forbid giving aid and comfort to either belligerent. Had that been its design it would have been expressed. Its language is: "To *cruise* or *commit hostilities* against the subjects, citizens, or property," etc. This plainly means acts of force, injury, or destruction, that are of a warlike character, as distinguished from the peaceable interchanges of commerce, which, however much they may indirectly aid a belligerent, involve no hostilities committed or participated in by the ship herself. If a vessel should engage to take part as a transport in a hostile expedition, she might be held to be involved in the general

design of the expedition, and in the intent to commit hostilities. But no intent of that kind is possibly attributable to the City of Mexico on fitting out from New York. And it is this "fixed intent" on her departure from this country that is alone material. Her designs were purely peaceful.

In the case of *U. S. v. Quincy*, 6 Pet. 466, above quoted, the court say:

"The intention is the material point on which the legality or criminality of the act must turn, and decides whether the adventure is of a commercial or warlike character. The law does not prohibit armed vessels, belonging to the citizens of the United States, from sailing out of our ports, and it only requires the owners to give security that such vessels shall not be employed by them to commit hostilities against foreign powers at peace with the United States. The collectors are not authorized to detain vessels, although manifestly built for warlike purposes, and about to depart from the United States, unless circumstances shall render it probable that such vessels are intended to be employed by the owners to commit hostilities against some foreign power at peace with the United States. All the latitude necessary for commercial purposes is given to our citizens, and they are *restrained only from such acts as are calculated to involve the country in war.*"

The voyage of the City of Mexico appears to me, beyond controversy, to have been intended to be wholly peaceable. She was, in all respects, in men and in equipment, in the same condition as upon her customary voyages, without armament of any sort. The port of Savanilla was in the undisputed, peaceful possession of the insurgents. There was no blockade, or attempted blockade, of it by the lawful government. The sole object of the owners of the ship, who remained all the time in possession of her, was to deliver these military supplies at Savanilla. There was no intent to commit hostilities, or even a breach of the peace; or to disturb any rights, in person or in property, of any subject of the lawful government of Colombia.

But for the excursion to Rio Hacha, it is improbable that any suspicion would have attached to the voyage. Coupled with that excursion, however, the precautions against detention found in the charter, and in the letters of instruction to the captain; the delay in filing the supplementary manifest, which recited the shipment of arms and military supplies taken on board at New York; and the false destination of these supplies, stated in the supplemental manifest, together with the fact of the two passengers accompanying Capt. O'Brien, under whose orders in respect to landing the supplies he was to act, —all these things tended to give an appearance of illegality to the voyage in its inception, which I am nevertheless fully satisfied it did not possess. The Rio Hacha incident, as I have said, was an afterthought, into which Capt. O'Brien was himself deceived and misled. When he discovered that the ship was used, and was sought to be still further used, for treacherous and hostile purposes, his conduct, so far as I can perceive, was praiseworthy and blameless, both in resisting

the troops, so far as possible, and in returning at once to Savanilla. No blame was attached to him by the prisoners. But even had he entered knowingly upon the Rio Hacha expedition as a hostile one, inasmuch as that expedition was clearly no part of the original intent of the voyage, it would not furnish any foundation for a forfeiture under our statute. The various other incidents of concealment and precaution to which I have referred, though wholly unnecessary in order to avoid arrest for any offense under our statute, were plainly prudent enough in relation to the danger that might be apprehended from the Colombian government; because that government, in case it should learn the fact of this shipment of arms, might endeavor to intercept them before arrival at Savanilla as contraband of war. This furnishes all needed explanation of the circumstances that I have referred to, and is in entire keeping with the purely commercial character of the voyage.

I find nothing, therefore, in the case authorizing any inferences to be drawn adverse to the entirely peaceable and commercial character of the adventure, as it was designed and planned when the vessel sailed from this port. The Rio Hacha excursion was an independent incident, during which Capt. O'Brien found himself surprised by the violent and treacherous acts of the troops, which he could not have anticipated, and which he did everything in his power to repair.

The libel should therefore be dismissed, and the vessel discharged from custody.

THE EMULOUS.¹

(District Court, E. D. New York. December 1, 1884.)

OBJECTION TO DEPOSITION—LACHES.

A cause being called for trial, the libellant offered in evidence a deposition, which was objected to. The libellant submitted to the objection on being allowed a continuance of the cause and leave to examine the witness anew. Three years after, the cause being again called, the libellant appeared by another proctor, and offered the same deposition. *Held*, that the libellant could not be allowed to question the validity of the objection; and, as no other evidence was offered, the libel must be dismissed.

In Admiralty.

A. B. Stewart, for libellant.

Wheeler & Souther, for claimant.

BENEDICT, J. This cause was called for hearing some three years ago, when the libellant offered in evidence a deposition taken *de bene esse*. The deposition was objected to, and the libellant submitted to the objection on being allowed a continuance and permission to examine the witness anew. The witness not having been re-examined,

¹Reported by R. D. & Wyllys Benedict, Esqs., of the New York bar.

the libelant now, by a new proctor, brings up the case, and in support of the libel offers the same deposition objected to on the former hearing. Having submitted to the objection at the first hearing, he cannot at this late date, and when, as it may be presumed, the witnesses for the other side are scattered, be permitted to question the validity of the objection once submitted to. The same result would follow if, as the libelant contends, the objection taken at the first trial was sustained by the court, but wrongfully. For it would be unjust to the claimant, who has acted upon the ruling of the court, to permit the libelant, after this long delay, to reopen the question raised by the objection to the deposition, and passed on at the first hearing.

There being no evidence for the libelant except that contained in the deposition referred to, the libel must be dismissed, and with costs.

THE RESCUE.

(District Court, W. D. Pennsylvania. April 16, 1885.)

1. COLLISION—TUG AND TOW—DESCENDING AND ASCENDING BOATS IN NARROW CHANNEL.

A tow-boat, incumbered with a coal-tow, descending the Ohio river, and passing through a narrow channel, has the right of way, and it is the duty of an ascending boat to remain below the channel until the descending tow has emerged therefrom.

2. SAME—DUTY OF PILOT OF DESCENDING BOAT.

The pilot of the descending tow-boat was not culpable in not warning the ascending boat against entering the channel, both boats being plainly in sight of each other. Each of two approaching vessels may assume that the other will reasonably perform its duty under the laws of navigation.

In Admiralty.

Barton & Son, for libelant.

Knox & Reed, for respondents.

ACHESON, J. In the mass of testimony in this case are to be found the contradictions between witnesses as respects both matters of fact and of opinion usual in controversies of this nature. By the preponderance of the proofs, however, the following material facts are established to my satisfaction. On the forenoon of November 30, 1883, the libelant's tow-boat Eugene, having in charge a tow of ordinary size, consisting of two coal-boats and three flats, all loaded with coal, was proceeding down the Ohio river upon a stage of about six feet of water, and passing through what is known as "Glass-house Ripple," a chute which, for a descending tow-boat with such a tow as the Eugene then had, is a narrow channel and one very difficult to navigate. The respondents' tow-boat Rescue, having in tow one flat partly loaded with stone, was then coming up the river. When

the Eugene was about 900 feet above and the Rescue was about 800 feet below the lower end of the wing-dam at the foot of Glass-house ripple, the boats exchanged whistles; the Eugene giving the first signal denoting her choice of the right side, to which the Rescue assented. As the Eugene was nearing the foot of Glass-house ripple, the Rescue, without any abatement of speed, entered it, and continued up stream under a full head of steam, with the wing-dam to her starboard. When about 250 feet above the lower end of the wing-dam the boats met and passed each other in dangerous proximity, the flat of the Rescue barely missing one of the coal-boats of the Eugene, but not actually colliding with it. At this moment, however, the Rescue threw her stern out from the wing-dam and in towards the Eugene, and the wheel of the Rescue was thus brought within perhaps 20 feet of the coal-boat; at any rate so close to it that the swells (which were very heavy,) caused by the revolutions of the wheel overflowed the side of the coal-boat and swamped it, so that it had to be cut loose. It sunk in a few minutes, and, with its cargo, was totally lost.

It cannot be pretended that this disaster was the result of inevitable accident. Undoubtedly fault there was somewhere. What the nature of it was, and which party was culpable, or whether both boats were in fault, are the questions now to be determined.

The space between the north shore and the wing-dam is about 400 feet wide, but by reason of a small bar at the wing-dam, a short distance above its lower end, the navigable coal-boat channel there is somewhat less than 400 feet in width, and, perhaps, does not greatly exceed 300 feet. Now, on this occasion, the Eugene was about in the middle of this channel,—slightly nearer the wing-dam than the north shore,—and was floating down stream, backing, from time to time, to keep straight in the channel. Some of the expert witnesses express the opinion that the Eugene should have been nearer the north shore, and quartering northwardly, or at least that that position was preferable. But, according to the clear weight of the evidence, her position in, and manner of running, the channel was free from fault. Besides, it will not do to hold such craft too rigidly to any particular position when running such a channel as Glass-house ripple. Under the most favorable circumstances a descending coal-tow is, to a certain extent, unmanageable. Floating with the stream, the tow is liable to be controlled largely by the current and cross-currents. And the tow-boat has not complete command of her movements like an unincumbered steamer.

Rule 3 for the government of pilots prescribes:

"When two boats are about to enter a narrow channel at the same time, the ascending boat shall be stopped below such channel until the descending boat shall have passed through it; but should two boats unavoidably meet in such channel, then it shall be the duty of the pilot of the ascending boat to * * * stop the engines or move them so as only to give the boat steerage-way, and the pilot of the descending boat shall cause his boat to be worked slowly until he has passed the ascending boat."

I am of the opinion that this rule was applicable to the circumstances of this case. But, even in the absence of such express regulation, it was a clear dictate of common prudence that the Rescue should remain below the mouth of Glass-house ripple until the Eugene had emerged therefrom. The latter was the descending boat, and had the right of way. She was burdened with a full tow, and hence in a measure was helpless to overcome the set of the current which is towards the wing-dam. All this the pilot of the Rescue knew, or was bound to know; and for him to enter there was to assume an unnecessary hazard, and was altogether indefensible.

It is said, however, that the Eugene was in fault in not warning the Rescue back. But to this I cannot assent. The signal which the Eugene had given merely indicated her choice of sides, and was by no means an invitation to the Rescue to enter this channel. The pilot of the Eugene had enough to do to attend to the proper navigation of his own boat. Moreover, each of two approaching vessels may assume that the other will reasonably perform its duty under the laws of navigation. *The Free State*, 91 U. S. 200. But were it conceded that the rescue was justified in entering Glass-house ripple, still she was highly culpable in not abating her speed. The expert testimony is to the effect that it was very dangerous for her to work on a full head of steam in passing the Eugene, and this is demonstrated by what actually occurred. The respondents, however, insist that the lost boat was not seaworthy for lack of proper splash-boards. But that they were reasonably sufficient is, I think, a fair conclusion from the whole proofs. Moreover, I am convinced by the evidence that no ordinary splash-boards would have prevented the swells caused by the wheel of the Rescue from overflowing the coal-boat.

As to the value of the lost property, there has been no serious controversy. The claim as set out in the bill annexed to the libel seemed to be well made out.

Let a decree be drawn in favor of the libelant for the amount claimed, with costs.

THE LEE¹TESSIER and others v. THE LEE and Cargo.¹*(Circuit Court, E. D. Louisiana. December 27, 1884.)*

SALVAGE—BARGE.

A barge broke loose in the harbor of New Orleans, and about 20 minutes thereafter, being apparently derelict, while her owners were in search of her, but not in sight, she was checked by some men in a yawl, who took possession of her and tied her up to the shore in safety. The owner of the barge shortly afterwards came for her, and libelants claimed a reward for their services, which was promised, and afterwards refused with opprobrious and insulting language, whereupon libelants retained possession of the barge and cargo, and brought their libel for salvage. The barge and cargo were worth \$1,900. *Held*, that the services rendered by libelants were valuable, and they had an award of \$25 each.

Admiralty Appeal.

R. King Cutler, for libelants.

E. W. Huntington, Horace L. Dufour, and A. C. Lewis, for claimants.

PARDEE, J. The libelants found the barge Lee, worth about \$1,000, with a cargo of cotton-seed, worth about \$900, adrift, with no one on board and apparently derelict, in the port of New Orleans. The wind was high, danger signals were out, the current was strong, and the barge was drifting towards and near to several steam-boats moored head on to shore, but lying with their sterns well out in the stream. There was no owner or apparent searcher for the barge in sight. The libelants, two of whom were out in a yawl, and one on shore, succeeded in getting a line aboard the barge, and with the help of others aboard the steam-boat Warren, with some difficulty and risk, checked the barge, and, hauling her in, tied her up in safety, so that she did no damage to herself nor to the other shipping near. When the owner, after about 20 minutes, came for his barge the libelants claimed a reward for their services, which was promised, but afterwards, when the barge had been removed, although the libelants remained aboard, it was refused, and (according to the weight of the evidence) refused with opprobrious and insulting language, whereupon the libelants retained possession of the barge and cargo and brought their libel for salvage.

It seems that the barge Lee belonged to the steam-boat Alberto, and shortly preceding its being found adrift was moored along-side of the Alberto, near the Cromwell Line landing; that the steam-ship New Orleans, of that line, in swinging out to start on her voyage, collided with the barge, crowding it upon the Alberto, and endangering that boat by pushing her on the wharf to such an extent that the master of the Alberto cut the barge adrift and whistled for assist-

¹ Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

ance. Several tug-boats responded after more or less delay, but first gave assistance to the *Alberto* in rescuing her from her dangerous position on the wharf, and afterwards one of them was sent after the barge, which had meanwhile drifted with the current of the eddy and the force of the wind up near the shipping, just below the head of Canal street, where it was rescued by libelants as aforesaid.

The libelants' demand for compensation is resisted on the grounds that the barge was neither derelict nor in danger, and that the services of libelants were not valuable, but were officious, without warrant and authority, and were for the purpose of fleecing and extorting money from claimants. From the evidence I conclude that the barge was not derelict, but was in danger of damaging itself and of doing great damage to other shipping; and while the libelants were no doubt actuated with the hope of reward, they rendered service in good faith, with sufficient warrant, and the service so rendered was valuable. That the services were rendered with a view to reward ought not to prejudice the libelants' claims in a court of admiralty; for, as is so well said by Mr. Justice BRADLEY, "salvage is a reward for meritorious services in saving property in peril on navigable waters, which might otherwise be destroyed, and is allowed as an encouragement to persons engaged in business on such waters and others to bestow their utmost endeavors to save vessels and cargo in peril." See *Sonderburg v. Tow-boat Co.* 3 Woods, 146.

The answer charges that the libelants knew the circumstances under which the barge was turned adrift, and that she was not abandoned, and particularly alleges that she was in no danger; but these charges are not supported by evidence. Under the principles that govern courts of admiralty in salvage cases, I am unable to see any sound reason for withholding compensation in this case. The claimants should have complied with the promise of the master of the *Alberto*, and paid or tendered a small sum at the outset, and the court would have sustained the tender; but as the claimants, instead, have resisted, largely increasing the expenses of libelants, and at the same time have unjustly vilified them, I feel it my duty to make such allowance as will be really compensatory for all but the vilification.

A decree may be entered awarding each of the libelants \$25, and condemning the claimants and their surety, on the release-bond, to pay the same, together with all costs in the case.

MILLER and another v. WATTIER.

(Circuit Court, D. Oregon. June 17, 1885.)

1. REMOVAL OF CAUSE — SUIT ARISING UNDER A LAW OF THE UNITED STATES.

A suit by a vendee of the state under the act of October 26, 1870, providing for the selection and sale of the swamp and overflowed lands granted to the state by the act of March 12, 1860, to enjoin the commission of a nuisance on the land so purchased, involves the question of whether said land was granted to the state by said act at the time of its selection by the state under said act of 1870, and therefore arises under said act of March 12, 1860, and is removable into this court under section 2 of the act of March 3, 1875, without reference to the nature of the other questions that may be involved in it.

Suit to Enjoin the Commission of a Nuisance.

N. B. Knight, for plaintiffs.

H. Y. Thompson and *George H. Williams*, for defendant.

DEADY, J. This is a suit in equity, brought by the plaintiffs in the state circuit court for the county of Marion, to enjoin the defendant from maintaining a certain dam on Little Pudding river, on the ground that the same causes the water to flow back on the plaintiffs' lands, and is therefore a nuisance. The defendant answered the complaint, and then removed the cause to this court on the ground that the controversy in the case arises under the act of congress of March 12, 1860, granting the swamp and overflowed land in Oregon to the state. The plaintiffs now move to remand the cause for the reasons following:

(1) It does not appear that a copy of the record has been filed in this court as required by law. (2) It does not appear that the case is one arising under the constitution or laws of the United States. (3) The court has no jurisdiction of the parties or subject-matter.

In support of the first point, it is stated by counsel, and such appears to be the fact, that the clerk of the state court, instead of making a "copy" of the record for this court, has put together the original papers, with copies of the journal entries, and delivered them to the defendant for that purpose.

The act of 1875 (18 St. 471) requires the party removing a cause to file "a copy of the record" in the court to which it is removed. The law devolves on the party, and not the clerk, the duty of procuring and filing a copy of the record; but if the clerk refuses to furnish such copy when duly demanded, he may be proceeded against both civilly and criminally. But there is no virtue or convenience in the copy that the original does not possess, and the former is only required because it would be inconvenient, if not improper, to deprive the state court of the latter,—the usual and proper evidence of acts done and suffered therein. But the fact is, the state court has voluntarily furnished the defendant with a portion of the record, instead of a copy of the same, for filing and use here, and I do not think the plaintiffs ought to be heard to object to it. They are not injured nor incon-

veniened by it; in fine, it does not concern them. For all the purposes of removal, and jurisdiction to hear and determine the cause, the original is equivalent to the copy; and in filing it the defendant has substantially complied with the statute. It is not unlikely that the original papers were sent here by mistake of the clerk; and, if such is the case, and the clerk shall apply to have the error corrected, it will be proper to allow the originals to be withdrawn from the files of this court, and copies thereof filed in their place. There is no claim that this court has jurisdiction of this case by reason of the citizenship of the parties. It was removed on the ground that it arose under a law of the United States, and therefore it is not necessary to further consider the third point made in support of the motion to remand.

A statement of the facts contained in the proceedings is necessary to the consideration of the second point.

The plaintiffs allege in their complaint that on March 12, 1860, 12 certain parcels of land, containing in all 877.67 acres, and described therein as being lots and subdivisions of certain sections, according to the public surveys, situate in Marion county, and constituting "a part of what is known as Lake Labish," (evidently a mere early phonetic spelling of the French *La Biche* or Deer lake,) were, and still are, "swamp and overflowed," within the meaning of the act of congress of that date, and as such were by the same granted to the state of Oregon; that in pursuance of an act of the legislative assembly of Oregon, entitled "An act providing for the selection and sale of the swamp and overflowed lands belonging to the state of Oregon," approved October 26, 1870, the board of commissioners for the sale of school and university lands, on November 11, 1871, duly selected said lands as *inuring* to the state of Oregon under said act of March 12, 1860; that on April 9, 1872, said board duly sold said lands to the plaintiff, John F. Miller, "as swamp and overflowed," he then paying 20 per centum of the purchase price, and receiving from "said board his certificate of the purchase of the same," who afterwards sold an interest therein to the plaintiff, W. P. Miller; that in 1882 the selection of said lands as aforesaid was approved by an agent of the United States "specially appointed for the purpose of examining and reporting upon the character of the lands claimed by the state as swamp and overflowed," but that patents have not been issued to the state for the same; that the defendant is the owner of a grist and saw mill on Big Pudding river, in said county, and known as "The Parkersville Mills;" that said mills are near Little Pudding river, "a constant stream" running through a portion of said lands, "in a clearly defined and distinct channel, where it has been accustomed to run from time immemorial, and near the northeastern extremity of said lands empties into Big Pudding river, a short distance above the defendant's mills;" that near said point the defendant "wrongfully and unlawfully maintains and keeps a dam

about seven feet high across Little Pudding river, whereby its waters "are raised and thrown over its banks, flooding a scope of country," including said lands, "of about five miles long and from one-half to three-quarters of a mile wide, and rendering the same utterly worthless;" that if said dam was removed, and said waters "allowed to flow in their natural channel," said "lands could be drained and reclaimed," and "made valuable for hay and pasturage;" that the only practical method of draining said lands is through the channel of the Little Pudding river, and so long as said dam remains "as it now is," they cannot be reclaimed, and the plaintiffs cannot perfect their title to the same; and that, although said dam has been adjudged a nuisance by the supreme court of the state, and the defendant has been requested by the plaintiffs to remove the same, he still continues to maintain it, "to the great nuisance of plaintiffs' said lands."

By his answer the defendant first simply denies *seriatim* the allegations of the bill, except the payment to the commissioners, and his own ownership of the Parkersville mills, and then proceeds to answer them in detail. And, *first*, he alleges that prior to 1850 William Parker took up and settled on donation No. 49, containing 640 acres, under the donation act of September 27, 1850, and on April 28, 1875, a patent was issued therefor,—the east half to his widow, and the west one to his heirs at law; that the southern part of the western boundary of said donation abuts on the north-eastern end of Lake La Biche. (Labish,) and Little Pudding river enters said donation through said part of said boundary, and thence flows across the same, where it has from time immemorial; that in 1850 said Parker erected a dam about six feet high across said river, near where it enters said donation, whereby its waters were raised and set back on said lake, which is an expansion of the river, and constructed a race therefrom on said donation about 80 yards long, wherein to conduct the water of said river for manufacturing purposes, and built a saw-mill at the lower end thereof; and that in 1852 he also built a grist-mill near the same point, which was, and ever since has been, run by water flowing through said race; that such dam remains where and as it was first erected, and the water continues to flow through said race as it has since 1850; that said dam, race, and mills are all on the west half of said donation, of which the defendant is the owner, together with the land on which they are situate, and all the water-power and privileges thereunto appertaining, and is now profitably engaged in running said mills by means of the water flowing through said race; that said mill property, with the water-power and privilege aforesaid, is worth \$12,000, but if said dam is removed, and the water diverted therefrom, it will be of little value, and the defendant will be damaged thereby not less than \$10,000.

The answer then avers: (1) That the United States surveys were extended over these lands in 1852, including the usual subdivisions; that the alleged listing and locating of said lands is illegal and void,

because the same was not made according to the legal subdivisions, and because the same and each parcel thereof is located in legal subdivisions, the greater part whereof is not wet and unfit for cultivation, and are therefore reserved to the United States by the act of March 12, 1860, and are now a part of the public domain. (2) That although the said lands were surveyed in 1852, and there was a regular session of the legislature of Oregon held in 1862, and biennially ever since, the alleged selection of said lands was not made until November, 1871, and therefore the act of March 12, 1860, does not apply to them; and that no selection of said lands has been approved by the commissioner of the general land-office, nor has any patent been issued for the same to the state. (3) That although 10 years have elapsed since the payment of 20 cents an acre to the state for said lands, no proof of any reclamation thereof has been made, nor have said lands been reclaimed, but they are now in the same condition, as to being wet and uncultivable, that they were at the date of the alleged purchase from the state. (4) That the plaintiffs have not, nor never had, the possession of said lands, or any right thereto; nor have they or either of them any right, title, or interest in or to the same. (5) That after the defendant heard that the plaintiff John F. Miller claimed said lands as swamp, he called on him and proposed some arrangement by which he could protect his property from injury resulting from the diversion of the water that supplied his mills, when said plaintiff told the defendant, in substance and effect, that such an arrangement was unnecessary, as the latter "held the key to the situation," and that no water could or would be drawn off said lands without his consent, and that, relying on said statement, the defendant expended about \$8,000 in improving said property; wherefore, plaintiffs are estopped, without the defendant's consent, from reducing the water above his dam. (6) That the defendant and those under whom he claims have been in the undisturbed, open, and notorious possession and use of the premises, including said water-power and privilege, for more than 30 years, and that he has acquired a right thereto by prescription. (7) That prior to 1850, and the construction of said dam, Lake La Biche (Labish) was a permanent body of water created by the expansion of Little Pudding river, and said lands were then covered with water, which the unobstructed channel of said river would not drain off and make fit for cultivation.

On the argument of the motion to remand, counsel for the plaintiffs maintained the proposition that it is not sufficient to give this court jurisdiction that it is asserted in the answer or petition for removal that the case arises under a law of the United States, or that the construction of one might become necessary in the course of the trial of it; citing *Millingar v. Hartuppee*, 6 Wall. 258, and *Gold Washing & Water Co. v. Keyes*, 96 U. S. 199. The proposition is not denied, and the authorities support it. But this is quite a different case from either of those.

In the latter case Mr. Justice WAITE says:

"Nothing was stated (in the complaint) from which it could in any manner be inferred that the defendants sought to justify the acts complained of by any such authority, (the constitution or laws of the United States.)"

The petition for removal was the only pleading on the part of the company, and that stated its ownership, derived from the United States, of certain mining land that only could be worked by the hydraulic process, which required the use of Bear river and its tributaries, and asserted that it acquired the right to so use the river under certain specified acts of congress, the construction of which were necessarily involved in the determination of the case, without, as the chief justice says, stating any facts to show the right it claims, or "to enable the court to see whether it necessarily depends upon the construction of the statutes;" to which he adds:

"The immunities of the statutes are, in effect, conclusions of law from the existence of particular facts. Protection is not afforded to all under all circumstances. In pleading the statute, therefore, the facts must be stated which call it into operation. The averment that it is in operation will not be enough; for that is the precise question the court is called upon to determine."

The former case was a writ of error to a state court under section 25 of the old judiciary act, and the question was whether a right claimed by the plaintiff in error, and which was decided against him in the court below, was derived from "an authority exercised under the United States," to-wit, an order of the United States district court. But it plainly appearing to the court that the order in question gave no such right, the writ was summarily dismissed, the chief justice saying, as he did so: "Something more than a bare assertion of such authority seems essential to the jurisdiction of this court."

But in this case there is a distinct assertion in the complaint that the lands in question are swamp and overflowed, and that they were so on March 12, 1860, and that as such were still within the purview and operation of that act in November, 1871, and liable to be selected by the state as the grantee thereof, and that they were so selected, and passed as such from the latter to the plaintiffs by purchase in 1872, all of which statements are denied and controverted by the answer of the defendant. Admitting all this, counsel for the plaintiffs contends that "the matter in dispute" is the right of the defendant to maintain this dam as against the plaintiffs, and that such dispute does not arise under an act of congress, and its determination only involves the question of whether or not the dam is a nuisance.

Section 2 of the act of 1875 (18 St. 470) gives the right to remove from a state court to this court any suit "arising under the constitution or laws of the United States," where "the matter in dispute" exceeds the sum or value of \$500. "The matter in dispute" may be real or personal property, or damages for an injury to either, or to the person; but in any case it must exceed \$500 in amount or value. This is the money element of the jurisdiction; and the other is, that the suit in

which this "dispute" is to be determined must arise under a law of the United States. The value of "the matter in dispute," and not its nature, is to be considered. But if the suit brought for the determination of this "dispute" necessarily involves the construction or application of an act of congress, then such suit arises under such act. As was said by this court in *Hughes v. Northern Pacific Ry. Co.* 9 Sawy. 319; S. C. 18 FED. REP. 106:

"A controversy which turns upon the existence, effect, or operation of an act of congress, arises under such act, and a suit brought to determine the same is a case arising under such act, within the meaning of the statute."

An action may be brought to recover the possession of a tract of land. "The matter in dispute" in such action is the right to the land, or the possession thereof. But that may depend on the legality or effect of a prior sale of the premises for delinquent taxes under an act of congress. In such case the action or controversy, without reference to the nature of the thing in dispute, arises under such act, whether invoked by the plaintiff or defendant, and is within the jurisdiction of the national courts. Nor is it material that other questions, in nowise depending upon the laws of the United States, are involved in the determination of the case. As was said by Mr. Justice HARLAN in *Railroad Co. v. Mississippi*, 102 U. S. 141:

"It is not sufficient to exclude the judicial power of the United States from a particular case, that it involves questions which do not at all depend on the constitution or laws of the United States; but when a question to which the judicial power of the Union is extended by the constitution forms an ingredient of the original cause, it is within the power of congress to give the circuit courts jurisdiction of that cause, although other questions of fact or of law may be involved in it."

Admitting, then, all that the plaintiffs claim in the argument,—as that the defendant cannot take advantage in this suit of any failure on the part of the plaintiffs to reclaim these lands or pay the remainder of the purchase price, on the ground that they are conditions subsequent to the grant or sale to the plaintiffs, for a breach of which no one can complain but the state; and that the question of whether the dam is a nuisance to these lands, or whether the plaintiffs are estopped to complain thereof, or whether defendant has acquired a right to flow these lands by prescription, are questions that do not arise under any act of congress,—still the plaintiffs' case, on their own showing, arises under the act of congress of March 12, 1830. They make no claim to any right, title, or interest in these lands except under this act, and in effect admit they have none other. Now, if the facts do not bring them within the purview or operation of the act,—as, if the lands are not swamp or overflowed within the meaning of the same, because the greater part thereof are not "wet and unfit for cultivation," or the right of the state thereto was lost by lapse of time long before the passage of the act of October 26, 1870, because the selection thereof was not made within two years from the adjournment of the

session of the legislature next after the passage of the act of March 12, 1860, as alleged in the defendant's answer,—then they are mere strangers to the premises, and cannot maintain any suit to abate or enjoin a private nuisance thereto or thereon.

So far, at least, then, this is a suit arising under a law of the United States, and removable to this court, under the first clause of section 2 of the act of March 3, 1875.

The motion to remand is therefore denied.

HANS v. STATE OF LOUISIANA.¹

(Circuit Court, E. D. Louisiana. May 15, 1885.)

CONSTITUTIONAL LAW—ACT OF MARCH 3, 1875, (18 ST. 470)—SUIT AGAINST STATE.

The statute of 1875 makes the jurisdiction of the circuit courts, so far as it depends upon the nature of the questions involved, co-extensive with the judicial power created by the constitution, and therefore includes all suits in law or equity which involve a federal question. But there can be no suit unless there is a defendant capable to be sued. States, without their continuing assent, are incapable of being brought before courts or defendants.

2. SAME—CITIZEN SUING HIS OWN STATE.

The constitution, by implication, even before its eleventh amendment, did not include within the judicial power a suit by a citizen against his own state. This exemption was enjoyed by each state before that time, and is based upon the general sense and general practice of mankind.

3. SAME—COMPELLING STATE TO PAY ITS OBLIGATIONS.

Good public reasons, founded on the distribution of powers in constitutional governments, make the power to compel states to pay their money obligations political and not judicial.

At Law. On exception to jurisdiction.

This suit was an action at law against the state of Louisiana by a citizen of said state for the recovery of the amount of certain coupons held by him representing the interest upon the "consolidated bonds" of said state, which fell due January 1, 1880. The bonds were authorized by an act of the legislature passed in 1874, which provided a continuing annual tax levy to meet the interest upon said bonds and a continuing annual appropriation thereof to its payment, and declared each provision of the act to be a contract between the state and every holder of the bonds issued under it. An amendment to the constitution of the state was adopted the same year, which is as follows:

"No. 1. The issue of consolidated bonds, authorized by the general assembly of the state, at its regular session in the year 1874, is hereby declared to create a valid contract between the state and each and every holder of said bonds, which the state shall by no means and in nowise impair. The said bonds shall be a valid obligation of the state in favor of any holder thereof, and no

¹Reprinted by Joseph P. Hornor, Esq., of the New Orleans bar.

court shall enjoin the payment of the principal or interest thereof, or the levy and collection of the tax therefor. To secure such levy, collection, and payment the judicial power shall be exercised when necessary. The tax required for the payment of the principal and interest of said bonds shall be assessed and collected each and every year until said bonds shall be paid, principal and interest, and the proceeds shall be paid by the treasurer of the state to the holders of said bonds as the principal and interest shall fall due, and no further legislation or appropriation shall be requisite for the said assessment and collection, and for such payment from the treasury."

By the new constitution adopted in 1879 it was ordained "that the coupon of said consolidated bonds falling due the first of January, 1880, be, and the same is hereby, remitted, and any interest taxes collected to meet said coupon are hereby transferred to defray the expenses of the state government." And by article 257 said constitution also prescribed that "the constitution of this state adopted in 1868, and all amendments thereto, is declared to be superseded by this constitution." The plaintiff alleged that by said provisions of said constitution the state claimed to be relieved of the obligation of her contract to pay the coupons held by him, and refused such payment. He also alleged that said provisions of the constitution of 1879 impaired the validity of said contract, in violation of article 1 of section 10 of the constitution of the United States.

The state appeared and filed an exception to the jurisdiction of the court, *ratione personæ*; that the state could not be sued without her permission; that the constitution and laws do not give the court jurisdiction of a suit against the state; and she declined the jurisdiction.

J. D. Rouse and Wm. Grant, for plaintiff.

M. J. Cunningham, Atty. Gen., for the State.

ARGUMENT OF JOHN D. ROUSE, ESQ.

May it please Your Honor:

The attorney general having waived the opening of this discussion, I am compelled to anticipate his argument.

The action is brought by a citizen of the state of Louisiana against the state of Louisiana. The exception is to the jurisdiction of the court to entertain such an action, because the state of Louisiana is a sovereign and has not consented to be sued in this court, and declines to submit herself to its jurisdiction. The first question arising is, how far is the state of Louisiana sovereign? In some respects she possesses the elements of sovereignty; in many others she has been deprived of them with her consent, or, rather, as she is not one of the 13 original states, she has never enjoyed them. The original 13 colonies surrendered a portion of the sovereignty which they possessed as independent states when they entered into the Union under the constitution.

* * * What sovereignty remained in the state of Louisiana when she became one of the United States under the constitution? She has no power to make treaties with foreign nations; she cannot issue letters of marque; she cannot enter into an alliance with a foreign state; she cannot pass any laws regulating or imposing duties upon imports; and there are various matters in which she does not possess the power of sovereign states. When the states entered into the Union, which some have seen fit to term a compact, and others properly denominate a nation, they surrendered to the nation which

they created, (or, properly speaking, which the people of the states created,) jurisdiction over those matters proper for the nation to have control of, rather than to be left to the individual constituents of that nation. By the adoption of the federal constitution they surrendered to the United States a certain degree of power to be exerted through its judiciary.

Section 2 of article 3 of the constitution of the United States provides "that the judicial power shall extend to all cases in law and equity arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states; and between a state, or the citizens thereof, and foreign states, citizens, or subjects." Thus was the judicial power extended by the very letter of the constitution to controversies to which a state is a party. It was a necessity of the government which they formed that such a power should be vested, and especially was it a necessity that the power should be vested in cases which might arise under the constitution or laws of the United States.

In the case of *Osborne v. Bank*, 9 Wheat. 738, Chief Justice MARSHALL says that "this clause of the constitution enables the judicial department to receive jurisdiction to the fullest extent of the constitution, laws, and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it." And again he says that "all governments which are not extremely defective in their organization must possess in themselves the power of expounding as well as enforcing their own laws."

So, also, Webster in his second speech on Foote's resolution said: "The people have wisely provided in the constitution itself a proper, suitable mode and tribunal for settling questions of constitutional law. These are in the constitution grants of power to congress, and restrictions on these powers. There are also prohibitions on the states. Some authority must, therefore, necessarily exist, having the ultimate jurisdiction to fix and ascertain the interpretation of these grants, restrictions, and prohibitions. The constitution has itself pointed out, ordained, and established that authority. How has it accomplished this great and essential end? By declaring, sir, that the constitution, and the laws of the United States made in pursuance thereof, shall be the supreme law of the land, anything in the constitution or laws of any state to the contrary notwithstanding. This, sir, was the first great step. By this the supremacy of the constitution and laws of the United States is declared. The people so will it. No state law is to be valid which comes in conflict with the constitution or any law of the United States passed in pursuance of it. But who shall decide this question of interference? To whom lies the last appeal? This, sir, the constitution itself decides also by declaring that the judicial power shall extend to all cases arising under the constitution and laws of the United States. These two provisions cover the whole ground. They are in truth the key-stone of the arch. With these it is a government; without them it is a confederation." 3 Webst. Works, 334. Again he said in his great argument before the senate of the United States, on the question whether the constitution was a compact between the sovereign states; "And in regard, sir, to the judiciary, the constitution is still more express and emphatic. It declares that the judicial power shall extend to all cases in law or equity arising under the constitution, laws of the United States, and treaties, that there shall be one supreme court, and that this supreme court shall have appellate jurisdiction of all these cases, subject to such exceptions as congress may make. It is impossible to escape from the generality of these

words. If a case arises under the constitution, that is, if a case arises depending on the construction of the constitution, the judicial power of the United States extends to it. It reaches the case, the question; it attaches the power of the national judicature to the case itself in whatever court it may arise or exist, and in this case the supreme court has appellate jurisdiction over all courts whatever. No language could provide with more effect and precision than is here done for subjecting constitutional questions to the ultimate decision of the supreme court. And, sir, this is exactly what the convention found it necessary to provide for, and intended to provide for."

In the case of *Mayor v. Cooper*, 6 Wall. 253, the supreme court say: "It is the right and duty of the national government to have its constitution and laws interpreted and applied by its own judicial tribunals. In cases arising under them, properly brought before them, this court is the final arbiter. The decisions of the courts of the United States, within their sphere of action, are as conclusive as the laws of congress made in pursuance of the constitution. This is essential to the peace of the nation, and to the vigor and efficiency of the government. A different principle would lead to the most mischievous consequences. The courts of the several states might determine the same questions in different ways. There would be no uniformity of decisions."

So, in the case of *Cohens v. Virginia*, 6 Wheat. 264, Chief Justice MARSHALL declares that "this jurisdiction is dependent upon the subject-matter, and where a case arises under the constitution and laws of the United States, the judicial power extends to it, whoever may be the parties."

Now, let us see, if your honor please, whether there is any reason for exempting a state from the operation of the judicial power of the United States, when a case presents a question arising under the constitution or laws of the United States. By entering into the nation, under the constitution of the United States, the several states submitted themselves in many named cases to its judicial power. A state may be sued by another state; and a state may sue, even now, a citizen of another state in the courts of the United States; and, before the constitution was amended, a state might be sued by the citizen of another state, or by an alien.

Chisholm v. Georgia was a suit brought by a citizen of South Carolina against the state of Georgia, under the provision of the constitution of the United States which declares that the judicial power of the United States shall extend to all controversies between states and the citizens of other states. It was there contended that that provision of the constitution authorized a state to sue a citizen of another state in the federal courts, but did not authorize a state to be sued. In deciding the case, Chief Justice JAY said: "The question now before us renders it necessary to pay particular attention to the second section, which extends the judicial power to 'controversies between a state and citizens of another state.' It is contended that this ought to be construed to reach none of these controversies excepting those in which a state may be plaintiff. The ordinary rules for construction will easily decide whether these words are to be understood in that limited sense. This extension of the power is remedial, because it is to settle controversies. It is, therefore, to be construed liberally. It is politic, wise, and good that not only the controversies in which a state is plaintiff, but also those in which a state is defendant, should be settled. Both cases, therefore, are within the reason of the remedy, and ought to be so adjudged, unless the obvious, plain, and literal sense of the words forbid it. If we attend to the words, we find them to be express, positive, free from ambiguity, and without room for such implied expressions. The judicial power of the United States shall extend to controversies between a state and citizens of another state. If the constitution really meant to extend these powers only to those controversies in which a state might be plaintiff, to the exclusion of those in which citizens had demands against a state, it is inconceivable that it should have attempted to

convey that meaning in words not only so incompetent, but also repugnant to it. If it meant to exclude a certain class of these controversies, why were they not expressly excepted? On the contrary, not even an intimation of such intention appears in any part of the constitution. It cannot be pretended that where citizens urge and insist upon demands against a state, which the state refuses to admit and comply with, that there is no controversy between them. Then it clearly falls, not only within the spirit, but the very words, of the constitution. What is it to the cause of justice, and how can it affect the definition of the word 'controversy,' whether the demands which cause the dispute are made by a state against citizens of another state, or by the latter against the former? When power is thus extended to a controversy, it necessarily, as to all judicial purposes, is also extended to those between whom it subsists. The exception contended for would contradict and do violence to the great and leading principles of a free and equal national government, one of the great objects of which is to insure justice to all,—to the few against the many, as well as to the many against the few. It would be strange indeed that the joint and equal sovereigns of this country should, in the very constitution by which they proposed to establish justice, so far deviate from the plain path of equality and impartiality as to give the collective citizens of one state a right of suing individual citizens of another state, and yet deny those citizens a right of suing them." 2 Dall. 476.

The result of that case led to the adoption of the eleventh amendment to the constitution. That amendment is but a limitation of the judicial power. It declares that the judicial power *shall not extend* to a suit brought by a citizen of another or a foreign state *against* a state of this Union, and divests no other jurisdiction under the constitution. The judicial power to entertain suits between a state and citizens of another state, provided the state is plaintiff, still remains; and that power has been exercised not unfrequently, notably in the case of *Pennsylvania v. Wheeling Bridge Co.* 18 How. 421. In that case it was contended that a state could not sue in the circuit court of the United States a citizen of another state, but it was held that the power to entertain jurisdiction of a controversy between a state and a citizen of another state was expressly granted in the constitution of the United States; that the eleventh amendment only took away jurisdiction of suits *against* a state when brought by a citizen of another state or of a foreign state, leaving the jurisdiction in all other cases unimpaired.

By entering the Union under the constitution the states submitted themselves to the judicial power of the United States in all cases contemplated by that constitution, and this proposition has been recently affirmed by the supreme court in the case of *New Hampshire v. Louisiana*, 108 U. S. 90; S. C. 2 Sup. Ct. Rep. 176. So, too, in the case of *Rhode Island v. Massachusetts*, 12 Pet. 720, the court say that "the states waived their exemption from judicial power as sovereigns by inherent right, by their own grant of its exercise over themselves."

It appearing, then, that the states are not sovereign; that they have consented in certain matters to submit their controversies to the jurisdiction of the courts of the United States,—is this suit one in which the state of Louisiana has submitted herself to the jurisdiction of the courts of the United States? The case presented, if your honor please, is that of a citizen of the state suing the state of Louisiana, alleging that he is the owner of certain coupons issued by the state of Louisiana, by which she contracted to pay him interest on certain obligations of the state, and he avers that the state of Louisiana has repudiated that contract; that she has forbidden her officers to execute it; that she has diverted the money which was collected for his payment to other uses. He avers that the action of the state of Louisiana impairs the contract which the state had made with him. The constitution of the United States declares

that no state shall impair the obligation of a contract. He therefore appeals to this court for a vindication of his constitutional right, and the enforcement of his constitutional guaranty that the contract entered into with him by the state shall not be impaired by herself. It presents a question arising under the constitution of the United States. It presents a question to which the judicial power of the Union extends under the third article of the constitution.

* * * Is this case taken out of the category of cases in which states may be sued in the courts of the United States, because it is not included among those specially designated in which a state may be sued as a party? The attorney general concedes that the state could be sued by another state. He concedes that before the adoption of the eleventh amendment of the constitution a state could be sued by a citizen of another state, because the express language of the constitution authorized it, mentioning the states by name. But that does not exclude cases arising under the constitution or laws of the United States. The extension of jurisdiction in particular instances when a state is a party was deemed necessary because a case might arise between states and individuals which would not involve any question arising under the constitution or laws of the United States. But in all cases arising under the constitution and laws of the United States it was proper and right—it was a necessity—that the government of the United States should retain within itself the power, through its own courts, to determine the construction of that constitution, and to enforce its provisions.

The constitution, in article 3, § 1, declares that the judicial power shall be vested in one supreme court, and in such inferior courts as congress may, from time to time, ordain or establish. That is mandatory. It did not leave it to the discretion of congress. For a long time this power was vested in the supreme court alone, but by the act of March 3, 1875, congress extended that jurisdiction to the circuit courts (employing the very language of the constitution) in all cases arising under the constitution and laws of the United States, which are of a civil nature, when the amount of value in dispute exceeds \$500.

In *Ames v. Kansas*, 111 U. S. 449, S. C. 4 Sup. Ct. Rep. 437, the state brought a suit against a corporation of her own creation, in one of her own courts. The defendant having set up its acceptance of the provisions of an act of congress by which it became a part of the Union Pacific Railway, incorporated by an act of congress, sought and obtained a removal of the cause to the circuit court, on the ground that the case presented a controversy arising under a law of the United States. The state denied the jurisdiction of the circuit court, because the state was a party, and declined to assent thereto, and moved to remand the cause to the state court whence removed. The motion was refused, and the supreme court affirmed the circuit court in maintaining jurisdiction. The court reviewed all previous decisions upon the subject of jurisdiction in cases where a state was a party, and, applying the principles of such decisions to the act of March 3, 1875, the court held that, as to cases arising under the constitution or laws of the United States, the language of the act of 1875 "is identical with that of the constitution, and the evident purpose of congress was to make the original jurisdiction of the circuit courts co-extensive with the judicial power in all cases where the supreme court had not already been invested by law with exclusive cognizance.

* * * The judicial power of the United States extends to *all* cases arising under the constitution and laws, and the act of 1875 commits that power to the circuit courts."

The same question as to the extent of the judicial power, and whether it includes cases to which a state is a party, when the case arises under the constitution or laws of the United States, was fully considered by the supreme court as long ago as 1821, in *Cohens v. Virginia*. Chief Justice MARSHALL then said: "It may be true that the partiality of the state tribunals, in ordi-

nary controversies between a state and its citizens, was not apprehended, and therefore the judicial power of the Union was not extended to such cases; but this was not the sole nor the greatest object for which this department was created. A more important, a much more interesting, object was the preservation of the constitution and laws of the United States, so far as they can be preserved by judicial authority; and therefore the jurisdiction of the courts of the Union was expressly extended to all cases arising under the constitution and those laws. If the constitution or laws may be violated by proceedings instituted by a state against its own citizens, and if that violation may be such as essentially to affect the constitution and the laws, such as to arrest the progress of government in its constitutional course, why should their cases be excepted from that provision which expressly extends the judicial power of the Union to all cases arising under the constitution and laws. After bestowing on this subject the most attentive consideration, the court can perceive no reason, founded on the character of the parties, for introducing an exception which the constitution has not made, and we think the judicial power, as originally given, extends to all cases arising under the constitution or a law of the United States, whoever may be the parties."

In deciding *Ames v. Kansas*, the chief justice, quoted and reaffirmed this case. No amount of argument on my part could add anything to what was there said by Chief Justice MARSHALL. Under the provisions of the constitution which extends the judicial power to all cases arising under the constitution and laws of the United States, the plaintiff has brought his case, and the jurisdiction of this court is demonstrated, and the state has no such sovereignty as will exclude this court from taking jurisdiction. When she became a member of the Union, she became a member subject to the judicial power of the United States, in the cases provided for in the constitution. *Dodge v. Woolsey*, 18 How. 351 *et seq.*; *Cohen v. Virginia*, 6 Wheat. 378; *Ames v. Kansas*, 111 U. S. 449; S. C. 4 Sup. Ct. Rep. 437; *Harvey v. Eom*. 20 FED. REP. 411, and note, 417. But, if the court please, we need not rest our case upon the consent contained in the constitution itself. The state of Louisiana has herself most emphatically submitted herself to the judicial power for the enforcement of the very contract which the plaintiff here seeks to enforce. The consolidated bonds to which the coupons are annexed, upon which the plaintiff sues, were issued under act No. 3 of the legislature of 1874. Section 11 of that act provides "that each provision of this act shall be, and is hereby declared to be, a *contract* between the state of Louisiana and each and every holder of the bonds issued under this act." At the same time, an amendment to the constitution of the state of Louisiana was proposed, which was subsequently adopted, and which provides as follows: "The issue of consolidated bonds, authorized by the general assembly of the state, at its regular session in the year 1874, is hereby declared to create a valid contract between the state and each and every holder of said bonds, which the state shall by no means and in nowise impair. The said bonds shall be a valid obligation of the state in favor of any holder thereof, and no court shall enjoin the payment of the principal or interest thereof, or the levy and collection of the tax therefor. To secure such levy, collection, and *payment*, the *judicial power* shall be exercised when necessary."

Your honor will perceive that, by the language of the amendment, the extension of the judicial power is to enforce the payment of the principal and interest; not simply the payment of the tax, but the payment of the obligation itself. The language employed is, "and to secure such levy, collection, and *payment*." The words "levy and collection" apply to the tax, and the word "payment" applies to the principal and interest of the obligation—of the bonds themselves.

Now, what is the judicial power? It has been defined by some high authorities to be the power of the judges—the power of the courts. I say that

it is the power of the judges to hear and determine—to decide—controversies between individuals. It includes also the power to enforce the mandates or decrees of the courts. Now, to what judicial power has the state of Louisiana submitted herself by this amendment to the constitution? Palpably and plainly, first to her own judicial power—to the power of her own courts. The words “judicial power” evidently refer to her own courts; but it includes more than her own courts. It submits the state of Louisiana to the judicial power of all courts capable of taking jurisdiction *ratione materiae*. A party may go into the federal court to enforce any right which he may enforce in a state court. When a state submits itself without reservation to the jurisdiction of the court in a particular case, that jurisdiction may be used in the particular case to enforce what the state has given permission to be done. That is what the supreme court said in the case of *Louisiana v. Jumel*, 107 U. S. 728, S. C. 2 Sup. Ct. Rep. 128, in construing this very constitutional amendment. And there is instruction in what was said by Mr. Justice FIELD in his dissenting opinion on that subject. “I admit,” said he, “that the rule of the common law that the sovereign cannot be held amenable to process in his own courts without his consent, is applied in this country to the state, under which designation are included the people within its territorial limits, in whom resides whatever sovereignty the state possesses. But they act and speak in this country, at least in time of peace, only through the constitution and laws. For their will we must look to these manifestations of it. If in that way they consent to suits, either directly against themselves by name, or against any of their authorized agents, there can be no reason of policy or of law against issuing process in proper cases to bring them or their agents before the court.” Again he says, at page 731: “It would puzzle the wit of man to find anywhere in the legislation of the world a more perfect assurance of the fixed purpose of a state to keep faith with her creditors, or of a pledge of a portion of her revenues for their payment, or of the submission of her officers to the compulsory process of the judicial tribunals, if necessary to carry out her engagements.”

In the case of *Curran v. Arkansas*, 15 How. 304, it was objected that the state could not be sued. But the supreme court answered that “the objection involved a question of local law, and that as the state permitted herself to be sued in her own tribunals, that was conclusive upon the subject.” And in *Davis v. Gray*, 16 Wall. 221, the doctrine was reaffirmed, and after affirming it the court said: “A party, by going into a national court, does not lose any right or appropriate remedy of which he might have availed himself in the state courts of the same locality. The wise policy of the constitution gives him a choice of tribunals. In the former, he may hope to escape the local influences which sometimes disturb the even flow of justice. And in the regular course of procedure, if the amount involved be large enough, he may have access to this tribunal as the final arbiter of his rights.”

So, if your honor please, by the submission of herself to the judicial power of her own courts, the state submitted herself to the judicial power of the federal courts having jurisdiction *ratione materiae*. She submitted herself to the jurisdiction of this court, because she made no exception. Even the supreme court of Louisiana, in the case of *State v. Burke*, put her exemption from suit to enforce this contract upon the ground that the constitutional amendment of 1874, which submitted the state of Louisiana to the judicial power, had been repealed by the constitution of 1871, and that submission taken away. Commenting upon this very opinion of the supreme court of Louisiana, Mr. Justice FIELD says. “In thus holding, the court would seem to have lost sight of two provisions of the federal constitution, one of which declares that ‘the constitution, and the laws of the United States which shall be made in pursuance thereof, * * * shall be the supreme law of the land;’ and the other, which declares that ‘the judges in every

state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.' These provisions, which govern in Louisiana as well as in other states, being overlooked, and the inhibition against the impairment of the obligation of contracts being limited to legislative action only, on the part of the state, so far as concerns her own contracts, it is not surprising that the court held that the ordinance of repudiation and shame embodied in the new constitution was to be obeyed; that its conflict with the federal constitution was to be disregarded; and that what the state was prohibited from doing should be deemed the legal expression of her will, and enforced as such. The decision rests upon the theory that a proceeding against the officers of the state to compel them to do their duty is a suit against the state, and that her consent to a suit against them has been withdrawn by clauses of the new constitution. But if those clauses never lawfully became a part of the new constitution, because the state under the federal constitution was incapable of enacting them, then her consent remains, and the present suits are simply attempts to compel her officers to do her lawful bidding. The state cannot speak through an enactment which contravenes the federal constitution." 107 U. S. 741; S. C. 2 Sup. Ct. Rep. 153.

The supreme court of Louisiana assumed that, although the constitution of the United States prohibited the state from passing any law impairing the validity of a contract, the state, by the adoption of a constitution, could avoid that prohibition. The court, in coming to that conclusion, overlooked the numerous decisions of the supreme court of the United States, declaring that that provision of the constitution was directed as well against impairing the obligation of a contract by constitutional amendment as by legislative authority; that in the meaning of the prohibition a constitution is a law.

In the case of *Dodge v. Woolsey*, 18 How. 331, it was held that "a change of constitution cannot release a state from contracts made under a constitution which permits them to be made." And in *Railroad Co. v. McClure*, 10 Wall. 511, that "the constitution of a state is undoubtedly a law," within the contract clause of the constitution, and that "a state can no more do what is thus forbidden by one than by the other;" and in *White v. Hart*, 13 Wall. 646, and *Gunn v. Barry*, 15 Wall. 610, the supreme court repeated these declarations with emphasis, and reaffirmed them. * * *

In *Louisiana v. Jumel*, Mr. Justice FIELD says: "When a state enters into the markets of the world as a borrower, she, for a time, lays aside her sovereignty and becomes responsible as a civil corporation." 107 U. S. 740; S. C. 2 Sup. Ct. Rep. 151. He but reiterated the language of the supreme court in *Murray v. Charleston*, where they say: "The truth is, states and cities, when they borrow money and contract to pay it with interest, are not acting as sovereigns. They come down to the level of ordinary individuals. Their contracts have the same meaning as that of similar contracts between private persons. Hence, instead of there being in the undertaking of a state or city to pay, a reservation of a sovereign right to withhold payments, the contract should be regarded as an assurance that such a right will not be exercised. *A promise to pay, with a reserved right to deny or change the effect of a promise, is an absurdity.*" 96 U. S. 445. * * * I presume it will not be disputed that the obligation here sued upon is a contract. If it be, I refer the attorney general to the opinion of the chief justice in the case of *Louisiana v. Jumel*, where he says: "The language employed in this instance shows unmistakably a design to make these promises and these pledges so far contracts that their obligations would be protected by the constitution of the United States against impairment." 107 U. S. 719; S. C. 2 Sup. Ct. Rep. 135.

I presume that the gentleman will not attempt to deny that the debt ordinance does impair that contract. In addition to the debt ordinance, we have article 257 of the constitution of 1879, which prescribes that "the constitution of this state, adopted in 1868, and all the amendments thereto, is

declared to be superseded by this constitution " That is an impairment of the contract by which the state had submitted herself to the judicial power for the enforcement of the contracts made under act No. 3 of the session of 1874.

But it is said that this case has been decided in that of *Louisiana v. Jumel*. I deny it. I deny that there is anything in that case which prevents the plaintiff from bringing and maintaining this suit. That case was not an action upon any contract under the act of 1874, seeking to enforce its obligations, but a case seeking the general good. In the one case, the plaintiffs asked for an injunction against an officer of the state from obeying the mandates of the constitution of 1879 in violation of the amendment of 1874; in the other case, they asked that the officers of the state be compelled to execute the contract of 1874, not in their own behalf, but in behalf of everybody who was interested in it. They were philanthropists seeking the general good. They asked the court to sit for the purpose of enforcing an obligation in favor of the whole world, and not for any special relief for themselves. Before the case went to trial they abandoned their claim for individual relief, and struck their demand therefor out of the pleadings. They in effect asked the court to take charge of the finances of the state, and to administer them for the benefit of all who were interested in the execution of the contracts into which the state had entered.

What did the court say: "The bonds and coupons which the parties to these suits hold, have not been reduced to judgment, and there is no way in which the state, in its capacity as an organized political community, can be brought before any court of the state or of the United States to answer a suit in the name of *these holders* to obtain such a judgment." Then it proceeds to give the reason why *these holders* could not bring a suit against the state: "It was expressly decided by the supreme court of the state in *State v. Burke*, 33 La. Ann. 498, that such a suit could not be brought in the state court, and under the eleventh amendment to the constitution no state can be sued in the courts of the United States by a *citizen of another state*." (Those plaintiffs were citizens of the state of New York.) "Neither was there when the bonds were issued, nor is there now, any statute or judicial decision giving the bondholders a remedy in the state courts, or elsewhere, either by *mandamus* or *injunction*, against the state in its political capacity, to compel it to do what it has agreed should be done, but which it refuses to do." 107 U. S. 720; S. C. 2 Sup. Ct. Rep. 135.

Does it exclude all remedy? Does it prevent the plaintiff from appealing to the judicial power to enforce the contract which the state had made with him? Does it prevent a *citizen of the state* from bringing a suit arising under the constitution and laws of the United States, when he seeks to enforce the prohibition against the impairment of his contract? There is not a word in this decision which excludes the remedy sought in this case, or the jurisdiction we are now seeking to maintain. The court said: "The question then is whether the contract can be enforced, notwithstanding the constitution, by coercing the agents and officers of the state whose authority has been withdrawn in violation of the contract, *without the state itself, in its political capacity, being a party to its proceedings*." 107 U. S. 721; S. C. 2 Sup. Ct. Rep. 136.

Your honor will perceive that one of the objections to the jurisdiction of the court was that the state was not a party to the proceedings. We have avoided that objection in this case by suing the state instead of her officers. Again, said the court: "So that the remedy sought implies power in the judiciary to compel the state to abide by and perform its contracts for the payment of money, not in rendering and enforcing a judgment in the ordinary form of judicial procedure, but by assuming the control of the administration of the fiscal affairs of the state to the extent that may be necessary to accom-

plish the end in view." 107 U. S. 722; S. C. 2 Sup. Ct. Rep. 136. That is what the court said in the case of *Louisiana v. Jumel*. Does your honor wonder that they came to that conclusion? Would it be possible for the court to come to any other conclusion, in view of the form of the pleadings and the mode of proceeding adopted by the complainants?

I respectfully submit, then, that the state has consented to be sued. I submit that she has made that consent a matter of contract, upon which she has obtained the loan of money. I submit that she cannot withdraw that consent to the injury of the party with whom she contracted; that such withdrawal impairs the validity of the contract, and is prohibited by the constitution of the United States, which is as binding upon the state, acting in a constitutional capacity, as it is upon the legislature of the state. The theory that the state is a sovereign finds no place in our government. I have already demonstrated that she is not a sovereign, although she possesses some elements of sovereignty. But it is immaterial whether she be a sovereign or not. It is immaterial whether the Union is a compact or a national government. It was established, as recited in the preamble, by the people of the United States, for the purpose, among other things, of establishing justice. And for the purpose of establishing justice they provided that the states should be subject to the judicial power, realizing that it was as necessary to administer justice between a state and her citizens as it is between citizens of different states. Therefore, I contend that I have established the two propositions: *First*, the submission of the state to the judicial power of the United States, by her entering into the Union; and, *secondly*, her submission thereto by her own voluntary act in the amendment of 1874 to her constitution.

Such submission to the judicial power of the Union being established, the jurisdiction of this court must be maintained.

BILLINGS. J. In *Louisiana v. Jumel* and *Elliott v. Wiltz*, reported in 107 U. S. 711, S. C. 2 Sup. Ct. Rep. 128, it was held by this court, and subsequently declared by the supreme court, that the suit was, in substance and effect, a suit against a state, and therefore that this court had no jurisdiction to hear or determine the same. This suit is brought upon obligations similar in all respects to those involved in the *Elliott Case*, *i. e.*, issued under the same legislative and constitutional guaranties, and impeded and defied by the same constitutional ordinance. There the plaintiff was a citizen of the state of New York. Here the plaintiff is a citizen of the state of Louisiana. The greater includes the less. If a citizen of another state cannot sue, *a fortiori* a citizen of Louisiana cannot. The effect of the eleventh amendment of the constitution was a construction by amendment of section 2, art. 3, of the constitution; and so far as, under that section, it had been held that the judicial power included a suit between a state and citizens of another state, when the state was defendant, that construction had been reversed. So far as relates to the class of cases to which this case belongs, *viz.*, where a state is sued by its own citizens, the constitution had never included it, but had by implication excluded it.

The general clause, that "the judicial power shall extend to all cases in law and equity arising under the constitution of the United States," establishes the rule of boundary of jurisdiction so far as it depends upon the subject-matter of the suit, but was not meant to change or

affect the capacity or liability of parties to be sued. It therefore included all suits involving or arising under the federal constitution, brought by parties competent to sue against parties capable of being sued. It included all suits of a requisite character against parties so situated or constituted that they could be sued, whether brought by individuals or by the United States or one of the states or by a foreign government; but it had no effect to subject to the jurisdiction of the courts parties incapable to be sued.

Indeed, it is to be observed that in the enumeration of the cases to which the judicial power extends, (Const. art. 3, § 2,) while there is specified the cases "between a state and citizens of another state, and between a state and the citizens thereof and foreign states, citizens or subjects," there is no mention of cases between a state and its own citizens. It is undoubtedly true that this enumeration of parties who could sue merely by virtue of their own character would not at all prevent the inclusion within the judicial power of other cases on account of the nature of the controversy. But when the jurisdiction is given merely by the character of the questions involved, it must be a suit in law or equity; that is, a demand presented against a party defendant, who, according to its nature and relations to others, can be sued. According to the settled ideas relating to governments, a state can no more be sued contrary to its continuing assent than can the dead. No matter what the nature of the controversy against the dead, human tribunals can take no cognizance of it. No more can they against a state against its will. The reason is that weightiest public reasons prevent that control over the treasury and resources of a state, and the compulsory appropriation thereof to the extinction of its debts on the part of courts, which the recovery of a judgment implies and necessitates. When the constitution was adopted, the effective enforcement of money judgments, obtained in equity, was by sequestration, and in law by the imprisonment of the debtor, which, of course, would be inapplicable to indebted states. Not more inconsistent with the functions of states, and, indeed, with their very existence, or organisms for the protection of the lives and property and health of the citizens, and their advancement by education, is any judicial control over the property of the states by bringing them directly before the courts. Though they do not make war or peace, nor regulate foreign or domestic commerce, nor deal with foreign governments, nor with each other through treaties, they still must, as sovereigns, regulate the taxation of the citizens, and must apply the taxes, when levied, to the repelling of pestilence, to the maintenance of schools and public order, and the promotion of the rights of all its citizens in their persons and estates. Its taxes must be levied, and its public lands disposed of, by legislative will, for which a *mandamus* from the courts, or a marshal's sale, cannot be substituted. The payment of the debts of a state is left to be enforced by an enlightened public conscience, which, at the time the constitution was adopted,

was thought to be an ample power to prevent all repudiation. It is matter of regret that just creditors of a state should be disregarded or defied; but even that is better than that government should be crippled and public good be possibly defeated, or public necessities go unprovided for.

These are the reasons which were given by the publicists and jurists against a state being sued against its will,—its continuing will,—when the constitution was submitted for adoption. These were the reasons given by Alexander Hamilton in the *Federalist*, No. 81, (Washington Ed. of 1818,) p. 508, when he says:

"It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every state in the Union. * * * There is no color to pretend that the state governments would, by the adoption of the plan of the convention, be divested of the privilege of paying their debts in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretension to a compulsive force. They confer no right of action independent of the sovereign will. *To what purpose would it be to authorize suits against states for the debts they owe? How could recoveries be enforced? It is evident it could not be done without waging war against the contracting state;* and to ascribe to the federal courts by mere implication, and in destruction of a pre-existing right of the state governments, a power which would involve such a consequence, would be altogether forced and unwarrantable."

See, also, Mr. Madison, as reported in 2 Elliot's Debates, 390. He there says: "It is not in the power of individuals to call any state into court." Mr. Webster, in his letter to Baring Bros. & Co., vol. 6, (Everett's Ed.,) at page 539, says:

"The security for state loans is the plighted faith of the state as a political community. It rests on the same basis as other contracts with established governments,—the same basis, for example, as loans made by the United States under the authority of congress; that is to say, the good faith of the government making the loan, and its ability to fulfill its engagements. It has been said that the states cannot be sued on these bonds. But neither could the United States be sued, nor, as I suppose, the crown of England. Nor would the power of suing give to the creditors, probably, any substantial additional security. The solemn obligation of a government arising on its own acknowledged bond would not be enhanced by a judgment rendered on such bond. If it either could not or would not make provision for paying the bond, it is probable that it could not or would not make provision for satisfying the judgment."

When the legislature of Massachusetts protested against the decision in *Chisholm v. Georgia*, 2 Dall. 419, it was against a state being sued by any one. This was the utterance of the conventions of New York and Rhode Island when they voted for the adoption of the constitution. This was the meaning of the eleventh amendment. It introduced no new provision, but corrected what the people of three-fifths of the states thought was an erroneous construction. The reasons which prompted it, and the arguments which secured it, are equally

strong against the citizen suing his own state, and against his suing any other state. In both cases the exemption springs from the inability of a court to deal directly with the treasury of a state.

In the cases of *Cohens v. Virginia*, 6 Wheat. 319, and of *Ames v. Kansas*, 111 U. S. 470, S. C. 4 Sup. Ct. Rep. 437, the court held that when a state instituted a suit it necessarily submitted itself to all reviews in and transfers to the federal courts, which the constitution and laws establishing the court authorized,—i. e., that having voluntarily taken the position of suitor, the state had necessitated the enforcement of all legally established rules by which the rights of parties litigant were ascertained and adjudged; and these cases hold nothing more. The contest there was as to what followed in the progress of a cause where the character of a suitor had been voluntarily assumed by a state to enforce a demand or a proceeding. The contest here is altogether different, and is whether a state can compulsorily be made a suitor. In both these cases the learned chief justices expressly reserve the question as to the right to present a demand against a state, even in a cause instituted by a state. They say, Chief Justice MARSHALL speaking originally, and Chief Justice WAITE speaking by quotation:

"The argument would have great force to prove that this court could not establish the demand of a citizen upon his state, but is not entitled to the same force when urged to show that this court cannot inquire whether the constitution and laws of the United States protect a citizen from a prosecution instituted against him by a state."

After an attentive consideration of the able arguments made and authorities cited by the counsel, my conclusion is that while the act of 1875, so far as jurisdiction depends upon the nature of the litigation, makes the jurisdiction of the circuit court co-extensive with the judicial power created by the constitution, and therefore includes all suits in law or equity involving a federal question, nevertheless, that does not include a suit against a state, for the reason that it is incapable to be sued against its continuing assent; and where, as here, the object of the suit is the recovery of money, courts would be without any means of enforcing the judgment without an assumption of those powers which, in accordance with the checks and balances and distribution of powers in all well-constituted governments, are unchangeably and forever political, and not judicial.

The exception must be maintained, and the suit dismissed.

See note to *Baltimore & O. R. Co. v. Allen*, 17 FED. REP. 188-197.—[ED.]

McALPINE and others v. TOURTELOTTE and others.

(Circuit Court, D. Kansas. June 8, 1885.)

1. EQUITY JURISDICTION—SUIT TO QUIET TITLE—EJECTMENT PENDING IN STATE COURT.

The fact that a complainant in a suit to quiet title founds his claim on a title derived from a decree in bankruptcy, will not give the circuit court jurisdiction to entertain the suit when an action of ejectment for the land in controversy is pending in the state court, and no relief could be granted without enjoining such action.

2. SAME—CONSTRUCTION OF DEED.

Where a party purchases land of a bankrupt at the assignee's sale, the mere fact that the description of the land is susceptible of two constructions will not justify a resort to a court of equity, as a court of law can, in such a case, decide what is the proper construction to place upon the deed as well as a court in chancery.

3. SAME—REMEDY AT LAW—MULTIPLICITY OF SUITS.

When a complainant's title is a title which he can enforce at law, he must show some special reason for going into chancery, even though there are several parties opposed to him and contesting his rights.

4. BANKRUPTCY—TITLE ACQUIRED BY PURCHASER AT ASSIGNEE'S SALE.

When proceedings to set aside a bankrupt's discharge, and subject certain land omitted by him from his schedule, are instituted after the deed of such land has been recorded and the land is scheduled by a new assignee, and sold by order of the court, the purchaser at such sale will acquire whatever title the bankrupt had in the land at the time of the sale, and if the bankrupt got any better or different title from the time he went into bankruptcy to the time the judicial sale was made, that title will inure to the benefit of the purchaser.

Suit by a Bill in Chancery to Quiet Title. The facts appear in the opinion.

James M. Mason and John W. Day, for complainants.

Goodin & Keplinger, for defendants Snyder.

Jefferson Brumbach, for defendant Tourtelotte.

MILLER, Justice. This suit is by a bill in chancery, the main purpose of which, perhaps, is expressed in the equitable phrase "to quiet title." The title to be quieted originated in this way: Mr. Joseph E. Snyder, who is the common source of title to all the parties in this controversy, became bankrupt in 1867, and was discharged from liability to all his debts. Not long thereafter there appeared upon the records of the land-titles of the county in which he lived evidence of title in him to property which had not been found there before, which had not been presented by him in his schedule of assets; and this induced some of the creditors to undertake to set aside his discharge, and to subject that property to sale for his debts. It is unimportant to go very much into the details of that proceeding in bankruptcy. It is sufficient to say that the discharge was set aside; that a new assignee was appointed; and that this assignee, under the directions of the court, produced a new schedule of the property, which was supposed to include the land now in controversy—part of it, or all of it.

Mr. Snyder appeared in answer to the proceedings taken against him to set aside his discharge. No special appearance or notice seems to have been served on him in regard to the further proceedings to subject this property to sale as a part of his assets; nor does it appear that he made any response to that particular movement other than that which is made in his answer to the proceedings to set aside his discharge. The schedule of property which the assignee presented, and for which he asks an order of the court that he might sell it, differs in some respects in its description, though it is probable that it was intended to be the same as that which is mentioned in the proceedings to set aside his discharge; but the description brought forward by the new assignee, in his additional schedule, is a very minute description, and says no more than that it was his property, and gives its description by metes and bounds, which was somewhat complicated; but it says nothing about how he became the owner of the property, from whom he derived it, nor what was the nature of his title. The decree of sale proceeded on the same principle, the sale itself proceeded on the same principle, and the deed proceeded on the same principle; i. e., upon the principle of describing the property by metes and bounds and declaring it to be his property, but saying nothing about how he got it, from whom he obtained it, or anything connected with it. Afterwards certain persons sued Snyder, his discharge having been set aside, in the ordinary state courts, and levied an attachment on part of this land for judgment, and had it sold, and bought it, and got the title that such attachment could give. Out of that proceeding two suits have grown up—two actions of ejectment, probably three. Three actions of ejectment, I think, depend on that attachment title.

The heirs of Snyder took possession or had possession of a part of this property, and they were sued in ejectment in the state courts by the holders of this bankrupt title. There were those four actions of ejectment pending in the state courts, growing out of the claim under Snyder and of the possession of these respective titles. Two of these suits, Tourtelotte's and Mrs. Snyder's actions of ejectment, were removed into this court. The suit against Mrs. Snyder and the heirs of Snyder was not originally an action of ejectment, but was a suit in the state court by bill in chancery. That was removed; but two others involving the same subject-matter were left in the state courts. One of these suits, I believe the Tourtelotte suit, has been tried, and verdict rendered against the present plaintiff; taken to the supreme court of the state; reversed; and was pending on a new trial when it was removed into this court. The present suit is a bill in chancery, brought by Nicholas McAlpine, James M. Mason, and Sophia A. Cobb, claiming to be the owners of all this property under the bankruptcy sale and purchase, and the object of it is to compel all these parties who are sued in an action of ejectment, and the one in chancery, to come in and answer in this suit, and try the question in chancery, so

that all may be settled, and one decree rendered to give them a quiet or perfect title against all these parties.

The first thing that presents itself is that no such suit, whether well founded or ill founded, can be maintained against the parties to the action in ejectment pending yet in the state court. The act of congress has decided that no injunction,—and no relief could be had here without an injunction, and that is what is prayed,—that no injunction could be issued to the state courts to a party to prevent his proceeding in a state court, except in such cases where that relief is authorized by the act concerning bankrupts. I think it was in the idea of the party who drew this bill that since he founded his claim on the title derived from the decree in bankruptcy, that this was a proceeding in bankruptcy within the meaning of that statute; but that clearly is not so. The simple meaning of that was and is that since in a bankruptcy proceeding there may be various suits by attachment, by execution, and by a hundred ways, in the state courts, which hold, absorb, and destroy the assets before it could be administered in bankrupt court in that class of actions, the bankruptcy statute allows an injunction against everybody, no difference where their proceeding is; but the old rule remains, that, except in that class of actions, the federal courts will not interfere by injunction in the suits pending in the state courts.

There is another exception also in the case where the federal court first has jurisdiction,—where the matter in controversy is fairly within its jurisdiction,—and shall issue its injunction to a party to that suit to prevent his proceeding in another court. None of these come within this case; and it is very clear that as to the two parties whose suit remains in the state court, and have not been brought here, that this action will have to be dismissed.

We come, then, to consider, however, the cases against Tourtelotte and against Teresa Snyder and the heirs of Snyder. Of course, the parties purchasing under that bankruptcy decree or sale were in the same condition that all other purchasers at a judicial sale are; that is to say, they take what they get. They buy publicly and openly, not of the original owner of the title, but they buy at the hands of the judicial sale by an officer. They take what the law gives them. They run their chances. That is the universal rule with regard to purchases at a judicial sale. Nobody is bound to them for anything. They look to the title they get before they buy; if they do not, it is their own fault. And in this case there seems to be no reason to depart from this, except what I will mention hereafter.

As the land sold was specifically described by metes and bounds, so that it might be said that a surveyor could take his compass and the description and go and lay off that land exactly, there is nothing wanting to identify it, with the single exception that it is alleged that the description is susceptible of two constructions. Very well; let that be so. Where that is the case a court of law has just the same

right to make the construction that a court of chancery has. I know of no right a party has to resort to a court of chancery simply to get a correct construction of a deed or instrument in writing. A court of law can decide and make that construction just as well as a court in chancery. And, if verbal testimony is admissible to enable a party to make that construction, as, for instance, proof of where a certain monument was and is, and the identity of a certain monument, or the variations in courses and distances, all that has been proved a thousand times before juries in an action in ejectment in the same courts. So that there is nothing in the description, or want of description, in this purchase and in this title which justifies their going into a court of chancery.

One of the main grounds relied upon for getting into chancery in this case is what may be called multiplicity of suits; and counsel raise that proposition on two branches of that question. One is, that they have now in process a multiplicity of actions in ejectment, and therefore they ought to be permitted to come in and make these parties adjust the matter in one suit in chancery. There are four actions in ejectment. The doctrine on that subject, of multiplicity of suits for the same thing and by the same parties, is not this case, because these are different parties; and even in that aspect of it, the old doctrine, that where there have been several actions of ejectment between the same parties, always decided in one way, then a court of chancery will interfere, has no application to this case. The only trial that has ever been had resulted in favor of the defendant and not the plaintiffs in this bill. They have never had a judgment in ejectment settling their title; therefore, under that principle, the court of chancery is not to come in and settle the title, when the verdict has been against them. On the other hand, they talk about the multiplicity of persons. They have got, I think, in all, perhaps five or ten persons. These persons represent four different suits or interests. I do not think it ever was held that that constituted a multiplicity of parties. When we come to talk about the necessity of a bill in chancery because of the multiplicity of parties, we talk about hundreds of people; and in a class of cases where you can sue a half dozen who represent everybody, or bring suit in the name of one or two who represent everybody in that suit, and thus settle the controversy. There is no such case here. It is idle to talk about a multiplicity of persons in this suit.

But perhaps the strongest reason for bringing this suit, if you could unite all these parties and make them defendants, is this: That, so far as the question of a common interest or title is concerned, there does exist one of the elements of chancery jurisdiction. The present plaintiffs claim, through their purchase at the bankruptcy sale, all the title which Snyder had at the time of his bankruptcy and the title which he had at the time of the sale, and the other defendants all contest that title; so that there is that common interest on the

side of defendants, and that common interest existing on the side of plaintiffs, and that common subject of contest; but that does not give a right to a suit in chancery. If the plaintiff's title is a title which he can enforce at law, he must show some special reason for going into chancery, even although there are several people opposed to him and contesting him. Now, after listening patiently to all that has been said on the subject, I do not perceive any reason for going into equity. The allegation, so far as I can gather it, is made, I must be permitted to say, in something of a loose way, and is, that after Mr. Snyder got his discharge in bankruptcy, or at the time he made his application for bankruptcy, he had an instrument in writing from one James, which professed to be a deed of conveyance of 10 acres within a much larger space of 40 or 60 or 80 acres, I do not know how much; but did not describe this 10 acres nor give it any locality, nor was the name of any grantee in that paper. After he got his discharge he went and filled up that paper with a description and with his own name, and had it recorded. It seems that thereupon Mr. James, who had been dealing with this property with some other parties, expressed his dissatisfaction with that description of the property, and Snyder reconveyed to James; and James reconveyed to him another piece of property, or the part of the same property, and all these deeds went on record, and were on record at the time the proceedings were instituted to set aside his discharge, and at the time the sale was made by the assignee in bankruptcy. Now, the object of this bill,—the purpose of this bill,—is to prove all these transactions by oral testimony, so as to show what was the property that was purchased by these parties in the sale and in the deed made by the assignee.

The first thing I have to say about that is, if any of that testimony is admissible at all, it is as much admissible in a suit at law as in chancery. If they can make their deed any better by proof of an equitable interest, or of changes in the interest, it is just as competent to do it in law as it is in equity. I know of no reason why the one court should not deal with it as well as the other. It is the same proposition, it is between the same parties; and there is no more power in a court of equity to make that good—to make that deed cover what it does not cover—by description than there is in a court of law.

But now I come to a proposition about which I have a little more hesitation than anything I have said, and as it may be used hereafter, and is one of the reasons, also, why I dismiss this bill, I should like the language to be carefully stated, and must be very careful myself. These proceedings to subject this land to sale by the assignee in the court of bankruptcy were all taken after these deeds were made, and the last one of them was on record in the office of the proper register of lands in the county. Mr. Snyder was brought in, if that was necessary, *de novo*, in order to have his discharge set aside, and he answered, and this matter was set up in that proceeding: that he

did own this land; and that was tried in that proceeding, and his discharge was set aside on that ground. Then immediately the new assignee was ordered to schedule this property, and did schedule, and did get a decree, and did sell it, and these plaintiffs, or the men from whom they purchased it, bought it at that public sale. Now, it is my opinion that the proceeding was binding upon Snyder, and it bound him just so far as it described the land it sold and no further; that whatever title was in Snyder at that time, if he varied the title between the time of his going into bankruptcy and the time of this judicial sale, nevertheless, it took all the interest which he had when the sale was made. I think he was still in the bankruptcy court; that he was still a party to the proceeding; that if he got any better or different title from the time that he went into bankruptcy to the time that this judicial sale was made, that that title inured to the benefit of the purchaser; that such legal title as was then in him on the records of the register's office was sold and bought by these parties, if covered by the description, and no more; that they took what they bought by that description in their deed and in their sale, and they take such title as Snyder had to it at the date of the decree, and that there is no place for chancery to interfere about it. These parties, the present defendants, are purchasers subject to all of these transactions. They are all purchasers subsequent to the decree setting aside his discharge; they are all subsequent to the decree of sale; they are subsequent to the sale and making and recording of the deed; they are all purchasers with notice of what was done in the bankruptcy court; and as that bound Snyder that bound them, and as it did not bind Snyder it did not bind them. There is no issue for chancery to interfere about it. I dismiss the bill.

UNDERWOOD and others v. DUGAN and others.

(Circuit Court, N. D. Texas. 1835.)

EQUITY—LACHES—TITLE UNDER FRAUDULENT TRANSFER OF LAND CERTIFICATE—TRUST.

The delay on the part of complainants in asserting their alleged claim to the lands in controversy in this case *held* fatal to their prayer for relief.

In Equity.

MCCORMICK, J. It appears from the pleadings and proof in this case that Finess Roberson (whose name is spelled with some variations, rendered immaterial by the proof) on the first of March, 1838, obtained from the proper authority in Texas a certificate for one league and one labor of land; that on the fifth day of March, 1838, he conveyed this certificate, by transfer written on the back thereof,

to Warner L. Underwood. A separate instrument made same day limited Warner L. Underwood's title to a part, and made him trustee for others as to the other part, not material to the issues in this case. Soon after this transaction Roberson removed to Arkansas, and Underwood returned to Kentucky, and the next appearance of the certificate is in 1852-53, in the office of the district surveyor of Grayson county, in which county it appears to have been located, and the location forfeited by failure to return the field-notes of the survey to the land-office by thirty-first August, 1853. On the twelfth May, 1855, Finess Roberson, in Sevier county, Arkansas, conveyed by separate writing said certificate to Dennis Trammel, and on the twenty-third of June, 1855, Dennis Trammel conveyed the certificate to S. W. March for valuable and adequate consideration. At that time the transfer to Underwood, which had been written on the back of the certificate, was completely covered and hidden by a piece of brown paper, just the size of the certificate, pasted on the back of the certificate; and the proof abundantly shows that S. W. March had no actual knowledge or notice of the transfer to Underwood. On the eighth of August, 1855, a patent issued to said March as the assignee of said certificate for the land in controversy. March claimed the land, paid taxes upon it, and about 1872 commenced placing tenants upon it under written leases, embracing specified parts of it, and a few years later built a dwelling-house upon it for his own residence, but died on the twenty-ninth day of July, 1878, before he had removed his residence to this land. Before the institution of this suit much of the land was in cultivation, and more of it inclosed for pasture, many wells dug and tenant houses erected on the land, and extensive and valuable improvements made thereon, rendering the tract very valuable.

The defendants hold March's title. The complainants hold Underwood's title. Underwood died in February, 1872. This suit was filed June 13, 1881. The defendants, besides other pleas, urge that "the complainants' demand, if any they have, is stale, and in a court of equity ought not to be heard." This the bill attempts to avoid by charging fraud on the part of March in procuring the Roberson certificate and concealing the transfer to Underwood, but this charge finds no support in the proof, and is fully met by the answer and the defendants' proof. It is also set out in the bill, in explanation of the delay, that shortly after the purchase of the Roberson certificate by Underwood "said Underwood went from Texas with his family to the state of Kentucky, intending soon to return to Texas, but that business, ill-health, and other causes delayed and prevented his return; * * * that by reason of his long and unanticipated absence, the disturbed conditions of the country, his ill-health, and the bad faith and frauds of persons who found access to his papers, they were misplaced, lost, abstracted, and destroyed."

The proof shows that soon after the purchase of said certificate by

Underwood, said Underwood's father died in Kentucky leaving a large estate somewhat involved in complications; that Underwood was a good lawyer and business man, and was engrossed with the business of said estate. It is probably within the judicial knowledge of the court that public affairs and public land matters were in an unsettled condition in Texas for nearly 10 years after 1838; and, again from the twenty-eighth of January, 1861, to the thirtieth day of March, 1870, were so disturbed as to prevent the running of statutes of limitation.

It is further shown by the proof that for several years, at least two or three years, before his death said Underwood's mental condition was such as disabled him from giving due care to his business affairs. The bill admits that in May, 1860, Underwood received information as to the condition of the certificate and the issuance of the patent, and the proof shows that his agent in Texas had ascertained the facts the previous winter. While the condition of the country was disturbed as above stated, yet from 1838 to the institution of this suit, a period of 43 years, the general land-office of the state and courts of the state were constantly open. Thousands of toiling honest citizens were in good faith acquiring titles to land, and redeeming them from their savage state, and expelling the savage occupiers.

More than 25 years before the institution of this suit, March paid \$1,000 in gold for this certificate, without any notice of the transfer to Underwood, and had the certificate located on good land, and followed up his location and procured the patent to himself on the chain of transfer submitted to the proper public officer, who decided that he was entitled to so receive it as assignee of Roberson. The proof in this case shows the transfer to Trammel to be genuine, and the transfer from Trammel to March is not questioned; and if Trammel was guilty of any fraud in connection with it, the proof not only does not implicate March in it, but strongly negatives such an implication. Now, when Roberson and Underwood and Trammel and March are all dead, and the transactions of 1838 faded from the memories of the few who may survive, more than 25 years since March acquired in good faith and for full value the legal title to the land, of which Underwood might have obtained knowledge then, and of which he did have actual knowledge more than 20 years before the bringing of this suit, during all of which years Underwood and the complainants have been resting quietly, and letting March and the defendants put their money and labor and skill into this land, the complainants come and pray "that the patent to S. W. March be declared to have been issued to said S. W. March and held by him, and all the defendants herein holding under him or through him, in trust for complainants."

In my opinion the complainants have waited too long, and their prayer in a court of equity cannot be granted, and the bill should be dismissed at complainants' costs; and it will be so ordered.

DENoyer v. RYAN.

(Circuit Court, D. Minnesota. June Term, 1885.)

PEDIGREE—EVIDENCE.

After a full consideration of the evidence in this case, *held*, that complainant has not proved himself to be the son and sole heir at law of the deceased owner of the real estate in controversy, and that the bill must be dismissed.

Action to Settle Adverse Claim.

S. L. Pierce, for complainant.

R. B. Galusha and Young & Lightner, for defendant.

NELSON, J. This action is brought under the statute of Minnesota, (Rev. St. c. 75, § 2,) by a citizen of the state of Nebraska against a citizen of the state of Minnesota, to settle an adverse claim to certain real estate in the county of Ramsey, in this district, described in the bill of complaint as follows:

"Lot numbered one (1) of section numbered five, (5,) in township numbered twenty-eight, (28,) of range numbered twenty-three, (23,) containing fifty-two and fifty-six one-hundredths acres (52 56-100) of land; also the west half (W. $\frac{1}{2}$) of the south-east quarter (S. E. $\frac{1}{4}$) of section numbered thirty-two, (32,) in township numbered twenty-nine, (29,) of range numbered twenty-three, (23,) containing eighty acres; also the north-east quarter (N. E. $\frac{1}{4}$) of the south-west quarter (S. W. $\frac{1}{4}$) of section numbered thirty-two, (32,) in township numbered twenty-nine, (29,) of range numbered twenty-three, (23,) containing forty acres; also lot numbered one, (1,) in section numbered thirty-two, (32,) township numbered twenty-nine, (29,) of range numbered twenty-three, (23,) containing twenty-nine and seventy hundredths acres, (29 70-100;) also lot numbered two, (2,) in section thirty-two, (32,) in township numbered twenty-nine, (29,) of range numbered twenty-three, (23,) containing thirty-one and 20-100th acres, (31 20-100;) also the south-west quarter (S. W. $\frac{1}{4}$) of the north-west quarter (N. W. $\frac{1}{4}$) of section numbered thirty-two, (32,) in township numbered twenty-nine, (29,) of range numbered twenty-three, (23,) containing forty (40) acres; also the west half (W. $\frac{1}{2}$) of the south-east quarter (S. E. $\frac{1}{4}$) of the north-west quarter (N. W. $\frac{1}{4}$) of section numbered thirty-two, (32,) in township numbered twenty-nine, (29,) of range numbered twenty-three, (23,) containing twenty acres; also the north half (N. $\frac{1}{2}$) of the south-west quarter (S. W. $\frac{1}{4}$) of section numbered one, (1,) in township numbered twenty-nine, (29,) of range numbered twenty-three, (23,) containing eighty acres; all of said real estate situate in Ramsey county and state of Minnesota; also the west sixty (60) feet of lot four, (4,) and the south third ($\frac{1}{3}$) of lot numbered three, (3,) in block numbered six, (6,) of Rondo's addition to the city of St. Paul, in said county of Ramsey; also a strip of land north of Pearl street, west of Joel Whitney's addition to the city of St. Paul, continued northerly to a point to intersect at Jackson street, and east of said Jackson street, in the city of St. Paul, in said county of Ramsey; also lots numbered twelve, (12,) thirteen, (13,) fourteen, (14,) and fifteen, (15,) Prince & Denoyer's rearrangement in the city of St. Paul, in said county of Ramsey. All of which said real estate is of the value of seventy-five thousand dollars."

The complainant claims to be the owner in fee, and sole heir at law of Stephen Denoyer, who died intestate, December 3, 1877, possessed of the real estate in controversy, which was distributed by the probate court of the county among his brothers and sisters and

nephews and nieces and widow surviving him. The defendant obtained the title vested under the decree of distribution by the purchase of part of the property from the heirs to whom it was distributed, and a part from their grantees. The claimant seeks to quiet and settle his claim to the parts assigned to the brothers and sisters and nephews and nieces of the intestate by virtue of the statute, as sole heir, alleging that he is the legitimate son of the intestate, Stephen Denoyer, and that the land is vacant and unoccupied. The defendant admits that the land is vacant, but denies that the complainant is the legitimate son and sole heir at law, and sets up the decree of distribution as a bar to this suit. A replication is filed; and voluminous testimony is taken in the United States and in Canada. The questions of fact and law are very thoroughly presented. I will first consider the facts at issue.

The complainant's testimony is chiefly hearsay, and consists of the declarations and admissions of the intestate, Stephen Denoyer, that the claimant is his son, and also the declarations of aged members of Stephen Denoyer's family, who were incapable of being examined on account of the infirmity of age. It also includes the testimony of other members of the family, of facts and circumstances tending to sustain his claim. The claimant is examined in his own behalf, and gives a long narrative of himself, and his discovery that he was the intestate's son, and the account given him of his birth by Stephen Denoyer. The relation of Stephen Denoyer to the witnesses whose declarations are testified to, and other facts connected with his history are conceded. Etienne or Stephen Denoyer was born in St. Phillippe, in the district of Montreal, Canada, April 21, 1805. He was the son of Etienne, of the same place, who had two brothers, Antoine and Andre. Stephen Denoyer, during his boyhood, moved to St. John, 12 miles distant from St. Phillippe, where his uncle Andre lived, and about 1827 left his home, and for 23 years his mother and sisters and family did not hear from him, and supposed he was dead. There is no direct and positive evidence of his whereabouts until 1839, when he was living in the state of Illinois, at Prairie du Rocher; and in 1841 was there married, and removed, in 1842, to Dubuque, Iowa, where his wife gave birth to a child, and mother and child both died. During the same year he removed to and settled in Wisconsin,—now Minnesota,—and from that time until his death kept the Half-way House between St. Paul and the present city of Minneapolis. He was married in St. Paul in 1845, and again in 1873. Evidence of these marriages are introduced, the ceremonies being performed by a priest of the Roman Catholic Church.

The complainant claims that previous to Stephen Denoyer leaving Canada, or about that time, he married a woman, whose name and family are unknown, and that he is the legitimate offspring of this marriage, being born in Troy, New York; that his mother died in giving him birth, and he was taken to Antoine Denoyer, Stephen's

uncle, to be raised, who paid the former \$200 a year until he was 14 years old.

Briefly, then, his evidence can be summarized: The complainant testifies "that he was brought up in the family of Antoine Denoyer, of St. Phillippe, Canada, and first discovered that his father was Stephen Denoyer, of Minnesota, in 1853 or 1854, when he was 16 or 17 years of age. He was recognized in the family and treated as a son of Antoine until that time, when, in a conversation with Antoine, he discovered that he was not his father. The discovery was made when the plaintiff had incurred the displeasure of Antoine, and was punished by him; and on the assertion by a neighbor that he was not Antoine's son, he made inquiry, and was informed that he was the son of Stephen Denoyer, of St. Paul. The complainant left his home, and started to visit Stephen in Minnesota, where he arrived in June or July, 1856, and entered his saloon unknown, and introduced himself, and became a member of the family. In the saloon one night he asked where his mother died, and Stephen Denoyer said, she died in giving him birth in Troy, New York, and that he took him to Antoine Denoyer to be raised, and he paid him \$200 a year for his keeping until he was 14 years old."

It is conceded that the complainant was brought up in the family of Antoine, and lived with him until he was 16 or 17 years old, as his son, and recognized as such. Antoine Denoyer was twice married, and had a large number of children by each wife. The last wife was Marie Gervais, and she and Antoine are still living, but mentally infirm, and not capable of giving their evidence.

The principal testimony upon which complainant relies is his own evidence of the declarations of Stephen Denoyer, and the evidence of other witnesses to whom Stephen Denoyer introduced him as his son, or his boy; and the evidence of one or two witnesses to whom it is claimed Stephen Denoyer gave an account of his birth, and declared him to be a son. It is true, there are hearsay declarations and evidence of members of Stephen Denoyer's family, and vague rumors and surmises of a mysterious relationship existing between the claimant and Stephen Denoyer, but they are not of sufficient weight to be considered in determining the issue.

The complainant's case would be established pretty clearly if there were no record evidence countervailing the theory advanced by him. The hearsay testimony of aged and deceased members of the family is very proper and admissible in suits of this kind, and it is allowed from the necessity of the case; for in many instances it is the only evidence possible to establish pedigree and consanguinity. In fact, anything which affords reasonable grounds of belief is competent to be considered to establish relationship; but loose declarations and expressions implying heirship, uncertain in their character, have not much influence in determining such relationship. The reliance placed upon this kind of evidence depends upon the circumstances attend-

ing the declarations, as well as the knowledge that the declarant is supposed to have possessed of the matters spoken of. Aside from the claimant's testimony, and that of one or two others, the evidence is made up of casual conversations in Stephen Denoyer's saloon 30 years ago, between the latter and acquaintances who stopped in passing his place; and while their recollection is indistinct upon most of the matters in these conversations, they are clear that Stephen introduced the claimant as his son or his boy. The complainant at that time was a lad of about 17 or 18, and is now a mature man of 47 or 48 years of age; but the witnesses generally testify as to his identity with the boy of 17 or 18 years, and some of them swear as to personal resemblance and similarity of character between the claimant and Stephen Denoyer. None of these frequenters of the "Half-way House" had seen the claimant until recently for a period of 30 years, and had only noticed the boy at the house once or twice.

If there was no evidence in opposition to the claim, it might be, perhaps, a fair deduction that the claimant was a son of Stephen Denoyer's, and as there are no other relatives who could take the estate but those to whom it was distributed by the probate court, the facts would establish his claim, and might justify a decree. Some of the complainant's witnesses are evidently mistaken, however, in relating the conversation and declarations of Stephen Denoyer, in which they state he spoke of having a son, and that he afterwards introduced the claimant as such. I shall not particularize; it is quite apparent by a glance at the testimony; for, by some of the witnesses Stephen Denoyer is reported to have talked about matters, and to have narrated domestic affairs which the record evidence shows to have been untrue, and no possible motive existed for such misrepresentation by him.

The theory of the defendant is that the claimant is the son of Antoine Denoyer, and cousin of Stephen. The complainant, while living with Antoine, was called Isaie, and some times John, and he brings this suit by the name of George Isaie, under which name he was married. The defendant urges that the claimant's true name is Jacques Isaie Denoyer, born in September, 1836, of the legitimate marriage of Antoine Denoyer and Marie Gervais. In proof of this they produce evidence which shows that there was only one child brought up in the family of Antoine called Isaie, and it is undisputed that the claimant was that child; and, furthermore, the parish register of St. Phillippe is introduced, and an entry appears therein as follows:

"On the seventeenth day of September, one thousand eight hundred and thirty-six, by us, as priest, undersigned, has been baptised, under condition. Jacques Isaie, born this morning of the legitimate marriage of Antoine Denoyer, farmer, of this parish, and of Marie Gervais. The god-father was Joseph Hebert, the god-mother Julie Bourdon, who, with the father present, could not sign.

[Signed]

"PIGEON, Priest."

The parish register is usually the best source of evidence in cases of this character. This entry was required to be made by the law of Lower Canada, and the effect of the record is defined by the "Acts of Civil Status," in force in 1836. It is in Canada the authentic evidence of birth and baptism. While this entry will not have equal weight in this court as evidence of the facts therein stated by the priest, and represented by him as declared by the persons presenting the child for baptism, it is admissible to prove that a child of Antoine Denoyer and Marie Gervais was presented for baptism, and was named Jacques Isaie. It was the duty of Antoine Denoyer, when the child was presented for baptism, to declare the day of birth, and the names and occupation, etc., of the father and mother, and it was the duty of the priest to make the entry. The parents, if present, and sponsors were required to sign the record, and if any of them could not sign their names, mention of that fact was required by law to be made in the entry. This record, therefore, raises a presumption that the Isaie who lived with, and was brought up in, the family of Antoine, was his legitimate offspring, and overcomes all the oral evidence of witnesses of the declarations and admissions of Stephen Denoyer and others. It is true, there are two records of baptism: one an entry which was made in the parish register, and the other a duplicate required by law to be filed in the prothonotary's office of the supreme court of the district of Montreal; and there is a difference between them in the date given when the child is stated to be born and presented for baptism. I do not think this difference is of much importance. The fact required to be established is the identity of the claimant, who lived in Antoine's family, with the child presented for baptism, and this certificate of entry is evidence of that fact.

The complainant's solicitor urges that the evidence fails to show that Isaie was ever called Jacques. One of the sons of Antoine testifies that he had a brother Jacques Isaie; but his evidence, taking into consideration the circumstances when given, perhaps, without this record, would have little weight, but in connection with the entry it must be considered as evidence tending to establish the fact that there was a son of Antoine's by the name of Jacques Isaie. The claimant had several Christian names; a familiar one was John. New Christian names are acquired arbitrarily; nick-names are frequently given, and sometimes names are assumed or fixed by an effort to Anglicize a French name. Jacques might very easily be pronounced Jack, which in English is the diminutive of John; so that, although the complainant in his testimony states that the name of John was given him while at work in a brick-yard, in Troy, New York, when he was about 16 years of age, it is not improbable that it was effected in this manner, and the explanation is not inconsistent with his statement. This, however, is not very important, for, as I said before, the fact to be established, and which the defendant endeavors to prove, is that the plaintiff is Antoine's son.

There is more written evidence introduced by the defendant. Letters are produced, written at the instigation and dictation of Stephen Denoyer to his uncle Antoine, in answer, it would seem, to inquiries about his son Isaie, who had gone to Minnesota. In these letters Stephen speaks of the claimant as Antoine's son; and further, a letter from claimant is introduced, written in 1858, while he was with Stephen Denoyer, in Minnesota, in which he addresses Antoine and Marie Gervais as his dear parents, and subscribes himself as their devoted son. And, in addition, there is introduced a written contract, executed in 1854, between Antoine Denoyer and the claimant, in which the latter represents himself as the son of Antoine. These admissions in the contract and in the letter are made after the alleged discovery by complainant that he was not Antoine's son, and at a time when he left his home to go and live, as he claims, with Stephen as his father. In his letters to Antoine the claimant does not speak of Stephen as his father, and does not intimate that he was recognized as a son, but expresses the affection of an absent member of the family for his parents.

It is not necessary, in my opinion, to examine the testimony further; for, after full consideration, I find that the claim of the complainant is not sustained by the evidence. It is not necessary to determine the effect of the decree of the probate court.

The bill of the complainant is dismissed, and a decree will be entered accordingly.

WELLS v. SEIXAS and others.

(Circuit Court, S. D. New York. June 6, 1885.)

DEED OF INFANT—WHEN AVOIDED.

The deed of an infant may be avoided at any time after becoming of age until he is barred by the statute of limitations, provided there has been no word or act on his part indicating assent.

Motion for a New Trial.

Theodore E. Burton and Algernon S. Sullivan, for the motion.

Peter Condon and Thomas Allison, opposed.

COXE, J. This is an action for dower. The plaintiff, on the twenty-third of March, 1870, united with her husband in conveying the property, which is the subject of this suit, by full covenant warranty deed. She was then an infant. Her husband died in July or August, 1872. At the time of his death she was living at Laporte, Indiana. In September, 1872, she became of age. In the fall of 1883, 11 years after attaining her majority, she disaffirmed the deed. The case was tried at the April circuit, 1885. At the close of the evidence, the defendant moved for the direction of a verdict upon the

ground, *inter alia*, that the deed, being voidable only, was rendered valid by the long years of inaction on the part of the plaintiff. The motion was opposed upon the theory that the deed was, as to the plaintiff, wholly void. The question, therefore, upon which the case turned at the trial was whether the deed was void or voidable. The court took the latter view, and directed a verdict for the defendant.

The plaintiff now moves for a new trial, and for the first time advances the proposition that the deed, though voidable, was disaffirmed within a reasonable time. In support of this view, *Sims v. Everhardt*, 102 U. S. 300, is cited. At page 312 of that case, the court say:

"Where there is nothing more than silence, many cases hold that an infant's deed may be avoided at any time after his reaching majority until he is barred by the statute of limitations, and that silent acquiescence for any period less than the period of limitation is not a bar. Such was, in effect, the ruling in *Irvine v. Irvine*, 9 Wall. 617. See, also, *Prout v. Wiley*, 28 Mich. 164, a well-considered case, and *Lessee of Drake v. Ramsay*, 5 Ohio, 251. But, on the other hand, there appears to be a greater number of cases which hold that silence during a much less period of time will be held to be a confirmation of the voidable deed. But they either rely upon *Holmes v. Blogg*, 8 Taunt. 85, which was not a case of an infant's deed, or subsequent cases decided on its authority, or they rest in part upon other circumstances than mere silent acquiescence, such as standing by without speaking while the grantee has made valuable improvements, or making use of the consideration for the deed. We think the preponderance of authority is that, in deeds executed by infants, mere inertness or silence, continued for a period less than that prescribed by the statute of limitations, unless accompanied by affirmative acts manifesting an intention to assent to the conveyance, will not bar the infant's right to avoid the deed. And those confirmatory acts must be voluntary."

In the case at bar, as the proof now stands, there is no act of omission or commission on the part of the plaintiff of which to predicate an intention to confirm the deed. There is silence, profound and unbroken, but nothing else. The plaintiff, since her majority, has not lived in the vicinity of the property in question, and there is no evidence that she ever saw it or knew of its existence until the fall of 1883. The language of the court just quoted is peculiarly applicable. It is a case of "mere inertness or silence, continued for a period less than that prescribed by the statute of limitations." The plaintiff, upon this authority, had 20 years in which to disaffirm her deed. She did disaffirm it in 11 years.

It may be conceded that there are many points of difference between the *Everhardt Case* and the case at bar. In the former, for instance, the plaintiff was under the double disability of coverture and duress. In the latter, on the contrary, she was a free agent from the moment she became of age. It may also be conceded that the circumstances of the *Everhardt Case* did not necessarily require the enunciation of the broad rule just quoted. Notwithstanding this, it cannot be gainsaid that the supreme court have, in words too plain to be misunderstood, expressed the opinion that the weight of the au-

thority is that the deed of an infant may be avoided at any time after becoming of age until he is barred by the statute of limitations, provided there has been no word or act on his part indicating assent.

It seems to have been the intention of the supreme court to announce a clear and general rule, which should put an end, so far at least as the federal tribunals are concerned, to the existing confusion and conflict of authority. It is not necessary to consider the proposition advanced by the defendant that the controversy must be determined by state rather than national law, for the reason that no New York decision is produced in conflict with *Sims v. Everhardt*. In fact, the authorities cited seem in perfect accord with that case; the difference being that the supreme court has taken a step in advance, and has, in cases of mere silent acquiescence, suggested a rule by which the vague and elastic expression, "within a reasonable time," is given a fixed and definite meaning. This being the view entertained as to the scope of the decision in *Sims v. Everhardt*, it is manifestly the duty of this court to follow it. The supreme court may change or modify the rule there stated. This court is not permitted to do so.

It follows that the motion for a new trial should be granted.

The question as to when the various voidable contracts of an infant may be avoided by him has been the subject of much litigation, and is involved in considerable conflict. Judge REEVE, in his work on Domestic Relations, p. *254, thus states the general rule: "It is a universal rule that all executory contracts which are voidable on the ground of infancy, may be avoided during infancy by the infant as well as afterwards; as where a minor promises to pay, etc. So, too, in all contracts respecting property which are executed by delivery of some article, on payment of money, may be rescinded by the minor both before and after the time of his coming of age.¹ But conveyances of real property by feoffment, on delivery of the deed which comes in lieu of payment, or by any other conveyance of such property, in fee for life or years, cannot be avoided before the infant attain to full age."² The infant may enter during minority, and take the profits till he has a legal capacity to affirm or avoid his deed; but the entry does not render the deed utterly void, and he may still confirm it on arriving at majority.³ The infant may probably, by his next friend, file a bill and have a receiver of the rents and profits appointed.⁴

As to how soon after majority the infant must exercise his privilege of disaffirming his voidable deeds of land, etc., the authorities are in conflict. One class of cases holds, as in the principal case, that they may be avoided at any

¹ *Riley v. Mallory*, 33 Conn. 207; *Stafford v. Roof*, 9 Cow. 626; *S. C. Ewell*, Lead. Cas. 92; *Chapin v. Shafer*, 49 N. Y. 407; *Cogley v. Cushman*, 16 Minn. 401, (Gil. 354.) See, also, *Shipman v. Horton*, 17 Conn. 483; *Bartholomew v. Finnemore*, 17 Barb. 429; *Price v. Furman*, 27 Vt. 268; *Carr v. Clough*, 26 N. H. 291; *Willis v. Twombly*, 13 Mass. 204; *Carpenter v. Carpenter*, 45 Ind. 142; *Bailey v. Barnberger*, 11 B. Mon. 114; *Biggs v. McCabe*, 27 Ind. 330; *Heath v. West*, 26 N. H. 191; *Grace v. Hale*, 2 Humph. 27.

² See *Zouch v. Parsons*, 3 Burr, 1794; *S.*

C. Ewell, Lead. Cas. 3; *Bool v. Mix*, 17 Wend. 132; *Baker v. Kennett*, 54 Mo. 88; *Hartman v. Kendall*, 4 Ind. 403; *Pitcher v. Laycock*, 7 Ind. 398; *Chapman v. Chapman*, 13 Ind. 396; *Emmons v. Murray*, 16 N. H. 390; *McCormic v. Leggett*, 8 Jones, Law, 426; *Slater v. Trimble*, 14 Ir. C. L. R. 342, Q. B.; *Hastings v. Dollarhide*, 24 Cal. 211.

³ *Zouch v. Parsons*, and *Bool v. Mix*, supra.

⁴ See *Matthewson v. Johnson*, 1 Hoff. Ch. 565.

time after reaching majority, till barred by the statute of limitations, and that silent acquiescence alone for any period less than the period of limitation is not a bar. The case of *Lessee of Drake v. Ramsay*¹ is a leading case upon this point. The same rule is laid down in a number of other cases collected in the note.²

There would seem to be no doubt, however, that the lapse of a less period of time, taken in connection with other equitable considerations, may amount to a confirmation.³

Another class of cases lays down the rule that if an infant would avoid his deed he must do so within a reasonable time after reaching majority.⁴ It is to be observed, however, of these cases that they nearly all rest upon the authority of the case of *Holmes v. Blogg*,⁵ or subsequent cases decided upon its authority, and that the decision of the rest seems to have been influenced by equitable considerations; as where the infant has stood by after majority and seen valuable improvements made on the premises without dissent, has retained and disposed of the consideration after majority, etc.⁶

In Iowa the rule that an infant must exercise his privilege of avoidance, if at all, within a reasonable time after majority, has been established by statute as to all his contracts.⁷ In England, likewise, the rule seems to be that the infant is bound expressly to repudiate his contracts within a reasonable time after arriving at majority; and that, if he neglects so to do, his silence will amount to an affirmation.⁸ The case of *Holmes v. Blogg*, as to this point, however, is a mere *dictum*, and none of them were cases of deeds executed by infants, but actions for calls upon railway shares, and seem to have been decided upon the point that the infant cannot remain a shareholder, cannot keep the interest, and prevent the company from having it and dealing with it as its own, without being liable to bear the burden attached to it;⁹ and hence these cases may well be distinguished from the cases of deeds executed by infants.

Upon the whole, the rule laid down in the principal case seems to be supported by the weight both of reason and authority.

M. D. EWELL.

¹ 5 Ohio, 251; S. C. Ewell, Lead. Cas. 98.

² *Wallace v. Latham*, 52 Miss. 291; *Cres-singer v. Lessee of Welch*, 15 Ohio, 193; *Prout v. Wiley*, 28 Mich. 164; *Irvine v. Irvine*, 9 Wall. 627; *Sims v. Everhardt*, 102 U. S. 300; *Voorhies v. Voorhies*, 24 Barb. 153; *Huth v. Carondelet Marine Ry. & Dock Co.* 56 Mo. 206; *Urban v. Grimes*, 2 Grant, Cas. 96; *Tucker v. Moreland*, 10 Pet. 76; *Boody v. McKenney*, 23 Me. 523; *Jackson v. Carpenter*, 11 Johns. 539; *Peter-son v. Laik*, 24 Mo. 544; *Youse v. Norcum*, 12 Mo. 564; *Baker v. Kennett*, 54 Mo. 90; *Norcum v. Gaty*, 19 Mo. 69; *Gillespie v. Bailey*, 12 W. Va. 70; *Kountz v. Davis*, 34 Ark. 590. See, also, *Bozeman v. Brown-ing*, 31 Ark. 364; *Green v. Green*, 69 N. Y. 553.

³ See *Lessee of Drake v. Ramsay*; *Cres-singer v. Lessee of Welch*, supra; *Wheaton v. East*, 5 Yerg. 41; *Hartman v. Kendall*, 4 Ind. 403; *Wallace v. Lewis*, 4 Harr. 80; *Morris v. Stewart*, 14 Ind. 334.

⁴ See *Hartman v. Kendall*, 4 Ind. 403; *Kline v. Beebe*, 6 Conn. 506; *Bigelow v. Kinney*, 3 Vt. 859; *Richardson v. Boright*, 9 Vt. 368; *Scott v. Buchanan*, 11 Humph. 476; *Hastings v. Dollarhide*, 24 Cal. 216; *Wallace v. Lewis*, 4 Harr. 80; *Harris v. Cannon*, 6 Ga. 388; *Nathans v. Ark-*

wright, 66 Ga. 179; *Bingham v. Barley*, 55 Tex. 281. See, also, *Chapin v. Shafer*, 49 N. Y. 412; *Robinson v. Weeks*, 56 Me. 106; *Little v. Duncan*, 9 Rich. Law. 59; *Summers v. Wilson*, 2 Coldw. 469; *Long v. Williams*, 74 Ind. 115; *Stringer v. North-western Mut. L. Ins. Co.* 82 Ind. 100; *Tunison v. Chamblin*, 88 Ill. 378.

⁵ 8 Taunt. 35; S. C. 1 Moore, 466.

⁶ See *Bostwick v. Atkins*, 3 N. Y. 60.

⁷ See Rev. St. 1860, § 2540; Code, § 2238; *Wright v. Germain*, 21 Iowa, 585; *Stucker v. Yoder*, 33 Iowa, 177; *Jenkins v. Jenkins*, 12 Iowa, 195; *Stout v. Merrill*, 35 Iowa, 56; *Weaver v. Carpenter*, 42 Iowa, 343; *Childs v. Dobbins*, 55 Iowa, 205; S. C. 7 N. W. Rep. 496; *Green v. Wilding*, 59 Iowa, 679; S. C. 13 N. W. Rep. 761.

⁸ See *Dublin, etc., Ry. Co. v. Black*, 16 Eng. Law & Eq. 556, and note; 22 Law J. Rep. (N. S.) Ex. 94; 8 Exch. 181; *Holmes v. Blogg*, 8 Taunt. 35; S. C. 1 Moore, 466; *Northwestern Ry. Co. v. McMichael*, 5 Exch. 114; *Leeds & Thirsk Ry. Co. v. Fearnley*, 4 Exch. 26; *Cork, etc., Ry. Co. v. Cazenove*, 10 Q. B. 935.

⁹ *Northwestern Ry. Co. v. McMichael*, supra. See, also, *Robinson v. Weeks*, 56 Me. 106; *In re Constantinople, etc., Co.*, *Ebbett's Case*, L. R. 5 Ch. App. Cas. 302.

MANASSE v. SPALDING.

(Circuit Court, N. D. Illinois. May 26, 1885.)

1. CUSTOMS DUTIES—PHILOSOPHICAL INSTRUMENTS.

Anemometers, hygrometers, Ruhmkorf coils, barometers, stereopticons, galvanometers, Geissler tubes, Grenat batteries, radiometers, *held to be dutiable, as "philosophical apparatus and instruments," at the rate of 35 per cent. ad valorem.*

2. SURVEYORS' COMPASSES.

Held to be dutiable at 45 per cent. ad valorem.

At Law.

Percy L. Shuman and Jo. H. Defrees, Jr., for plaintiff.

Chester M. Dawes, Asst. U. S. Atty., for defendant.

BLODGETT, J., (*orally*.) In November and December, 1883, the plaintiff imported several invoices of anemometers, hygrometers, Ruhmkorf coils, barometers, stereopticons, galvanometers, Geissler tubes, Grenat batteries, radiometers, and surveyors' compasses, and a duty of 45 per cent. *ad valorem* was assessed on them, under the last clause of Schedule C of the tariff act of March 3, 1883, which reads as follows, (Heyl, pt. 2, p. 13, cl. 216:)

"Manufactures, articles, or wares, not specially enumerated or provided for in this act, composed wholly or in part of iron, steel, copper, lead, nickel, pewter, tin, zinc, gold, silver, platinum, or any other metal, and whether partly or wholly manufactured, 45 per cent. *ad valorem*."

The plaintiff insisted that these goods were only subject to a duty of 35 per cent. *ad valorem* under Schedule N of the same act, (Heyl, pt. 2, p. 31, cl. 475,) as "philosophical apparatus and instruments," and the only question in the case is, what is meant by the term "philosophical apparatus and instruments" as here used. The testimony in the case shows that goods of this kind are sold mainly to schools and institutions of learning, and to persons engaged in scientific pursuits and observations. When an instrument or apparatus involves the illustration of some principle of natural philosophy or natural science, it may be properly termed, I think, "a philosophical instrument," within the meaning of this clause. But it is insisted that instruments of this character have now gone into such general use in the arts and in business that they have become mere implements or tools of trade. While I must admit there is some force in the argument, yet I do not see where the line can be safely drawn in the application of this rule. The barometer, for instance, is an instrument devised for the purpose of indicating the weight or pressure of the atmosphere, and acts wholly in obedience to certain natural laws, and illustrates such laws; but it has come into very general use, and is no longer an instrument used only for illustrating the principles of natural science. It is used as a "weather-glass" by many people who are not engaged in scientific pursuits or scientific instruction, who are only interested in its in-

dications for the purpose of forecasting the weather, or to gratify their curiosity. The same may be said of the thermometer and hygrometer; but still these instruments are part of the apparatus used for instruction and information in various ways in relation to scientific subjects, and the universality of their use does not detract from their character as philosophical instruments. If thermometers or hygrometers are so constructed as to be obviously intended for use only in some special branch of business or trade, as in that of brewing and distilling, for instance, they might then be deemed implements of trade for that purpose; or the thermometer used by the physician for determining the temperature of the patient, might be held to be an implement of his calling or profession, because it is peculiarly adapted to that purpose, and, perhaps, to none other. But the instruments involved in this invoice are adapted, as the proof shows, to the purposes of scientific instruction, and are also capable of being, to some extent, utilized by those sufficiently educated to apply them to certain purposes in the arts. They must, therefore, be allowed, as it seems to me, to come under this general description as "philosophical instruments and apparatus," and are only subject to a duty of 35 per cent. *ad valorem*. Surveyors' compasses, which are also included in this invoice, it seems to me are more properly described as "mathematical instruments," and not as "philosophical instruments." A surveyor's compass is something more than a mere needle which indicates the direction of the magnetic meridian. It is a combination of sights, levels, graduated arcs, etc., with the needle, for certain specific purposes, like that of running lines, adjusting boundaries, etc.; and as such they seem to me to be more accurately described as mathematical instruments or implements of trade.

The finding will therefore be for the plaintiff as to all these goods except the surveyors' compasses.

YOUNG and others v. SPALDING.

(Circuit Court, N. D. Illinois. May 26, 1885.)

CUSTOMS DUTIES — OPERA-GLASSES COMPOSED OF METAL, GLASS, AND SHELL, DUTY ON.

Certain opera-glasses composed of metal, glass, and pearl or shell, and of which the pearl or shell was the component material of chief value, held to be dutiable at the rate of 25 per cent. *ad valorem*.

At Law.

Percy L. Shuman and Jo. H. Defrees, Jr., for plaintiffs.

Chester M. Dawes, Asst. U. S. Atty., for defendant.

BLODGETT, J., (*orally*.) The plaintiffs imported a quantity of shell-covered opera-glasses, which were classed as manufactures of glass, shell, and metal, in which the metal was the component of chief value, and assessed as dutiable at 45 per cent. *ad valorem*. Heyl, pt. 2, p. 7, cl. 143. The articles in question are composed of shell, metal, and glass, and plaintiff contends that the shell is the component of chief value, and that they are dutiable at 25 per cent. *ad valorem*, under clause 486. Heyl, pt. 2, p. 32. The proof offered on the trial shows quite conclusively that the shell is the chief component of value in these goods in all but two instances. The plaintiff is therefore entitled to recover as to all the goods, where, by the testimony of Lemaire, the manufacturer, the shell is shown to be the chief item of cost, or component of value. In regard to those where the shell and metal are of equal value, a duty of 45 per cent. *ad valorem* should be paid as a "manufacture of copper not otherwise provided for." Heyl, pt. 2, p. 13, cl. 216.

VANACKER v. SPALDING.

(Circuit Court, N. D. Illinois. May 26, 1885.)

CUSTOMS DUTIES—RUBBER BAGS FOR MANUFACTURE OF TOY BALLOONS—
DUTY ON.

Certain bags or pouches composed wholly of India rubber, *held* to be dutiable as "manufactures of India rubber not specially enumerated," at the rate of 25 per cent. *ad valorem*.

At Law.

Percy L. Shuman and Jo. H. Deftrees, Jr., for plaintiff.

Chester M. Dawes, Asst. U. S. Atty., for defendant.

BLODGETT, J., (*orally*.) The plaintiff imported to the city of Chicago certain bags or pouches made wholly of India rubber, which were classed as "toys," and a duty of 35 per cent. *ad valorem* assessed thereon. Heyl, pt. 2, p. 29, cl. 425. The importer contended that the goods in question were articles composed of "India rubber, not specially enumerated, or provided for," and as such subject only to a duty of 25 per cent. *ad valorem*. Heyl, pt. 2, p. 30, cl. 454. The goods in question are small India-rubber bags, which are intended for the purpose of being inflated with gas, thereby making a small balloon, to be used as a child's plaything. The only question is whether such an article is a "toy" or "a manufacture of India rubber, not otherwise provided for." I am of opinion that these goods are not "toys" in the form in which they are imported. In order to make them salable as toys, they must be inflated and closed so as to retain the gas, and, although this is but a slight addition to them, still they cannot be called playthings or toys until this process is completed. I am

therefore of opinion that these good should have been classed as "manufactures of India rubber not specially enumerated," and charged with a duty of 25 per cent. *ad valorem*.

The issue is found for the plaintiff.

STODDER v. SPALDING.

(Circuit Court, N. D. Illinois. May 26, 1885.)

CUSTOMS DUTIES—WOOL KNIT HOODS.

Certain wool knit hoods *held* to be dutiable at 30 per cent. *ad valorem*, under act March 3, 1883.

At Law.

Percy L. Shuman and Jo. H. Defrees, Jr., for plaintiff.

Chester M. Dawes, Asst. U. S. Atty., for defendant.

BLODGETT, J., (*orally*.) The plaintiff imported a quantity of wool knit hoods, and the appraisers classed them as "a manufacture of wool not specially enumerated or provided for," and assessed a duty on them of 35 cents per pound, and 40 per cent. *ad valorem*. Heyl, pt. 2, p. 24, cl. 363a. The plaintiff paid this duty under protest, appealed to the secretary of the treasury, and now brings this suit, and contends that the goods were only dutiable at 30 per cent. *ad valorem* under the following paragraph of Schedule N, act of March 3, 1883. Heyl, pt. 2, p. 27, cl. 400:

"Bonnets, hats, and hoods for men, women, and children, composed of chip, grass, palm leaf, willow, or straw, or any other vegetable substance, hair, whalebone, or other material not specially enumerated or provided for in this act, 30 per cent. *ad valorem*."

I think there can be no doubt that the duty on these goods was improperly assessed. Clause 400, just read, specifically describes "hoods for men, women, and children," and provides that the duty upon them shall be 30 per cent. *ad valorem*. This minute description must be held to control as against the general terms used in the clause under which the collector classed them for duty.

The issue is found for the plaintiff.

DEERING v. WINONA HARVESTER WORKS and others.¹

(Circuit Court, D. Minnesota. June Term, 1885.)

PATENTS FOR INVENTIONS—PRACTICE—INFRINGEMENT OF SEVERAL PATENTS—CONSOLIDATION OF SUITS—EXTENDING TIME TO ANSWER.

D. filed a bill on May 25, 1885, alleging an infringement of two of the patents issued for improvements in grain-binders, both relating to the cord-binding mechanism; and on June 1, 1885, he filed another bill against the same defendants for an infringement of five patents relating to grain-binding and harvesting machines,—all of the devices alleged to be infringed being used in one machine. Defendant on June 18, 1885, moved to consolidate the two suits, and that the time to answer both bills be extended to the first rule-day in September. *Held*, that the motion should be granted.

In Equity.

Banning & Banning, for complainant.

Dyrenforth & Dyrenforth, for defendants.

NELSON, J. The defendants are engaged in manufacturing and selling grain harvesters and binders, both operated conjointly as one machine. The complainant files his bill May 25, 1885, alleging an infringement of two of his patents issued for improvements in grain binders, both relating to the cord-holding mechanism; and on June 10, 1885, he files another bill against the same defendants for an infringement of five patents, relating to grain-binding and harvesting machines. All of the mechanical devices which are alleged to be infringed, are used in one machine. On June 18, 1885, a motion is made by defendant's solicitors that the two suits be consolidated, and, for the purposes of answer, proofs, and hearing, be treated as one and the same suit; also that the time to answer both bills of complaint be extended to the first rule-day in September. The motion is opposed by the complainant's solicitors on the ground (1) that the several alleged infringements of seven different patents could not be joined in the same bill, as it would be on demurrer bad for multifariousness; (2) that the voluminous testimony in the consolidated cases would tend to confusion on the hearing, and seriously inconvenience the court. The charge of multifariousness against a bill counting upon infringements of the seven separate patents embraced in the two bills, would not be sustained. The principles announced in *Nourse v. Allen*, 3 Fisher, Pat. Cas. 63, and followed in *Gillespie v. Cummings*, 3 Sawyer, 260, and other cases, permits such joining of separate and distinct causes of action.

The defendants are engaged in the manufacture of harvesting and binding machines, containing mechanism infringing all the patents, if the allegations of the complainant in both bills are true. I think the convenience of the court will be served if the two suits proceed as one, and certainly the labor of the solicitors of both parties will be lightened.

¹ Reported by Robertson Howard, Esq., of the St. Paul bar.

The delay asked for by defendants is reasonable, and cannot prejudice the complainant. The motion to consolidate, and for time to answer, is granted; and it is so ordered.

CONOVER v. THE CITY OF CHESTER.

HECKMAN v. SAME.

(District Court, S. D. New York. May 5, 1885.)

1. COLLISION—RUNNING NEAR PIERS.

Ferry-boats passing up and down the East river, and having no call to go in the immediate vicinity of piers 5 to 7, appropriated by law to the special uses of canal-boats, will be held in fault for a collision resulting from attempting to pass between tugs lying off those docks waiting for canal-boats, within 200 or 300 feet of the shore.

2. SAME—DISSENTING SIGNALS.

A signal of two whistles given by a ferry-boat to indicate that she would pass inside, but not assented to, does not relieve her from fault.

3. SAME—FAULT.

A tug in waiting as above, not over 200 or 300 feet from shore, hearing a signal of two whistles, replied with one, and proceeded towards the shore, but, observing that the ferry-boat continued her course inside, backed. *Held*, that the tug was not in fault, and that the ferry-boat was solely responsible for the collision that ensued.

In Admiralty.

Edward D. McCarthy, for libelants.

Beebe & Wilcox, for claimants.

BROWN, J. At about half past 7 in the evening of January 3, 1884, the tug-boat Skeer, belonging to the libelant Conover, having the libelant Heckman's canal-barge Hammill lashed to her starboard side, was waiting near pier 7, East river, in the flood-tide, for the tug-boat Amboy, which lay across the slip below, to get out of the way, so that she might pick up another canal-boat in the slip on the southerly side of pier 7. While thus waiting, and, as I find, substantially at rest, the City of Chester, an Annex ferry-boat running from Jersey City to the bridge pier at Brooklyn, rounded the Battery, and, seeing the Skeer ahead, undertook to pass between her and the New York shore. In doing so, she struck the Skeer a violent blow on her port side, and also injured the Hammill by the blow communicated to her.

The City of Chester must be held solely answerable for this collision. The docks near which the Skeer was lying are devoted specially by statute to the use of canal-boats, where tugs are in the habit of picking up and landing such boats, and of making up their tows. The pilot of the City of Chester was familiar with these facts. Tugs lying in this vicinity, whether their colored lights are seen or not,

are presumed to be there on the business of such boats. The statute, moreover, requires that steamers, which includes ferry-boats, in going up the East river shall go as near the middle of the river as may be. There was, in this case, no obstruction, and nothing to prevent the City of Chester from going well out towards the middle of the river. She had no right to be navigating near the shore, having no call there. I think it clear that at no time within five minutes preceding the collision was the Skeer more than 300 or 400 feet out from pier 7. She was probably much less all the time. But even that distance would afford no excuse for the City of Chester to undertake to go inside of her. The ferry-boat was going at the rate of about 10 miles an hour. It was, therefore, not more than from one to two minutes after she was in a position to see the Skeer that the collision happened. When the Skeer was first seen by those on board the City of Chester, they say that the former's colored lights were not visible. If that were true, considering the place where the Skeer was lying, that was no presumptive evidence even that she was in motion; and the proof is clear that she was not, except such slight movements as were necessary to keep her in place. She had previously moved out from the slip between piers 5 and 6, and had then drifted up near to pier 7,—possibly first moving outward a little, and then coming back again. The collision was not over 100 or 200 feet from the pier. It was the business of the City of Chester to keep out in the river, and altogether clear of these tugs near the New York shore. *The Sam Rotan*, 20 FED. REP. 333; *The Active*, 22 FED. REP. 175.

The evidence does not establish any fault in the Skeer. The witnesses of the City of Chester say that they gave a signal of two whistles twice. Various witnesses on the part of the Skeer, several of them disinterested, say that only one signal of two whistles was heard; and that one shortly before the collision, when the boats were about 300 feet apart, to which the Skeer immediately replied with a dissenting signal of one whistle. Whatever doubt there may be whether a previous signal of two whistles had been given or not, it was not heard by any of those about pier 7. Moreover, in the situation in which the City of Chester was at the time when her witnesses say that this first signal of two whistles was given, namely, about off pier 2, the tug-boats about and near to pier 7 could not reasonably suppose such a signal, even if given and heard, to have been designed for them, since they were altogether out of the line of the required course of the City of Chester. The ferry-boat also had no right to change her course towards the shore without a previous assent of two whistles, which she never got, so that her failure to get an answer to her alleged first signal was no inducement and no excuse for her going to the left. When the second signal of two whistles was heard on the Skeer, it was immediately answered with one whistle, and rightly so. *City of Hartford*, 11 Blatchf. 72. The Skeer then started up towards the shore, in conformity with her own whistle, as, in my judgment,

she also ought to have done. The City of Chester, instead of porting to go to the right and out into the river where she belonged, and where both the statute and the inspectors' rules required her to go, persisted in her maneuver to go inside, seeing which, the Skeer then backed, but not in time to avert the collision. In all this, I think, the Skeer did what was required, and all that was reasonably incumbent on her, to avoid the collision.

The case, in most of its features, is similar to that of *The Payne* and *The Vanderbilt*, 20 FED. REP. 650, but with even less excuse for the City of Chester than the Payne had in that case. The libelants are entitled to a decree against the City of Chester for the full amount of the damages, with costs; and an order of reference may be taken to compute the amount.

HAIGHT and another v. THE MAYOR and others.

(*District Court, S. D. New York. May 7, 1885.*)

COLLISION — PUBLIC SERVICE — MUNICIPAL CORPORATION — COMMISSIONERS OF CHARITIES AND CORRECTION.

The corporation of the city of New York having been held by the state courts not liable to respond in damages for injuries to persons or property arising from the negligence of the employes of the commissioners of charities and correction while in the discharge of their separate functions, *held*, that a libel to recover damages against the city for a collision between a schooner and a steam-boat owned by the municipality, but in the exclusive use and control of the said commissioners, and while navigated by a pilot employed by the commissioners, could not be sustained, though the collision was solely through the fault of the pilot of the steamer

In Admiralty.

Alexander & Ash, for libelants.

E. Henry Lacombe, for the mayor.

BROWN, J. Upon the merits of this cause I am of opinion that this collision, which occurred in the East river, between Sixty-second street and Blackwell's island, was not so far within the eddy as to make the navigation of the schooner faulty for being found within the eddy. The extent of the eddy varies with the tide; and the position and course of the schooner clearly prove, as it seems to me, that she had not gone so far within it as to be perceptibly affected by it. The steam-boat was therefore bound to keep out of her way. There was room enough for her nearer to the western shore, where she ought to have gone, and might have gone without difficulty. If the defendants were, therefore, legally responsible for the faults of the barge, the libelants would be entitled to a decree. But the steam-boat, though owned by the municipality, was not at the time, as the evidence shows, under its control, or in its service, or under the

management of any officer or employe of the corporation. It was in the exclusive service of the commissioners of charities and correction; and the pilot who was navigating her testifies that at the time of the collision he was in the employ of the commissioners of charities and correction, and had been for a long time previous.

These facts bring the case, so far as I can see, entirely within the decision in the case of *Maxmilian v. The Mayor*, 62 N. Y. 161, where the responsibility of the corporation for the negligent acts of persons in the employ of the department of charities and correction is discussed by FOLGER, C. J., with his usual fullness and learning; and the conclusion was there arrived at, sustained by principle and authority, that the corporation could not be held for the negligent acts of the employes of that department, because it is an independent board, over which the corporation has no control, and which does not act for the use or the benefit of the corporation in the discharge of any of its corporate functions or duties.

On this ground I am obliged to dismiss the libel, but without costs.

MORRELL and another v. RHEINFRANK and others.

(District Court, S. D. New York. May 12, 1885.)

COLLISION—PRINCIPAL AND AGENT—DISCHARGE OF BOATS.

A canal-boat loaded with coal was consigned to the dock of respondents, who were bound to unload her. They employed shovelers, paying them by the ton. The captain was in charge of the boat and bound to move her as required, so that the different hatches in turn should come beneath the stationary derrick. A scow being in the way so as to prevent the canal-boat's moving far enough astern to bring the fore-hatch under the derrick without being wound round, to avoid the trouble of the latter course, the shovelers, at the captain's request, got permission from those in charge of the scow, which was at the time unattended, to move it ahead. The scow was moved ahead and fastened by the shovelers, the captain of the canal-boat supervising it. Afterwards a passing steamer caused the scow to surge back and forth so that she struck the canal-boat and injured her. *Held*, that the respondents were not liable for the acts of the shovelers in their imperfect fastening of the scow, nor for the consequent damage.

In Admiralty.

Hyland & Zabriskie, for libelants.

Bartlett, Wilson & Hayden, for respondents.

BROWN, J. The consignee was doubtless bound to provide a suitable berth for the libelants' boat. When the canal-boat, having discharged from the after and middle hatches, desired to discharge from the fore-hatch, and the scow was in the way so as to prevent the canal-boat's backing far enough to bring her fore-hatch under the derrick, it was a mere matter of convenience to the captain of the boat whether he should wind her round, which he might have done, leaving

the scow in her place, or whether he should get the scow hauled out, so as to enable him to pull the canal-boat back under the scow's stern. It was not the duty of the respondents to have the scow moved out, merely because that would be a little more convenient for the captain; but, even if that was the respondents' duty, it was a duty which could only be exercised lawfully through the men in charge of the scow. The shovelers worked for the respondents by the ton, and were employed for shoveling only. They certainly had no authority to represent the respondents in moving the scow, or to undertake to move the scow on their behalf, or in procuring those in charge of the scow to move her. The shovelers' proposal, therefore, to get the scow moved, must be regarded as a voluntary proffer of aid to the captain of the canal-boat, to save time and trouble to them all, for their own benefit, rather than to wind the canal-boat about, as they might have done, and would otherwise have been obliged to do. The captain of the canal-boat in reality supervised this whole proceeding. He alone was in charge of his own boat, and had sole control of her in moving from one hatch to another. When the scow was pulled away by the shovelers, the captain ordered them where to halt and make fast. He evidently trusted to their competency to make fast properly. Whether the rope's becoming slack two or three hours after sufficiently to permit the suction and rebound of the scow from passing steamers to strike the canal-boat, was owing to the rising tide or to the lines slipping because not securely fastened, is immaterial, so far as concerns the respondents. The shovelers were not their agents in doing this work about the scow, and the risk of their competency, and of the sufficiency of their work, was, I think, clearly upon the captain who accepted and supervised their services in moving her.

The libel must therefore be dismissed, but without costs.

THE J. T. EASTON.

(*District Court, S. D. New York. May 23, 1885.*)

1. COLLISION—DAMAGES—REPAIRS—DEPRECIATION.

Where a small injury, occasioned by collision, such as the cracking of the gunnel streak, can be repaired by bolts and braces at slight expense, so as to be, for all the practical purposes of use and durability, as good as new, damages should be allowed on that basis only, and not the comparatively large cost of putting in a new beam, especially where during a long interval no repair has been made.

2. SAME—MASTER'S ESTIMATE.

In a conflict of evidence as to depreciation, the low estimate of the master at the time, as shown in his claim then made, with knowledge of all the facts, was adopted.

In Admiralty.

Hyland & Zabriskie, for libelant.

Owen & Gray, for claimant.

BROWN, J. The libelant claims some three or four hundred dollars for an injury to her canal-boat by collision. Upon the evidence in the case I am satisfied that the actual damage could be repaired by the use of bolts and braces for \$15, so that the canal-boat, for all the practical purposes of use, of convenience, and of strength, would be just as good, and just as durable, as before the injury. Whether, if repaired in that way, her market value would be essentially depreciated is a question upon which the witnesses differ. An owner whose boat is damaged by the negligence of another is entitled to have his boat repaired in a way which will not leave her essentially depreciated in her market value, or inferior for practical use. But where an injury can be perfectly repaired for all practical uses at slight expense, but, as in this case, cannot be placed in exactly the same condition as new, except by taking out and replacing much other good work at a very considerable expense, the court must hesitate in allowing damages on the basis of the latter mode of repair, especially where, as in this case, though a long time has elapsed, no such repair has been made. The court could only be warranted in allowing for new beams upon very plain and certain proof that the market value of the boat will otherwise be materially and certainly lessened. In the conflicting evidence in this case I think the acts of the libelant herself, or rather of her husband, who was the master and manager, must be considered as a sufficient practical guide for the court on the latter point.

A great preponderance of evidence shows clearly that after full examination of this injury by the captain's surveyors, he offered to settle for \$25; while the claimants would give him but \$10. A considerable time has elapsed, yet no kind of repair of the injured beam has been made up to the present time; and on the survey during the trial the alleged break shows even less than when recent; and the fact of the break itself is not altogether beyond doubt. Under these circumstances the court would not be justified in awarding damages upon the basis of a necessity of taking out some 40 feet of the gunwale streak in order to repair this comparatively slight injury. I must regard the estimate made by the captain after his survey as sufficient to cover whatever trifling difference may be made in the value of the boat by a repair in the ordinary inexpensive way; and I award him the sum he then claimed, and which has since been paid into the registry, namely, \$25; for which judgment may be entered, without costs.

HARMAN v. LEWIS and another.¹*'Circuit Court, E. D. Missouri. June 20, 1885.)*

1. LIFE INSURANCE—BENEVOLENT SOCIETIES—ASSIGNMENT OF CERTIFICATE.

Where a certificate of membership in a benevolent association insures the beneficiary's life, and provides that no assignment of the certificate "shall be valid, unless approved by the secretary," an assignment without such approval will be invalid.

2. SAME.

Query, whether such a certificate or policy in a benevolent association, incorporated under the laws of Missouri, and which has for its object to give financial aid and benefit to the widows and heirs at law of deceased members, or to such uses and purposes as the member shall by last will appoint, is assignable.

Bill of Interpleader.

The dispute in this case is as to the right to receive a fund paid into court by the Masonic Mutual Benefit Association, a benevolent association organized under the laws of the state of Missouri. This fund consists of insurance money due from said association, by the terms of a certificate of membership issued to T. L. Funkheuser, now deceased. M. D. Lewis, the administrator of the assured, claims as such. M. L. Funkheuser claims under an assignment. John P. Harman claims as guardian of Lillian Funkheuser, only child and heir of the deceased, who did not leave a widow. The certificate of membership, or policy, names the assured as his own beneficiary. It contains, among other provisions, the following:

"This certificate is issued by the society and accepted by the holder and beneficiary therein upon the following express conditions and agreements: (1) That the same is issued and accepted subject to the articles of association and by-laws of the society. * * * (4) No assignment of this certificate shall be valid unless approved by the secretary."

The following clause is printed upon the back of the certificate:

"Upon the death of a member of the society, if the certificate has not been assigned or pledged, the benefit will be paid to the beneficiary named in the certificate, or if no person is designated therein as beneficiary, then to the widow; if there be no widow, then to the children of the deceased member in equal parts, or if there be neither widow nor children, then to his executor or administrator."

The by-laws of the society provide that no pledge or assignment of a policy or benefit shall be valid or binding unless approved by the society. They also provide that the object of the society is to give financial aid and benefit to the widows and orphans and heirs at law of deceased members, or to such uses or purposes as said deceased members shall by last will and testament appoint.

The assignment in question was never approved by the secretary. Said guardian claims that even if the assignment had been approved

¹ Reported by Benj. F. Rex, Esq., of the St. Louis bar.

it would have been invalid, because contrary to the articles of association and the Missouri statutes concerning benevolent associations.

Geo. D. Reynolds, for Harman.

Geo. C. Smith, for Lewis.

M. L. Wilcox, for M. L. Funkheuser.

TREAT, J. (*orally*.) Fund paid into court is subject to the ruling of the court as to the respective rights of parties. It is not necessary to enter into an elaborate consideration, in the light of authorities, of the peculiar obligations resulting from certificates of membership in this corporation. Whether such a certificate was assignable admits of extreme doubt. But even if assignable under the terms of the certificate, said terms were never complied with. The result is that the fund in court, less costs, must be paid to John P. Harman, guardian of the child of deceased.

Decree will be entered accordingly.

CENTRAL TRUST CO. v. WABASH, ST. L. & P. R. CO., and BUTLER,
Intervenor.¹

(Circuit Court, E. D. Missouri. June 6, 1885.)

1. EQUITY PRACTICE—CONSENT—MORTGAGES—EQUITABLE LIENS.

Where, in a foreclosure suit, a claimant intervenes, and the master, to whom his claim is referred, reports that the demand has not been contested and should be allowed, and that the intervenor is entitled to a lien for the amount due him superior to that of mortgage creditors, and no exceptions to the report are filed, and all parties in interest assent, the report will be confirmed.

2. MORTGAGES—EQUITABLE LIENS—SURETY ON APPEAL—BOND.

Semble, that where a judgment is rendered against a mortgagor before the appointment of a receiver and an appeal is taken, and after the appointment of a receiver in foreclosure proceedings the judgment is affirmed, a surety on the appeal-bond, who has to pay the judgment, is not entitled to any lien, unless the judgment creditor would have been entitled to one in case his demand had remained unsatisfied.

In Equity.

Phillips & Stewart, for complainant.

Wager Swayne, Henry T. Kent, and Green, Burnett & Humphrey,
for defendant.

George B. Burnett, for intervenor.

Wells H. Blodgett, for receivers.

TREAT, J., (*orally*.) The intervening petition of John P. Butler was brought to the attention of the court yesterday. There are no exceptions filed either before the master or before this court, yet I thought it my duty to look through the record to ascertain whether it fell within the decision made by Brother BREWER; and if so, though

¹ Reported by Benj. F. Rex, Esq., of the St. Louis bar.

nobody objected to it, the court would reject it. I find, however, that all parties who have any interest, public or otherwise, in the matter have assented to this small demand, and that being the condition of things I confirm the report. But I wish it understood that this decision is not to be drawn into a precedent except under like circumstances. In other words, if a party chooses to go on an appeal-bond in a suit against a corporation,—not a lien demand,—prior to the appointment of a receiver, and the appellate tribunal (it being a state proceeding) affirms the original judgment and gives the necessary judgment against the principal and his sureties, the surety has no right prior to the mortgage. Now, what was the demand? Was it a lien demand? If so, the court would admit the right, as by subrogation, of a surety who paid off that lien, to be reimbursed.

Nothing is disclosed in this particular case with regard to the original demands whether they were lien demands or not. When I asked the counsel yesterday the nature of the original demands, and whether there was any lien for them by statute, he replied he thought not. If not, why, as Brother BREWER said, should a man, who had chosen to become surety on an appeal-bond, the litigation extending for a greater or less time, bring his claim in here to override a mortgage, because he had paid as surety a claim at large? The proposition as thus stated, every gentleman of the profession will understand, is an elemental one. A person sues a corporation like this Wabash Company, for illustration, on a demand which is not a lien demand. The company takes an appeal; some one chooses to go on that appeal-bond. The litigation extends for a period of time, more or less, but in the intervening time receivers are appointed. They are not parties to the original litigation; they know nothing about it, and then because that surety has to pay, and in the mean time the corporation is cast into the hands of receivers on an application for a foreclosure of a mortgage, why should such parties be put in any other position, not being subrogated to a lien demand, than that of a creditor at large? Now, I see that Gen. Swayne, who is one of the counsel here, and Mr. Blodgett and others have a different idea. So, also, the counsel for the mortgagee. But Brother BREWER and myself reached a common conclusion that there should be a disclosure to this extent, viz.: If the original judgment was a lien prior in right to the mortgage, and in order to preserve the property the surety become subrogated thereto, he would be in the position of a lien creditor. But how are you prior in right through suretyship on an appeal for accounts that are not liens at all? If so, what would be the result? A man who buys a bond secured by a mortgage on a railroad could not know whether his bond was worth anything. I confirm this report with these remarks, in order that parties may understand that but for the assent of all concerned I would not allow the account.

FULLER and others v. KNAPP and others.*(Circuit Court, S. D. New York. 1885.)***1. EQUITY PRACTICE—DEMURRER.**

A defendant cannot be permitted, after a demurrer has been overruled which goes to the whole bill, and leave has been given him to answer, to avail himself a second time of the demurrer.

2. SAME—COMPELLING DEFENDANT TO ANSWER INTERROGATORIES.

A complainant cannot, by motion, compel a defendant to answer certain interrogatories annexed to the bill, but if the answer is insufficient he must present exceptions stating the charges in the bill, the interrogatories applicable thereto to which the answer is responsive, and the terms of the answer *verbatim*, so that the court may see whether it is sufficient or not.

3. SAME—RIGHT OF DEFENDANT TO REFUSE TO ANSWER INTERROGATORIES—EQUITY RULES 39, 44.

A defendant is at liberty to decline to answer any interrogatory, from answering which he might have protected himself by a demurrer, notwithstanding he answers other parts of the bill; and although he submits to answer, he is not compellable to discover other matters than he would be compellable to discover upon filing a plea in bar and an answer in support of such plea.

4. SAME—EXTENT OF INTERROGATORIES—EXCEPTIONS.

A complainant cannot interrogate as to matters which he has not put in issue, although he may expand his interrogatories so as to cover every incident of the facts as alleged. If interrogatories are propounded as to facts beyond the scope of the inquiry to which the bill is legitimately addressed, the defendant may omit to answer and have their propriety tested upon exceptions to his answer, as he might by a demurrer to such interrogatories.

5. SAME—LIFE INSURANCE—RIGHT OF INSURED—INTERROGATION AS TO DIVIDENDS.

Parties to a contract of life insurance do not contemplate that the policy-holder is to be permitted to participate in the management of the company, or dictate the amount of the dividend it shall declare, or question the result after the discretion of its managers has been exercised in this behalf. The contract is that the policy-holder shall have the benefit of such dividends as are appropriated, not such as the policy-holder or the court may think might have been discreetly appropriated by the company.

WALLACE, J. The complainants' motion is, in substance, one to remove a demurrer from the files. The defendants demurred to the bill for want of equity, and the demurrer was set down for argument, and was overruled. The defendants then answered, and at the same time demurred again to the whole bill. A defendant cannot at the same time answer and demur to the whole bill, though he may demur to part and answer to the residue. Equity rule 32. After a demurrer has been overruled, a defendant may insist upon the same matters by way of defense in his answer. This has not been attempted here. The defendants cannot be permitted, after a demurrer has been overruled which goes to the whole bill, and leave has been given them to answer, to avail themselves a second time of the demurrer. The motion is therefore granted. The complainants also move to compel the defendants to answer certain interrogatories annexed to the bill. This is not correct practice. If the answer is deemed to be insufficient, the complainant must present exceptions stating the charges in the bill, the interrogatories applicable thereto,

to which the answer is responsive, and the terms of the answer *verbatim* so that the court may see whether it is sufficient or not. *Brooks v. Byam*, 1 Story, 296.

As the question of the sufficiency of the answer has been fully discussed by counsel, and elaborate briefs have been submitted asking for a consideration of the merits, it is deemed proper to indicate what disposition should be made of the exceptions when they are formally presented. The bill is for discovery and relief. It seeks an accounting concerning a fund in which the complainants have an interest, and a discovery of facts upon which the amount of the fund and the complainants' interest depends. It is founded upon a policy of insurance issued by the Metropolitan Life Insurance Company, one of the defendants, March 2, 1874, upon the life of Austin B. Fuller to Harriet A. Fuller, his wife. The other defendant, Knapp, is the president of that company. The bill alleges that the company, by the terms of the policy, in consideration of certain payments made and to be made by Harriet A. Fuller, agreed that, should Austin B. Fuller die within 10 years from March 2, 1874, it would pay to Harriet A. Fuller the sum of \$10,000; and that, should he survive the said 10 years, the company would pay the said Harriet A. Fuller the sum of \$1,231 as a reserve endowment; and also agreed that said policy was issued on the "reserve dividend plan," and that should the premiums be paid as stipulated for 10 years from the date thereof, and should said Austin B. Fuller survive that period, it would pay the said Harriet A. Fuller her equitable proportion of "the reserve dividend fund" in cash.

Further averments are intended to show what is meant by the terms "reserve dividend plan" and "reserve dividend fund" as used in the policy. These averments are to the effect that the company issued certain printed instructions to its agents, and especially to the agent through whom the complainants obtained the policy in suit, containing an explanation of the scheme of insurance, and an exposition of the rights of the assured, and the obligations of the company under a policy issued on the reserve dividend plan. It is alleged that in these instructions the company represented that all persons who take policies within the same year form a class, which is treated by the company as a distinct body for 10 years; that the company guaranties to the policy-holders an equitable share in all the surplus earnings of the company which are to be divided at the end of each year. But the policy-holders stipulate among themselves that all these dividends shall be retained by the company at the average rate of interest obtained on all its investments, and be divided at the end of the 10 years between the policy-holders of the class then living; that if any policy is forfeited for non-payment of premiums, the dividends which have already accrued upon it inure to the benefit of the other policy-holders of the class, and are to be retained by the company, invested and divided at the end of the 10 years among the living members of the

class; and that death-claims are paid out of the general funds of the company, and not out of the class fund exclusively. It alleges that the company also represented in these instructions that the reserve fund under the reserve dividend plan is accumulated from several sources: from ordinary dividends arising from the general earnings of the company; from the dividends which lapsed to the class by the death of members before the expiration of 10 years; and from the dividends forfeited to the class by non-payment of policies, and by retiring members.

The bill alleges that the complainants accepted their policy upon the faith of these representations as to the character and incidents of "the reserve dividend plan," and that these representations are in fact a correct statement of the plan as the term is used in the policy. It further alleges that many other persons became insured in the same class with complainants, upon the reserve dividend plan; some of whom died within the 10 years, whereby the accumulated dividends upon their policies accrued to the general fund; some of whom retired, and thereby forfeited their dividend; and that the policies of others lapsed. That interest was earned by the company upon its investments, and defendants are now in possession of the whole fund accruing to the class. That the defendants have in their possession books and records showing all these facts, details of which are not known to complainants, and without a discovery of which complainants cannot prove the facts upon which their rights to relief depend.

The bill contains appropriate allegations to show that complainants duly paid the premium upon the policy during the 10 years, and that Austin B. Fuller survived the 10 years of its duration, and the complainants became entitled to the equitable proportion of the reserve dividend fund in cash, due to policy-holders of the class of 1874. Interrogatories are propounded to the defendant calling for a statement of the earnings of the company during the 10 years, and incidentally of the receipts, expenses, and losses; a statement of the average interest received by the company on its investments during the 10 years; a statement of the names of policy-holders in the class of 1874; and how long each policy continued in force, what premiums were paid upon it, what dividends were earned when it lapsed or matured, what interest was earned by the fund, and what payments had been made from it. The defendants are also interrogated whether the company issued to their agents, or to the agent through whom the complainants insured, the instructions explaining the reserve dividend plan as set forth in the bill; and whether the term "reserve dividend plan" as used in the policy is the plan described in the instructions; and if not as so described, defendants are required to state what is the correct meaning of the term.

The answers of the defendants admit the issuing of the policy described in the bill; set out the policy in full; deny that the company issued such instructions to its agents as are stated in the bill; deny

that such instructions correctly describe the meaning of the term "reserve dividend plan" as used in the policy; allege that the policy alone comprises the whole contract between the parties; admit that many other persons became insured in same class with defendants, under the reserve dividend plan; admit that dividends were earned on some of the policies, and that some of the persons so insured died, some retired, and some forfeited their dividends; admit that interest was earned by the company upon its investments; and allege that the company has set apart and apportioned the fund among the different policies entitled to the same, and now holds the equitable proportion of the fund earned by the complainants' policy, and is ready and willing to pay over the same. They refuse to answer the interrogatories requiring them to state what is meant by the term "reserve dividend plan," or what its meaning is as used in the policy; and refuse to answer any of the interrogatories which call for statements of facts, by which the amount of the reserve dividend fund for the class of 1874, and complainants' proportion thereof, can be ascertained.

The material parts of the policy, as set forth by the defendants, are the same as is alleged by the bill, except that it contains the following clauses:

"At the request of the assured this policy is issued upon the reserve dividend plan. * * * This policy shall not be entitled to any share in the dividend surplus of said company other than at such time and after the manner and upon the conditions hereinbefore described."

There is nothing in the policy to explain the features of the reserve dividend plan, what obligations the company assumes to the policyholder, or what interest accrues to the policyholder whose policy is issued under such plan.

A defendant is at liberty to decline to answer any interrogatory, from answering which he might have protected himself by a demurrer, notwithstanding he answers other parts of the bill, (equity rule 44;) and, although he submits to answer, he is not compellable to answer other matters than he would be compellable to discover upon filing a plea in bar, and an answer in support of such plea. Equity rule 39.

The sufficiency and the equity of the bill have been considered upon a former occasion, when the demurrer was overruled. It was then held that if the contract between the parties was such as is asserted by the bill, the beneficiary in the policy, at the end of the 10-year period, was entitled to recover a sum, the amount of which, if disputed, would involve the taking of a complicated account, in which the discovery sought by the bill would be essential to enable complainants to proceed. From the nature of the transactions involved, it is apparent that practically all the information which is indispensable to enable complainants to ascertain what sum they are entitled to is exclusively within the knowledge of the officers of the company.

Upon the case made, they are entitled to a portion of the fund, the amount of which necessarily involves an inquiry as to the number and amount of the policies of the class of 1874, the dividends which accrued upon them, the number that have been forfeited or have lapsed by retirement or death, the times when they lapsed or became forfeited, and of the interest due upon the investment of the dividends. In the management of this fund the company acts as the agent, in a limited sense, of the policy-holders, and owes them the duty of keeping a correct account of the fund. It refuses to render that account, and seemingly takes the position that the policy-holders have no right to an account. Jurisdiction in this class of cases, depending as it does, not so much on the absence of the common-law remedy, as upon its inadequacy, is exercised largely as a matter of judicial discretion, influenced by the particular circumstances of each case and the conduct of the parties. *Northeastern Ry. Co. v. Martin*, 2 Phil. 758; *Southeastern Ry. Co. v. Brogden*, 3 Macn. & G. 23; *Foley v. Hill*, 2 H. L. Cas. 28; *Anderson v. Noble*, 1 Drew. 143; *Bliss v. Smith*, 34 Beav. 508; *Pike v. Dickinson*, L. R. 7 Ch. App. Cas. 61.

Whether, if discovery were not sought, the bill would be maintainable, it is not necessary to decide; it is sufficient that, being one for discovery as well as for relief, it falls within the class recognized by the authorities as cognizable in equity. *Mackenzie v. Johnson*, 4 Madd. 373; *Phillips v. Phillips*, 9 Hare, 471; *Shepard v. Brown*, 9 Jur. (N. S.) 195; *Hemings v. Pugh*, Id. 1124; *Makepiece v. Rogers*, 11 Jur. (N. S.) 314; *Dinwiddie v. Bailey*, 6 Ves. 136; *Moses v. Lewis*, 12 Price, 502; *Story*, Eq. § 458; *Miller v. Kent*, 16 Fed. Rep. 13.

When the bill was before the court upon demurrer, it was not necessary to determine with precision how far the complainants were entitled to a discovery respecting the matters of the bill, although it was then incidentally intimated that some of the interrogatories were beyond the scope of the allegations. A complainant cannot interrogate as to matters which he has not put in issue, although he may expand his interrogatories so as to cover every incident of the facts alleged. If interrogatories are propounded as to facts beyond the scope of the inquiry to which the bill is legitimately addressed, the defendant may omit to answer, and have their propriety tested upon exceptions to his answer, as he might by a demurrer to such interrogatories.

There are no allegations in the bill which authorize the complainants to interrogate the defendants respecting the general earnings, expenses, and losses of the company during the 10 years in question. There is nothing in the policy itself, or in the conditions of the reserve dividend plan, as the features of that plan are described in the bill, which authorizes a policy-holder to require the company to appropriate or apportion annually among its policy-holders its surplus net earnings; much less to apportion such a sum as might have been realized as net income, if the company had conducted its business

prudently and efficiently. A dividend is a sum actually apportioned. The parties to a contract of life insurance do not contemplate that the policy-holder is to be permitted to participate in the management of the company, or dictate the amount of the dividend it shall declare, or question the result after the discretion of its managers has been exercised in this behalf. The contract is that the policy-holder shall have the benefit of such dividends as are appropriated, not such as the policy-holder or a court may think might have been discreetly appropriated by the company. It follows that the defendant should not be required to answer interrogatories Nos. 8, 11, 13, 14, 15, 16, 17. The seventh interrogatory would seem to call for all information necessary in support of the facts alleged in the bill, so far as they relate to the amount of the reserve dividend fund. Interrogatories Nos. 9, 10, and 12 are repetitions in part of No. 7, with modifications which are not material in any aspect that the accounting may present.

The other interrogatory which is not answered, calls upon the defendant to describe the term "reserve dividend plan," and to state what its meaning is as used in the policy. Inasmuch as the defendants deny that the plan is such as the complainants allege it to be, and there is nothing in the policy itself to indicate what are its features or details, and the covenants of the policy cannot be interpreted without the aid of the explanation, the defendants are properly called upon to explain the meaning of the term. Greenl. Ev. §§ 280, 293. The parties treat in reference to the conditions and features of that plan. In one view it may be regarded as an extrinsic agreement, incorporated by reference into the policy. In another, the term may be considered as having a signification, by usage, known to experts, and which is to be ascertained from competent witnesses. It is not known to have a legal, defined meaning. What that term means as used in the policy is a conclusion of law, and so far as the interrogatory calls for a legal conclusion it does not require an answer.

The defendants cannot be excused from answering the interrogatories upon the ground that their answer sets up matters by way of defense which are a bar to the suit. It is said by Mr. Tyler (Mit. & T. Eq. Pl. 74) that "the modern practice of making of defenses by answer has lead to great confusion; and questions in pleading have arisen so paradoxical that judges, perplexed and bewildered, have hardly known how to decide them." No perplexity exists, however, in this case. The answers, taking their affirmative and negative statements together, do not meet the material allegations of the bill, so far as they relate to the rights of the complainants to call upon the company for an accounting. The material facts are admitted upon which their right rests, and it is not denied that the company now has in its possession a sum of money to which they are entitled.

BANQUE FRANCO-EGYPTIENNE and others v. BROWN and others.

(Circuit Court, S. D. New York. 1885.)

EQUITY PRACTICE—FILING CROSS-BILL. SETTING UP DISCHARGE IN BANKRUPTCY DELAY.

Leave granted defendants to file a cross-bill, setting up their discharges in bankruptcy, unless complainants elect to amend the prayer of their bill so as to waive any recovery against defendants for a debt which was not created by fraud, or while they were acting in a fiduciary character.

WALLACE, J. The defendants Duncan & Sherman move for leave to file supplemental answers to the bill, setting up their discharges in bankruptcy, which have been obtained since the cause was at issue. A very long delay has taken place since the discharges were obtained, and, notwithstanding the extenuating circumstances which are offered in explanation, the delay is so unprecedented that, if the complainants had been to any extent prejudiced by it, the application could not be considered with any degree of favor. The transactions assailed by the bill are complicated, and numerous defendants are impleaded. Relief is prayed against all of them, assuming that they have participated in a fraudulent scheme by which the complainants were induced to invest in certain mortgage bonds; but relief is also prayed against some of them as trustees of a fund which came to their hands and was diverted in breach of their duty; and against others upon the theory that complainants can follow the trust funds into their hands. It may well be, under the allegations, that some of the defendants will be adjudged to account who were not guilty of any fraud personally, or who were not acting in a fiduciary relation towards complainants. No relief is prayed against either of the defendants Duncan or Sherman, exclusively, or as to transactions in which other defendants are not joined. The proofs that have been taken would have been necessarily taken if these defendants were not parties to the bill. It is alleged in the moving affidavits that "no witness has been examined solely to establish the pretended claims of the complainants against the said defendants Duncan & Sherman, or either of them; and that, had the discharges in bankruptcy of these defendants been pleaded immediately upon the granting of such discharges, the complainants would not have omitted to examine a single witness whom they have since examined; and that the course of procedure in the suit would in no respect have been different from what it has been had such discharge been so pleaded." The truth of this statement is not challenged, nor is its effect in anywise impaired by the opposing affidavits. Under such circumstances, as the complainants have not been prejudiced, there is no just reason for denying the defendants the relief they ask.

It would be premature upon this application to determine to what extent the discharges in bankruptcy will avail the defendants as a

protection against the claims made by the bill. It is sufficient for present purposes that the discharges may be available in part to protect them against the relief sought. The application has been presented as though the discharges may be set up by way of supplemental answer. The correct practice requires this to be done by means of a cross-bill. *Miller v. Fenton*, 11 Paige, 18; 1 Daniell, Ch. Pr. 607; Story, Eq. Pl. § 393; *Taylor v. Titus*, 2 Edw. 135.

Leave is granted defendants to file a cross-bill setting up their discharges, unless complainants elect to amend the prayer of their bill so as to waive any recovery against the defendants for a debt which was not created by fraud, or while they were acting in a fiduciary character.

Ex parte KOEHLER, Receiver, etc.

(Circuit Court, D. Oregon. June 26, 1885.)

MUTUAL AND DEPENDENT COVENANTS.

The covenants in the agreement of December 14, 1882, made between the Northern Pacific Terminal Company, of the first part, and the Northern Pacific, the Oregon Railway & Navigation, and the Oregon & California Railway Companies, of the second part, whereby the former undertook to furnish the latter terminal facilities at Portland, for which they agreed to pay, in certain proportions, the interest on the terminal company's bonds and the expense of maintaining such facilities, and keeping up its organization, as rent for the use of such facilities, are mutual and dependent, and therefore the terminal company, having failed to furnish said facilities, is not entitled to the payment of said interest and expenses, and the receiver of the Oregon & California Railway is instructed to act accordingly.

In Equity.

John W. Whalley, for the receiver.

DEADY, J. On December 14, 1882, an agreement was entered into between the Northern Pacific Terminal Company, of the first part, and the Northern Pacific Railway Company, the Oregon Railway & Navigation Company, and the Oregon & California Railway Company, of the second part, by which the terminal company undertook to construct, furnish, and maintain adequate terminal facilities, for the use of the parties of the second part, at and near Portland, including a railway bridge across the Wallamet, for the term of 50 years; in consideration of which said parties did "jointly and severally covenant, promise, and agree to and with the party of the first part, and for the benefit of each and every person who shall, or may at any time hereafter become a holder of said bonds, (meaning the bonds, not to exceed five millions of dollars in value, to be issued by the terminal company for the purpose of furnishing said terminal facilities,) or of any coupons thereunto belonging, to pay to the party of the first part, as rental therefor, the following sums:

"(1) A sum equal to the interest, at the rate of 6 per centum per annum, on all said bonds then or at any time outstanding, to be paid in semi-annual installments. (2) A sum sufficient to create a sinking fund for the redemption of said bonds, to be paid in semi-annual installments, commencing ten years from the date of said agreement. (3) A sum sufficient to pay all taxes and insurance on the property of the terminal company, and all repairs thereon, together with the expense of maintaining its organization and the issue and payment of said bonds and coupons, to be paid quarterly."

It is also provided in said agreement that said payments shall be made by the three parties of the second part in the following proportions: By the Northern Pacific Railway and the Oregon Railway & Navigation Companies, 40 per centum thereof, each, and by the Oregon & California Company, the remaining 20 per centum; and that if either of said parties shall fail to pay its proportion of said rental, the same shall be paid by the others of said parties; and if said failure shall in any case continue 30 days, the party of the first part may forfeit and annul all the rights of said defaulting party under said agreement; and shall do so at the request of either of the others of said parties; but the defaulting party shall not thereby be released from any obligation under said agreement.

On June 19th, Mr. Richard Koehler, the receiver of the Oregon & California Railway, in the suit of *Harrison v. Oregon & California Company*, filed his petition in this court, stating that no terminal facilities had been furnished to said corporation by said terminal company, except a depot building on the east side of the Wallamet river, worth not to exceed \$6,000, and not absolutely necessary to its business, which is also used by the Oregon Railway & Navigation Company, and an appliance, consisting of railway tracks and barges, for the transfer of cars from one bank of the river to the other; and that the Oregon & California Company has been compelled to furnish, at great expense, its own terminal facilities on each side of the river; that the Oregon & California Company has paid under said agreement its share of the interest on the bonded debt of the terminal company up to December 31, 1883, amounting to \$30,858, and that since then and up to December 31, 1884, such interest has been paid by the Northern Pacific Railway and the Oregon Railway & Navigation Companies, and that a semi-annual installment thereof will fall due on June 25th; that no demand was ever made on the Oregon & California Company for payment of any of the expenses and charges incurred under said agreement, except as follows: On January 5, 1885, an account was presented for such charges and expenses up to September 30, 1884, for the sum of \$7,371.87; on February 10, 1885, one from October 1 to December 31, 1884, for the sum of \$1,078.15; on March 21, 1885, one from January 1, 1883, to January 1, 1885, for the sum of \$2,589.96; and payment of the same requested, which was not made, but as the petitioner believes payment thereof was made by the Northern Pacific Railway and the Oregon Railway & Navigation Companies.

In view of these facts the petitioner says he is in doubt whether it is his duty as the receiver of the Oregon & California (1) to pay any portion of the sums claimed by the terminal company; (2) or to pay any portion thereof except such as has accrued since his appointment as receiver; (3) or to pay any portion thereof by him disputed, until the same is adjusted by arbitration; (4) and whether the proper interpretation of said agreement does not make the completion of adequate terminal facilities a condition precedent to the right to demand said 20 per centum from the Oregon & California Company; and asks for instructions in the premises.

The agreement by the Oregon & California Company to pay 20 per centum of the semi-annual interest on the terminal company's bonds, and the other expenses and charges mentioned therein, appears to me to be, in effect, an agreement to pay so much for the use of terminal facilities to be furnished by the latter company. The interest on the money used in the construction of the facilities, and the cost of keeping them up, is assumed to be the rental value of the same. The agreement is substantially a contract on the part of the terminal company to construct terminal facilities and lease them to the Oregon & California Company for so much a year, and a contract by the latter company to accept such lease, occupy the premises, and pay the rent therefor, in the manner provided.

The parties to this agreement must have contemplated and intended that the construction of the facilities would proceed *pari passu* with the issue of the bonds, and that the parties of the second part would be in the enjoyment of the same when and as they were called on to pay rent for the use of them. The covenants of the parties to the agreement are mutual and dependent—to be performed concurrently. And therefore neither party can complain of a default by the other, unless it can also show a performance or offer to perform on its part. *Neis v. Yocum*, 9 Sawy. 24. Upon this view of the matter, and assuming what is alleged in the petition, that no facilities of any consequence have been constructed or furnished to the Oregon & California Company, the terminal company is plainly in default, and cannot compel the further payment of the rent by the former, and is not, in justice, entitled to it; and the receiver is so instructed.

Whether the contract to pay this interest can, under any circumstances, be construed as having been made with the holder of these bonds, and whether such holder can, therefore, compel payment by the Oregon & California Company of its proportion thereof, directly to himself, is a question not now before the court, as it does not appear that any one but the terminal company is making any demand for it. But if the terminal company, or the holder of any interest coupon of these bonds, is dissatisfied with this instruction, application may be made for leave to commence legal proceedings against the receiver, when the matter may be further heard and considered.

MOBILE SAVINGS BANK v. BOARD OF SUP'RS OKTIBBEHA CO.

(District Court, N. D. Mississippi, E. D. April Term, 1885.)

1. **MUNICIPAL BONDS—COUNTY BONDS IRREGULARLY ISSUED—BONA FIDE HOLDER.**
Where the authority of a county to make subscription and issue bonds in aid of a railroad company is given by statute, and the bonds are issued and put in circulation, and come into the hands of a *bona fide* purchaser without notice that all the steps have not been taken as required, such holder will not be affected by any failure in making the subscription, or in the delivery of the certificate of subscription; the bonds reciting that they are issued in pursuance of the constitution and laws of the state.
2. **SAME—INTEREST—REQUIREMENTS OF STATUTE.**
Where the rate of interest which bonds bear does not exceed that provided by the statute authorizing the issuance of the bonds, though the time of payment may vary from that provided in the statute, yet the bonds will be held valid.
3. **SAME—BONDS TAKEN IN PAYMENT OF PRE-EXISTING DEBT.**
The fact that bonds were taken in payment of a pre-existing debt renders the holder thereof none the less a *bona fide* holder for value.
4. **SAME—BONDS ISSUED ON CONDITION—KNOWLEDGE OF HOLDER.**
Knowledge on the part of the holder of bonds and coupons at the time of their reception that it was agreed between the railroad company and the county that the bonds should become null and void if used for any other purpose than the construction of a branch road between certain points in the county, and that the bonds and coupons were used for a different purpose than that agreed upon, will defeat a recovery by such holder in an action on such bonds.
5. **SAME—ELECTION—MISSISSIPPI CONSTITUTION.**
Where two-thirds of those voting at an election vote in favor of the issuance of county bonds in aid of a railroad, such bonds may be lawfully issued, although two-thirds of the registered voters of the county have not voted for such issue. *Carroll Co. v. Smith*, 111 U. S. 526, S. C. 4 Sup. Ct. Rep. 539, followed.
6. **SAME—CONSTRUCTION OF STATUTE BY STATE COURT.**
Where the subscription for capital stock and the issuance of bonds was authorized by the voters of the county, no subsequent construction of the constitution by the supreme court of the state can annul the authority thus given.
7. **SAME—PLEADING WANT OF CONSIDERATION.**
A plea averring that bonds in suit were issued without any consideration valid in law, and are null and void, as plaintiff well knew when he received them, and that the consideration therefor had failed; but failing to aver any facts constituting such failure,—is insufficient.

Demurrer to Special Pleas.

E. L. Russell, B. B. Boone, and A. J. Russell, for plaintiff.*Butler & Carroll and Muldrow, Nash & Alexander*, for defendant.

HILL, J. The questions now presented arise upon plaintiff's demurrer to defendant's amended special pleas.

The first of said pleas in substance alleges that the alleged election authorizing subscription for capital stock in the Mobile & Ohio Railroad Company, and the issuance of bonds in payment thereof, and the act of the legislature authorizing the same, required that when an election should have been held, and a majority of two-thirds of the voters should have legally assented thereto, that the president of the board of supervisors should subscribe for \$125,000 of the capital stock, and a certificate of the same should be given to the county.

The plea avers that no subscription of capital stock was made; and a certificate thereof delivered, as required by said act of the legislature, and that when the plaintiff received said bonds with coupons attached, it well knew that the same had not been done, and that said county of Oktibbeha had never, by voting in the stockholders' meetings, and by levying a tax to pay said bonds and coupons, or otherwise, ratified the issuance of the same; all of which was at the time the plaintiff received said bonds and coupons sued upon well known to plaintiff.

The consideration for the bonds and coupons, as recited upon the face of the bonds, was the payment for capital stock in the Mobile & Ohio Railroad Company, and this subscription of stock should have preceded the issuance of the bonds and coupons. A suit by the railroad company upon the bonds, while in their possession, would have been defeated without the issuance of the capital stock, the issuance of which was a duty imposed upon the company. The law imposed upon the president of the board of supervisors the duty of subscribing for the capital stock, when duly authorized by the voters of the county, and vested him with no discretion to subscribe or not to subscribe for the same, and a tender of the certificate of capital stock to the president of the board would have entitled the railroad company to demand the execution and delivery of the bonds.

The plea avers that the plaintiff had knowledge that the law under which the bonds are claimed to have been issued, required as a condition precedent the issuance of the stock. It is certainly true that the plaintiff is charged with a knowledge of the law of the land, under which the bonds were issued, but where the authority to make the subscription and issue the bonds is given by statute, and the bonds are issued and put in circulation, and come into the hands of a *bona fide* purchaser without notice that all the steps have not been taken as required, such holder will not be affected by any failure in making the subscription, or in the delivery of the certificate of subscription; the bonds reciting, as those sued upon in this cause do, that the bonds are issued in pursuance to the constitution and laws of the state. The declaration avers that the plaintiff is a *bona fide* holder, for value, of the bonds and coupons sued upon, which negatives knowledge of any imperfection in the bonds sued upon. To make this plea good, it must aver knowledge by the plaintiff, at the time the bonds were received, that the subscription for capital stock and a certificate therefor had not been made, and for want of this averment the demurrer to this plea must be sustained. *Hotchkiss v. National Banks*, 21 Wall. 354.

The second plea makes the same averment as the first, with the addition that plaintiff, when the bonds were received had knowledge that the subscription for capital stock, and issuance of a certificate for the same, had not been made; which constitutes this plea a valid defense to the action, and therefore the demurrer thereto will be overruled.

The third plea in substance avers that the statute of the state, un-

der which the bonds and coupons are claimed to have been authorized, provided that the bonds should bear 7 per cent. interest, payable annually, whereas the bonds sued upon bear 7 per cent. interest, payable semi-annually, which it is averred renders them null and void upon their face. The supreme court of the United States has repeatedly held that when the rate of interest does not exceed that provided by the statute authorizing the issuance of the bonds, though the time of payment may vary from that provided in the statute, yet the bonds will be held valid. See *Commissioners v. Clark*, 94 U. S. 278; *Myers v. City of Muscatine*, 1 Wall. 384. Therefore this plea does not present a sufficient defense to the action, and the demurrer thereto must be sustained.

The fourth plea avers that the original order, contract, and agreement between the Mobile & Ohio Railroad Company and the county of Oktibbeha, was that the said bonds and coupons should not be delivered to said railroad company until said company should execute and deliver to said county its obligation to use said bonds and coupons exclusively in the construction of a branch road from Artésia west by way of Starkville, and for no other purpose, and if used for any other purpose that said bonds and coupons should become null and void; and that said railroad company, in violation thereof, used a large number of said bonds, including those sued upon, for other purposes than the construction of said railroad, and that those sued upon were received by plaintiff in payment of a pre-existing debt. The fact that the bonds were taken in payment of a pre-existing debt renders the plaintiff none the less a *bona fide* holder for value, is the established doctrine of all the federal courts. *Swift v. Tyson*, 16 Pet. 1; *Oates v. National Bank*, 100 U. S. 239; *Wood v. Seitzinger*, 2 Fed. Rep. 843; S. C. 14 Amer. Rev. 503, and note by Mr. Riddle; Jones, Pledges, note to section 110. The plea further avers that the plaintiff, at the time of the reception of said bonds and coupons, well knew that the order, contract, and agreement made and entered into between the Mobile & Ohio Railroad Company and the county of Oktibbeha, was that said bonds and coupons should become null and void if used for any other purpose than the construction of said branch railroad, and at that time knew that the bonds with the coupons sued upon were used for a different purpose than that agreed upon by said contract. The plea would have been more complete had it averred that said obligation was not executed, and that plaintiff then had knowledge of that fact; but I am of opinion that it does set up a sufficient defense to the action, and that the demurrer must be overruled as to this plea.

The fifth plea avers that the board of supervisors of Oktibbeha county had no power, authority, or jurisdiction, to issue the bonds and coupons sued upon, and that they are null and void. I am of opinion that this plea does set up a defense to plaintiff's action; therefore the demurrer to this plea must be overruled.

The sixth plea in substance avers that before the bonds and coupons sued upon were issued and delivered to the Mobile & Ohio Railroad Company, and before the same were delivered to plaintiff, or any rights therein had accrued either to said company or to plaintiff, the supreme court of this state had construed the meaning of the constitution of the state, requiring two-thirds of the voters of the county to vote subscriptions to the capital stock of railroad companies, to mean that two-thirds of the registered voters of the county should vote therefor; and further avers that there were then 2,700 qualified voters in the county, and that only 950 votes were cast in said election, and of that number 750 voted for, and 250, or thereabouts, voted against, said subscription; and that less than the required two-thirds of the voters at said election voted for said subscription, and therefore said bonds and coupons are null and void, and that both said railroad company and plaintiff, at the time they received the same, well knew all these facts.

The plea fails to aver the time when said bonds and coupons were issued and delivered to said railroad company, or when they were received by plaintiff. The plea does not deny that the election was held at the time averred in the declaration, and recited on the face of the bonds. The substantial contract between the railroad company and the county was made by the election authorizing the subscription and issuance of the bonds. The statute required the president of the board to perform the clerical and manual act of subscribing for the stock on the books of the company and issuing the bonds, provided the requisite number of voters of the county voted in favor of the same. The president of the board, the authority of the voters having been ascertained, had no discretion under the law to make or to refuse to make the subscription and issue the bonds. The supreme court of the United States in *Carroll Co. v. Smith*, 111 U. S. 556, S. C. 4 Sup. Ct. Rep. 539, decided that the true construction to be given to said provision in the constitution, was two-thirds of those voting in said election, and not two-thirds of the qualified and registered voters of the county. The number of votes cast in said election, as shown by the plea, was more than two-thirds of those voting in said election. The subscription for capital stock and the issuance of the bonds was authorized by the voters of the county, and no subsequent construction of the constitution by the supreme court of the state could annul the authority thus given. Aside from this, the bonds show upon their face that they were issued on the first day of July, 1873, and the court judicially knows that the case of *Hawkins v. Carroll Co.* 50 Miss. 735, in which the construction given to the constitution of the state is invoked in the plea, was not rendered until the October term of that court in 1874. To render the plea a good defense, it must give the date upon which the bonds and coupons were delivered to, and received by, the railroad company and the plaintiff, which is not stated in the plea, so as to enable the court to deter-

mine the question from the face of the plea. For this defect, if for no other, the plea does not set up a sufficient defense to the action, and the demurrer, therefore, must be sustained.

The seventh plea in substance avers that the bonds sued upon were issued without any consideration, valid in law, and are null and void, and that plaintiff, when the same were received, well knew that fact, and that the consideration therefor had failed. But the plea fails to aver any facts constituting such failure, and for this reason this plea does not set up a sufficient defense to plaintiff's action, and the demurrer thereto must be sustained. Code Miss. §§ 1536, 1546; *Mobile Sav. Bank v. Oktibbeha Co.* 22 FED. REP. 580.

The eighth plea avers that the bonds and coupons sued upon were issued and delivered to the Mobile & Ohio Railroad Company upon the express condition that said company would issue and deliver to the county of Oktibbeha certificates of capital stock in said company, and for the further consideration that said railroad company would build a road from Artesia west, by way of Starkville, extending 30 miles, and that said railroad company had refused and failed to issue and deliver said certificates of stock in said railroad company, and had failed and refused to build said railroad from Artesia, by way of Starkville, for the distance of 30 miles, and that, therefore, the consideration for which said bonds were issued had wholly failed, and that said bonds and coupons are null and void. The plea further avers that plaintiff, at the time that said bonds and coupons were received by it, well knew the conditions upon which they were issued and delivered, and that said certificates of capital stock had not been issued and delivered, and that said railroad had not been built. It is insisted that this plea is double, and that the demurrer should for that reason be sustained thereto. The plea only sets up, as a matter of defense, a failure of consideration in not issuing and delivering stock, and in failing to build the road, and notice on the part of the plaintiff. This objection to the plea is not well taken. The plea sets up a sufficient defense to the action, therefore the demurrer to this plea must be overruled.

FIFTH NAT. BANK OF NEW YORK v. NEW YORK ELEVATED R. CO.

(Circuit Court, S. D. New York. June 17, 1885.)

1. ELEVATED RAILWAY—STREETS IN NEW YORK CITY—RIGHTS OF ABUTTING LOT-OWNER TO DAMAGES.

Where, under an act of a state legislature, a railroad company erects an elevated railroad over a street, the fee of which is in the city, an abutting lot-owner holds his easement in the street subordinate to the rights of the public therein; and unless the new structures erected on the street injure it as a thoroughfare for travel, and it is permanently subjected to a new use which is subversive of the original use, such abutting owner, though he may suffer inconvenience, is not legally injured and entitled to damages.

2. SAME—EVIDENCE OF NEW AND INCONSISTENT USE.

The jury are not justified in finding that a new and inconsistent use has been imposed upon the street, unless travel is practically impeded, or light in the traveled way is sensibly diminished, or the street is, at the point complained of, made inconvenient for the accommodation of persons or vehicles.

Motion for New Trial.

Kelly & Macrae and Roger A. Pryor, for plaintiff.

Davies & Rapallo and Henry H. Anderson, for defendant.

SHIPMAN, J. This is a motion by the defendant for a new trial, the jury having returned a verdict for the plaintiff for \$6,000.

Before the year 1874, Third avenue and Twenty-third street, each being streets 100 feet in width, were legally laid out by the authorities of the city of New York, over and upon lands which were acquired by condemnation for street purposes, under the act of 1813, whereby said city obtained the title in fee to said streets and to the land thereunder, in trust, that the same and that each street "be appropriated and kept open for, or as a part of, a public street and avenue, forever, in like manner as the other public streets in said city are, or of right ought to be." The plaintiff purchased, in the year 1874, a lot upon the south-west corner of Third avenue and Twenty-third street, which was bounded on the east by the west side of said avenue, and on the north by the south side of said street, and erected thereon a building, which was completed in the spring of 1875. This building has ever since been used in the following way: the basement for stores or offices, the first floor for the plaintiff's banking-room, and the other floors for apartments.

Under the provisions of the statute passed by the legislature of the state of New York in 1875, and known as the "Rapid Transit Act," which provided for the construction of elevated and underground railroads, an elevated steam-railroad was built by the defendant, in the year 1879, along Third avenue. It was held by a majority of the court of appeals of the state of New York, in 1877, that, under the rapid transit act and the previous acts in relation to the defendant, provision was "made for compensation for any property rights the abutting owners may have in the streets," the fee of which is in the city; but the question whether the contemplated structures would invade any property or rights of such owners so as to entitle them to damages, it was thought did not arise. *In re Elevated R. Co.* 70 N. Y. 327; *In re Gilbert Elevated Ry. Co.* 70 N. Y. 361. No compensation to the plaintiff for injury or damage was made, and there does not seem to be any adjudication, by which the plaintiff was bound, on the subject.

The structure which the defendant built was a permanent one, consisting, at the corner of the streets in question, of an elevated railroad track, placed upon substantial pillars about 15 feet high, and a depot over a part of Twenty-third street, which is reached by a staircase from said street; the entire structure being of the strength and

capacity necessary for the equipment of a railroad operated by steam, and for the accommodation of large numbers of passengers. This action was brought to recover damages, which were alleged to have been caused to the plaintiff's property by the erection of said road and depot, and by the running of railroad trains near to the building. The principal damage was alleged to consist in the obstruction of light from the building, and in the injection into it of noxious odors, gas, and smoke.

The charge to the jury was to the effect that if the streets, at the point where the plaintiff's building is situate, were permanently subjected by the erection of these structures to a new use, which was subversive of and repugnant to the original use for which each street was taken,—that is, for an open thoroughfare or avenue for travel,—and such new and inconsistent use was a damage to the easement of the plaintiff in the street, which easement or right of property consisted only in a right to the light and air afforded by the street, and in a right of access thereto, then, for the damages arising to its property from such exclusion of air, light, and access, the plaintiff was entitled to compensation. The requests to charge covered five points, which were substantially as follows:

(1) That the determination whether the street should or should not be kept open as a public street rested in the discretion of the legislature. (2) That the evidence clearly showed that the new structure did not subject the streets to a new use subversive of or inconsistent with their original use as thoroughfares. (3) That in order to find that there was such new and inconsistent use, the jury must find that the defendant's structures interfered with the free passage of persons, horses, or vehicles over Third avenue. (4) That an abutting owner has no right of property in the street to be affected or damaged by such new use. (5) That there could be no recovery for so much of the damage as was caused by the operation of the railroad trains.

It is competent for the legislature, so far as not restrained by the constitution under which it acts, to grant to a railroad company power to lay a railroad longitudinally over a highway; and when private property is taken by a use which is subversive of or inconsistent with the original use, compensation must be made therefor. *Springfield v. Connecticut River R. Co.* 4 Cush. 63. When the title in fee to such street is vested in a city in trust for the benefit of the people, no compensation is to be made to the city for the occupancy of the street by the railroad, because the legislature conclusively determines what is for the public advantage. *People v. Kerr*, 27 N. Y. 188. In such case, it is also often said that the abutting owners are not entitled to compensation, because, having parted with the title to the land covered by the street, they have no remaining interest or right therein which can be taken, or which can be the subject of damage. This statement of the law was true with reference to the facts which judges or commentators had in mind when the statement was made. An abutting proprietor upon a street, the fee of which is in the city, has no legal interest which can be affected by a surface horse railroad

which is placed in the street; nor, although the inconvenience and annoyance resulting from the operation of a steam surface road is much greater than that resulting from a horse railroad, is his property ordinarily taken or appropriated, in a legal sense, by a steam road which is laid opposite his lot. But a state of facts has occasionally arisen within the last few years by which, although the new method of travel to which the street is subjected, is for the transportation of persons or of freight, the structures which are placed upon the street for the convenience or necessities of the new system are such as not only blockade and prevent the street from being an avenue for ordinary travel, but also deprive an abutting owner from access to the street or from light from it. While a legislature may have said, in general, that the occupancy of the streets of a city by a steam railroad is consistent with the use for which they were established, yet it did not intend to say that all the structures which might subsequently be placed upon a particular narrow street for the purposes of such railroad did not impose a new burden upon the street. A platform may be built over a street which shall cover its entire width and exclude light from the roadway, and the adjacent buildings and structures may be placed opposite the lot of the abutting owner which shall prevent access to his land, and thus a new condition of things is brought into existence which was not contemplated by learned judges when they said that an abutting owner has no interest in the street which can be the subject of damage.

It is this new condition which raises the question whether an abutting owner, who has no right in the soil of the street, has any especial incorporeal right therein of which he may be deprived, and for the loss of which he is entitled to compensation. The main object of a city highway is for the public travel, but that is not its only object. City streets are also, incidentally, to provide sites upon which dwellings and buildings for business purposes can be built. Such streets are established in order to furnish an overflowing population with places in which to live and to work. An important part of the value of a lot abutting upon a street consists in its access to the street, and in the fact that one or more sides can always receive air and light, while a building away from a street may be hemmed in on all sides. This privilege or capacity which appertains to a lot abutting upon a street which has been dedicated to the public, though it is not a right in the soil of the street, is real, and is important, and, so far as the right of access to the street is concerned, has been distinctly recognized by courts. There may be a difficulty in defining the extent of the right, but there is a natural sense of justice which is not satisfied by the declaration that because the owner has parted with his right to the soil in front of his lot, which was taken for the purposes of a street, therefore he is remediless, although the street may be permanently so covered by new structures for the benefit of modes of travel not used for ordinary street purposes, as to exclude him from access to it, or

from light from it. In the *Story Case*, this right is called an easement in the bed of the street for the purposes of air and light, and access from it. *Story v. New York Elevated R. Co.* 90 N. Y. 122.

But, inasmuch as the land covered by the street was taken for public uses, the abutting owner holds his easement subordinate to the rights of the public in the street; and if the new structures are not inconsistent with or destructive of the uses for which the street was originally taken, he has no cause to complain. Until the streets are burdened with an occupancy which substantially injures them as thoroughfares for travel, and they are permanently subjected by the new structures to a new use, which is subversive of the original use, the abutting owner, though he may suffer inconvenience, is not legally injured, because his easement is subject to the controlling right of the public; and if the street continues to be a thoroughfare for ordinary travel, in accordance with the objects for which it was originally laid out, no right of the abutting owner is trenching upon.

The question, then, which was submitted to the jury is of the first importance. It was whether, on the corner of Third avenue and Twenty-third street, either of those streets were subjected by the permanent structures there erected to a new use subversive of or inconsistent with the original purpose for which the streets were taken, that of being a thoroughfare for travel; and the jury were told that the main object of a street was to create and maintain an avenue for travel, and if these streets were kept open and unobstructed, and were not used for purposes inconsistent with travel, the use of the street was preserved. While the language of the charge was correct and was technically sufficient, I fear that the jury were not sufficiently clearly told by the court that, in order to find that the streets were not kept open and unobstructed, the road-bed then not being occupied by the railroad track, it was not sufficient to show that pillars and staircases had been placed in the streets, and a track had been placed upon the pillars which to some extent prevented the streets from being as open as they were before the road was constructed, but that they must be of opinion that substantial obstructions had been placed upon the travel upon the street, and that it was thereby rendered inconvenient to the public as an highway. I fear that the jury were unintentionally led into the opinion that because a new and permanent structure for the purposes of a steam road had been placed over a street of 100 feet in width, therefore they were permitted to find that a new and inconsistent use was imposed upon the street, although travel was practically unimpeded, and light in the traveled way was not sensibly diminished, and the street was not actually at that point made inconvenient for the accommodation of persons or vehicles.

As the motion for a new trial is granted for the reason which has been given, I do not consider the remaining question which was strenuously argued by the defendant's counsel, which was, in substance, that the injury caused to the plaintiff by the injection into its build-

ing of gas and smoke in consequence of the operation of the trains, should not be considered as an element of damage.

The motion for a new trial is granted.

GIVEN v. WESTERN UNION TEL. Co.¹

(Circuit Court, S. D. Iowa. June 11, 1885.)

1. TELEGRAPH COMPANY—DELIVERY OF MESSAGE—DIRECTIONS TO DELIVER AT PARTICULAR PLACE.

The proper mode of directing a telegraph company to deliver at a particular place all telegrams directed to a party, is to leave with the company or send to it at its office directions in writing; and a mere verbal instruction or request to a messenger of the company at some other place than its office, cannot be relied on to fix any legal obligation on the company for a failure to so deliver a message.

2. SAME—ABSENCE OF PARTY ADDRESSED FROM CITY—DUTY OF COMPANY.

Where a telegraph company telephones to the place of business of a party to whom a telegram is directed, and, learning that he is out of the city and will be absent for several days, causes said telegram to be delivered at the residence of the party, to his wife, and then informs the sender of the message of the absence of the party from the city, it has performed its duty.

3. SAME—DUTY TO INFORM EMPLOYEES OF TIME OF CLOSING OTHER OFFICES.

It is not the duty of a telegraph company, with offices scattered all over the United States, to keep the employees of every one of its offices in the country, or in any one state, informed of the time when every other office closes for the night.

4. SAME—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

On examination of the evidence in this case, *held*, that negligence on the part of the telegraph company is not shown, and that any loss that resulted to plaintiff from a failure to receive the message in time to act thereon, was caused by the contributory negligence of plaintiff in not informing his wife where to send messages received during his absence from home, or by her failure to act promptly in the matter.

Tort for a Failure to Transmit and deliver a telegraphic message seasonably.

The plaintiff claimed a recovery of \$10,000 upon the following state of facts:

On the twenty-fifth day of February, 1884, one R. W. Patterson filed in the office of the defendant in Chicago, at 3:45 p. m., the following message:

"To Welker Given, Des Moines, Iowa: Will you consider a proposition to become editor in chief of an important paper at Denver; salary three to four thousand, and stock interest? If so, come to Chicago to-night and see the proprietor to-morrow It is a fine prospect.

[Signed]

"R. W. PATTERSON."

This message was sent to Des Moines at 3:55 p. m. and was there received at 4 p. m. The plaintiff, to whom the message was addressed,

Reported by Robertson Howard, Esq., of the St. Paul bar.

was the private secretary of the governor of Iowa; and defendant's manager, upon receipt thereof, telephoned to the governor's office, stating that a message had been received for plaintiff. Reply was made that he was out of town. At 4:14 p. m. a message was sent to Patterson informing him that Given was out of town, which was delivered to Patterson at 5 p. m. The original message, signed by Patterson, was delivered to plaintiff's wife at 4:30 p. m. At 7:09 p. m. the following message was filed in the office of defendant, at Des Moines, by plaintiff's father:

"To Welker Given, Some Hotel, Marshalltown, Iowa: Have important dispatch for you. Where shall I send it?"

[Signed]

"JOSIAH GIVEN."

This message was received at Marshalltown at 7:15 p. m., and receipted for by plaintiff at 7:20. Thereupon the following message was filed in defendant's office, at Marshalltown, at 7:40 p. m.:

"To Josiah Given, Des Moines, Iowa: To Tremont House, Marshalltown."

[Signed]

"WELKER GIVEN."

This message was received at the Des Moines office at 8 p. m. Plaintiff alleged that at about 8:15 p. m. his father, Josiah Given, called at defendant's office in Des Moines and received the last dispatch named, and receipted therefor; that he called for a blank upon which to write a message, and was offered by defendant's clerk a night-rate blank; that the clerk was informed by Josiah Given that the message he was about to send was a very important one, and that it was essential it should be delivered that night; that he wished, therefore, to send it at full rate; and that, after some talk between him and the clerk, the original message received from R. W. Patterson, in the afternoon, with the change of address, was refiled, and full rate paid therefor. This message was sent to the relay office at Chicago, where it remained during the night, and was transmitted to Marshalltown the following morning, being received there at 8:20 a. m., and delivered to and receipted for by plaintiff at 8:45 a. m.

The plaintiff further alleged that nearly two years previous, when he became private secretary of the governor, he had given instructions to one of defendant's messengers that all messages addressed to him, and received at defendant's office during business hours, should be delivered at the governor's office. The plaintiff alleged the negligence of defendant—*First*, in failing to deliver the original message at his place of business; *second*, in failing to transmit with diligence the message, when refiled by Josiah Given, to Marshalltown, and also in failing to notify defendant that the office at Marshalltown was closed for the night; *third*, in failing to keep the office at Marshalltown open, as plaintiff had requested the operator to do, until the receipt of the message; *fourth*, in sending the message to R. W. Patterson, informing him that plaintiff was out of town.

Defendant denied generally all the allegations of the plaintiff's petition, pleaded the contributory negligence of plaintiff, and a contract

with plaintiff whereby it was exempted from liability for delay in the delivery of unrepeatd messages. The defendant insisted on the trial that, as a matter of law, the damages claimed were too remote.

It appeared, from the evidence that if the message addressed by Josiah Given to plaintiff at Marshalltown had been received there before 2:45 A. M. on the twenty-sixth of February, the plaintiff could have taken the train thence to Chicago, where he would have arrived at 2 P. M. that day. The original dispatch was sent by Patterson at the request of T. C. Henry, who was president of the Denver Tribune Publishing Company, of Denver, Colorado. He had seen an editorial in the *Chicago Tribune* which had attracted his attention, and made inquiry of Joseph Medill and R. W. Patterson, editors of that paper, as to who was the writer thereof, and was informed that it was plaintiff. He thereupon requested that the dispatch aforesaid should be sent. Henry was informed by Patterson on the morning of the twenty-sixth of February of the receipt of the message stating that Given was out of town, and left for home in the afternoon. He never communicated with plaintiff subsequently upon the subject of the message, and employed another editor.

Testimony was offered by the defendant denying the receipt of any instructions from plaintiff with respect to the delivery of his messages at his office. Testimony was also introduced tending to show that the time when the message was filed by Josiah Given for Welker Given, Marshalltown, was 9 P. M., and not 8:15, P. M., as claimed by plaintiff; and this testimony included the office record kept by defendant, the statement of the receiving clerk, and the date of filing upon the message itself. It appeared that the usual hour of closing of the Marshalltown office was 9 P. M., and the opening hour was 8 A. M., and that it was closed and opened at these hours on the day in question. Testimony was also introduced tending to show a want of authority in Henry to employ a managing editor, and other matters with respect to the financial condition of Henry and the Denver Tribune Publishing Company.

The trial was to the court without a jury; Mr. Justice MILLER and Judge LOVE sitting in the case.

Phillips & Day, for plaintiff.

Runnells & Walker, for defendants.

MILLER, Justice. The foundation of plaintiff's claim is that by the negligence of the defendants in conveying and delivering these messages he lost employment as editor of the *Denver Tribune*, which he would otherwise have secured, and that as another man did by reason of this negligence get that employment, for which he received from \$4,000 to \$5,000 for a period of time during which plaintiff only received a much smaller sum, he is entitled to recover the difference in this action.

The first subject of inquiry, therefore, is the existence of such negligence as would make defendant liable for any damages. The first

act of negligence charged to the defendant has relation to the delivery at Des Moines of the message from Patterson to plaintiff. It is said that the duty of the company was, immediately upon the receipt of the telegram, to deliver it at the office of the governor, which was the usual business place of plaintiff; and to make this duty clearer, it is said that instructions were given by plaintiff to the company that all messages for him should be delivered there. The testimony does not sustain this assertion. The person to whom said directions should have been delivered says he received no such instruction, and other clerks and employes in the office of the company say the same thing. The plaintiff, who gives the only testimony on this subject, says that he at some time, not very definitely fixed, sent word by one of the messengers to have all dispatches for him sent to the office of the governor's private secretary, which he was. But this was merely a verbal instruction or request to the messenger, which he may have construed as given for his own government, and which, if intended to govern the actions of the company, was not delivered to the proper person. The duty of the messenger was to deliver messages from the telegraph office, not to it. For the latter purpose he was the agent of the plaintiff and not the defendant. Besides, the proper mode of directing the company on that subject is so obviously to have notified it or sent to it directions in writing, that a casual statement to a messenger, at some other place than the office, cannot be relied on to fix upon that company any legal obligation.

It is next argued that the previous course of business between the parties made it the duty of the company to send the dispatch to that office; and, in support of this, the evidence of plaintiff shows that, as private secretary of the governor, he had been in the habit of receiving telegraphic messages from that company at that place, and nowhere else, and that there he received also telegrams of his own on private business. But it is not stated that any such private messages had been there delivered and received for him when he was absent from the city, or that the company had any reason to suppose that in such case he wished them to be delivered there. In the instance now in question, the defendant communicated with the governor's office by telephone, and received information, which was true, that plaintiff was out of the city, and would be absent two days. The men in charge of the telegraph office sent the message to the residence of plaintiff, where it was received by his wife in due time, and telegraphed to Patterson, the sender of the message, the information of plaintiff's absence from the city. For both these acts the defendant is blamed. In both of them we think the defendant did its duty. Its first obligation was to the sender of the message. It was proper he should be informed of the absence from the city of the party to whom it was sent, as it asked him to come to Chicago that night.

Without elaborating the matter we are of opinion, that when informed that plaintiff was out of the city, and would be for two days,

the company did the precise thing which it ought to have done, namely, delivered the message to his wife at his residence, and thus enable her, the most likely of all persons in the world to know where her husband was, to send the message to him immediately. If she did not know where he was, it was the fault, if fault was in any one, of the plaintiff, who had neglected to inform her. The dispatch remained in her hands from 4:30 P. M. until 7:09 P. M., and during this time the golden opportunity was lost. We think this was contributory negligence sufficient to defeat the action. For, even if, after this delay, when Josiah Given, father of plaintiff, undertook, at 7 o'clock P. M., to communicate with plaintiff, he had transmitted the original message, instead of an inquiry as to where it should be sent, the former would have been received in time to enable him to go to Chicago that night. It is not easy to see, when all parties were aware of the necessity of such prompt action, why the original message was not sent, instead of an inquiry to the same person as to where it should go. The delay thus occasioned defeated the only other chance for his going to Chicago that night.

But it is urged that there was negligence in sending the message to Marshalltown, when the father of plaintiff finally offered this original message for transmission. The office in Marshalltown, by custom or by orders from its superiors, closed at 9 o'clock P. M. Defendant produces the record of the dates of receiving, filing, and delivering messages, and the evidence of the receiving clerk, which show that this message was filed in the office at 9 o'clock, and therefore too late for transmission that night to Marshalltown. Also the date of its filing on the message itself, with proof that these entries are made truthfully, and in due course of business.

Mr. Josiah Given testified, on the other hand, that he was in the office at 8:15 P. M., and there received the dispatch directing him to send the original message to plaintiff at Tremont House, Marshalltown. He says this, because he looked at his watch when he left the court-house to go to the telegraph office. He further testifies that, when he received his dispatch from his son, he began to repeat the message from Patterson, writing on a blank which had been given to him, but which he discovered was for a night message. He said he must have a day-message blank, as it was important, and must be sent at once. It was then suggested that the message might be repeated from the one already in the office, and this was determined on. How long a time all this occupied, with the walk from the court-house, the receipt and examination of the message from plaintiff to his father to forward the dispatch to the Tremont House, the change of blanks, and the conversation, no one can tell. As the *onus* of proving the blame rests on the plaintiff, we cannot say that any unnecessary delay by the office prior to 9 o'clock is established.

It is said that the object might have been accomplished if those in charge of the office at Des Moines had known that the office at Mar-

shalltown closed its business at 9 o'clock, and had communicated that fact to Josiah Given. It was shown that they did not know this, and that they were not furnished with means of knowing when the offices of the company closed for the night at other places than Des Moines. The want of this information is assigned for negligence. But we do not see any sufficient reason for believing that if Mr. Josiah Given had been told, when he offered his last message, that the office at Marshalltown was closed for the night, that he could have provided any other means of repairing the evil, and so the information, if communicated to him, would have done no good. Nor do we see that it is the duty of the Western Union Telegraph Company to keep the employes of every one of its offices in the United States informed of the time when every other office closes for the night. The immense number of these offices all over the United States, the frequent changes among them as to time of closing, and the prodigious volume of a written book on this subject, seem to make this onerous and inconvenient to a degree which forbids it to be treated as a duty to its customers, for neglect of which it must be held liable for damages. There is no more obligation to do this in regard to offices in the same state than those four thousand miles away, for the communication is between them all, and of equal importance.

The question of the remoteness of the injury, and want of any satisfactory measure of damages, has been ably discussed, and is one of much interest; but as we are of opinion that no such negligence is shown as to render defendant liable at all, we forbear to consider that question, and render judgment for the defendant.

BEAN *v.* OCEANIC STEAM NAV. CO., Limited.

(Circuit Court, S. D. New York. June 20, 1885.)

1. MASTER AND SERVANT—UNSAFE MACHINERY.

Where an injury is caused by the use of unsafe machinery, which the employer knew, or in the exercise of ordinary care should have known, was unsafe, and the employe did not know was unsafe, from his inability to examine or know about the machinery, the employer will be responsible.

2. SAME—DUTY OF EMPLOYER.

Ordinary care on the part of an employer implies, as between him and his employes, not simply the degree of diligence which is customary among those intrusted with the management of the machinery used, but such as, having respect to the exigencies of the particular service, ought reasonably to be observed. Known and foreseen dangers, not necessarily incidental to the business, are to be avoided if practicable, unless the employe knowingly accepts the risk.

Motion for New Trial.

Herman H. Shook, for plaintiff.

Everett P. Wheeler, for defendant.

SHIPMAN, J. This is a motion by the defendant for a new trial of an action at law, the jury having returned a verdict for the plaintiff for \$1,250.

The plaintiff, while employed in discharging cargo in the hold of the steamer Republic, a vessel of the defendant, was injured by the falling upon him of a draught containing boxes of goods that were being hoisted out of the hold. This action was to recover damages for the injury. In stating the facts, I use, in part, the language of the defendant's counsel in his brief:

"The defendant employed a stevedore to discharge cargo, and he engaged gangs of men who were set to work at the different hatches; some being employed in the hold to get out the boxes and bails of goods and place them on the draught, and others being engaged on the deck in working the machinery by which they were lifted, and others again being employed in putting them onto the pier ready to be taken away. A machine called a winch was the means employed, in combination with block and tackle, to raise the cargo out of the hold. This winch was composed of a central shaft, with a drum at each end. The shaft was made to revolve by being geared onto the shaft of a small donkey engine. It appeared that when there was a necessity for discharging cargo rapidly, and therefore discharging by the means of two whips at the same time from the same hatch, the rope running over the block of each whip was coiled around one of the drum-ends. On the other hand, when there was no necessity for haste, the rope was fastened to the center axle, and then coiled around that. In this case it was impossible that the rope should slip if properly made fast, because of the attachment to the axle. In the case of its being coiled around the drum-ends, it was possible that it should slip if the man employed to coil the rope around the winch, and by means of this produce friction between the rope and the drum so that the rope would not slip upon it, did not coil the rope around a sufficient number of times, or if one of the coils should slip off so that the adhesion of the rope to the drum was not sufficient to counterbalance the weight of the load."

While the man at the winch was endeavoring to take an additional coil around the "end" in order to hold the weight steadily, a coil slipped off, the rope slipped, and the weight dropped. The steam-ship lines in the city of New York have for the last eight years used the two drum-ends in the same way in which the defendant used them and no serious accident has happened. Slight accidents to the workmen at the winch from the slipping off of the coil have occurred, which indicate that the use of the two ends is more unsafe than the use of the barrel. When heavy loads are drawn from the hold, the rope is attached to the center of the drum, because, in such cases, two or three blocks are used to divide the strain, and such an arrangement requires a greater length of rope than can be used upon the "ends." The loads that were being taken out at the time of the accident were not heavy.

The charge to the jury was to the effect that the question for their determination was whether the injury was caused by a lack of ordinary care on the part of the defendant in attaching the rope to the winch in an unsafe method, or was attributable to the ordinary risks which are incident to a safe and prudent system, one of which is the carelessness of a co-employee. Ordinary care and the obligations of the master in regard to machinery to be used by his employees were defined in this language of the supreme court in *Hough v. Railway*

Co. 100 U. S. 213, and the jury were instructed that employers were responsible if an injury happened by the use of unsafe machinery which the employer knew, or in the exercise of ordinary care should have known, was unsafe, and the employe did not know, from his inability to examine or know about the machinery.

The jury, by their verdict, negatived the theory that the injury was caused by the negligence of the attendant at the winch, and found that it occurred by reason of the negligence of the defendant in causing the winch to be used in an unsafe manner, the plaintiff being excusably ignorant of the unsafeness.

The principal point which the defendant makes is that the question of liability for the use of the drum-ends "is not properly a question of negligence in the just sense of the term. The use was intentional, and designed to effect a certain purpose, to-wit, the more rapid discharge of the cargo. The possibility of slipping was a risk incident to this use. The point for the court to decide is whether the company is liable in damages for an accident incidental to the use of approved appliances for the discharge of cargo in cases where the use of these appliances involves a somewhat increased danger as compared with the use of the old appliances." This ingenious way of stating the question disregards the requirements which the supreme court has recently declared are properly imposed upon employers with respect to the selection of machinery to be used by their workmen, and considers the obligation as satisfied if the accident is incidental to the use of approved, though somewhat dangerous, appliances. The defendant would make the employer's liability hinge upon the question whether the appliances were the approved or customary ones; and if they had received the general sanction of employers, and had answered the purposes which they were designed to accomplish, the duty of ordinary care is complied with.

The requisites of ordinary care are not satisfied by such a rule. "Ordinary care on its [a railroad company's] part implies, as between it and its employes, not simply the degree of diligence which is customary among those intrusted with the management of railroad property, but such as, having respect to the exigencies of the particular service, ought reasonably to be observed." *Wabash Ry. Co. v. McDaniels*, 107 U. S. 454; S. C. 2 Sup. Ct. Rep. 932. Known and foreseen dangers, not necessarily incidental to the business, are to be avoided, if practicable, unless the employe knowingly accepts the risk. At this point the defendant says that the use of the two ends of the winch is necessary to the business, and that while this system involves a certain degree of danger beyond that from the use of the central drum, the necessities of commerce have called for the use of double winches, and therefore the danger is incidental to the business. It is by no means clear to my mind that speed and safety cannot be combined by the use of drum-ends which are so made as to hold the rope firmly. If the present method of constructing the "ends" is at-

tended with danger, such danger can be avoided without serious expenditure of money or of thought.

It is true that if the employe knows, or has good reason to know, when he enters upon the employment, that dangerous appliances are being used, he assumes the risk of the injury which is incidental to such use; but, in this case, the finding of the jury is to the effect that the plaintiff was ignorant that the two ends were being employed. The defendant insists that the finding was against the weight of the evidence. Upon the trial of the case, the attention of both court and counsel was principally directed to the question of the safety of the method which the defendant used, and both evidently thought that upon that question the case turned. Upon reading over the testimony I think that the jury might have erred in not finding for the defendant upon the point of the plaintiff's knowledge or character of the appliances, but the testimony on that subject was not of the strength which should justify granting a new trial.

The motion is denied.

OLIVER v. PULLAM.

(Circuit Court, W. D. North Carolina, / May Term, 1885.)

STATE LANDS—EJECTMENT—GRANT OBTAINED BY FRAUD.

That a grant of state land was founded upon "a fraudulent entry, and obtained by false and fraudulent practices," cannot be availed of in an action of ejectment brought by a senior grantee to vacate such grant.

2. SAME—COLOR OF TITLE—ADVERSE POSSESSION—NORTH CAROLINA STATUTE.

A fraudulent grant of state land may be color of title and become a good title if the fraudulent grantee hold actual adverse possession for seven years against a senior grantee who has a right of entry and a right of action to recover possession, and is under no disability mentioned in the statutes.

3. SAME—STATUTE OF LIMITATIONS—SUBSEQUENT INSANITY.

When a statute of limitations has begun to run, no subsequent disability will restrain its progress.

Civil Action to Recover Land.

Jones & Hardwick, for plaintiff.

P. J. Sinclair, for defendant.

DICK, J. This case is submitted for determination upon briefs and a statement of facts agreed upon by the counsel of the parties. Both parties claim the land in controversy from the state under grants which are conceded to be regular in form. The grant of the plaintiff was issued July 13, 1846, and he has never had actual possession of any part of the lands included in the grant of defendant. The grant of defendant is dated twenty-first of December, 1847, and he has had continuous possession of that part of the land included in both grants, and has cultivated, and exercised other acts of ownership over the

same, from December, 1869, to the commencement of this action. The respective grants contain other lands besides those in controversy; and this case presents questions of law arising from lapping of grants, which have been frequently considered in the courts of this state. The senior grant conveyed the title of the state to the plaintiff, and he is entitled to recover in this action, unless he has lost his remedy by laches, and the lapse of time specified in the statute of limitations of this state.

The defendant pleads the statute, and insists that his actual adverse possession, under colorable title, for more than seven years, under known and visible boundaries, constitutes a perpetual bar to the claim of the plaintiff. The plaintiff, in his reply, insists that the defendant's grant and actual possession does not constitute the colorable title and adverse possession required by the statute, as such grant is void,—being founded upon "a fraudulent entry, and was obtained by false and fraudulent practices." No regular demurrer was filed to this reply, but in the case agreed the defendant admits the truth of the allegations for the purposes of this action, and insists, as by demurrer, that they are *irrelevant* and *immaterial*. A grant is the conveyance by which the state passes its title to portions of the public lands, and the law has made various provisions as to the manner in which such transfer of title shall be made. When the proper officers of the state have authority and jurisdiction to issue a grant for public land, it cannot be collaterally impeached for defects or irregularities in any preliminary proceeding, or for fraud in obtaining it; because it is the act of the sovereign, tested by the great seal, and stands on the footing of a record, and is valid until set aside by a direct legal proceeding for that purpose. But where the state had previously granted the land, or the officers had no authority, or exceeded their jurisdiction, the grant is absolutely void, and may be so treated in an action of ejectment. *Harshaw v. Taylor*, 3 Jones, Law, 513; *Smelting Co. v. Kemp*, 104 U. S. 636.

The distinction between voidable and void grants has been clearly defined in the decisions of the supreme court of this state, in cases relating to such matters. If the land is vacant, and the subject of entry, the grant can only be impeached by a direct proceeding for that purpose. When the land is not vacant, or the subject of entry, the grant is void, and advantage may be taken in an action of ejectment. *Hoover v. Thomas*, Phil. Law, 184. If a junior grant covers in part land which had been previously granted, (as in this case), it will be good for the land comprehended in it which had not been granted. *Hough v. Dumas*, 4 Dev. & B. Law, 328. As to the part previously granted, the junior grant is void, and does not in any way hinder the senior grantee from asserting his title in an action at law, brought within the period required by the statute of limitations.

If the junior grant was obtained by fraud, with knowledge of the previous grant, and the first grantee thinks himself aggrieved by

such cloud upon his title, he may institute legal proceedings to have the junior grant vacated; and if such fraud and knowledge are clearly established by evidence, then the court in which such proceedings are pending may vacate the junior grant *in toto*. Until such judgment has been rendered, such junior grant is valid as to lands not included in the senior grant. *Hoyt v. Rich*, 4 Dev. & B. Law, 533.

The doctrine of the common law, so strongly urged in the argument of the plaintiff's counsel, that "fraud vitiates every species of contract," is true in a general sense, but it must be reached in the regular and authoritative manner provided by law, and by parties entitled to institute such legal proceedings.

The plaintiff in his reply alleges that the grant of the defendant is void because it was founded upon "a fraudulent entry, and was obtained by false and fraudulent practices." This is not good pleading. It is well settled that a grant cannot be collaterally impeached in an action of ejectment for any antecedent fraud practiced upon the state. A good allegation in pleading is a statement of fact which, if denied, will form a proper issue, and which the rules of law will allow to be proved on the trial. Anything which is not allowed to be proved, cannot be properly alleged, and may be struck out on motion. If a regular demurrer had been filed to the reply in this case, it would not have admitted the truth of the allegations of fact and the conclusions of law as stated. A demurrer only admits the facts that are relevant and properly pleaded, and never admits conclusions of law or matters of inference and argument, however clearly stated. In the case agreed, the counsel of the defendant admits the truth of the allegation for the purposes of this action, but insists, as by demurrer, that they are *irrelevant* and *immaterial*. His purpose was to admit such matters only as would have been admitted by a formal demurrer.

Passing over the questions that arise upon the informal pleadings, and considering the allegation of fraud upon the state as true, it cannot be availed of in this action to vacate the grant of the defendant *in toto*. It appears, therefore, that the defendant claims under a grant which is not entirely void, and contains well-defined boundaries, and he has been in the actual adverse possession of the land in controversy for 16 years, exercising all the rights of ownership. This condition of things seems to comply with all the requirements of the state statute of limitations for securing titles to lands held adversely to the owner under colorable title. He has long exposed himself to the action of the plaintiff, who had the superior title. The law considers every man cognizant of his own title, the boundaries of his land, and the character and extent of the possession held by himself or an intruder, and requires that he shall, in a reasonable time, assert, by appropriate legal remedies, his rights against unlawful intrusions and encroachments.

There are numerous instances where the state has granted lands
v.24F,no.3—9

which had been before granted, and the supreme court of this state has decided, in many cases of lapped patents, that if the junior patentee has held actual adverse possession of the lapped land for seven years, he acquires title to that portion of the land embraced in both patents. If the senior patentee has not been in actual possession of any of the lands embraced in his patents, then the actual possession of the junior patentee of a part of the lands common to both, extends his claim to the boundaries of his patent. *McLean v. Murchison*, 8 Jones, Law, 38. As the plaintiff did not avail himself of his full and adequate legal remedies, he cannot justly complain that the statute of limitations, founded in the wise and salutary public policy of giving repose to possession, and quieting titles to land, now denies the remedies so long neglected.

I am of opinion that the junior grant of defendant would constitute color of title even if its boundaries were entirely covered by the senior grant of the plaintiff. *Hoyle v. Logan*, 4 Dev. Law, 495. It has all the elements of color of title. It is a written document of title under the great seal of the state, regular in form, professing to convey the land, with well-defined boundaries, and showing the character of the possession held under it to be adverse to all claimants. *McConnell v. McConnell*, 64 N. C. 342. If the grant was obtained by the fraudulent practices alleged, it was not an absolute nullity. The effect of ordinary fraud is not absolutely to avoid the contract or transaction which has been caused by such fraud, but to render it voidable at the option of the party defrauded. The state had a right to rescind the grant of defendant for the fraud practiced, but until rescinded it operated as color of title against the senior grantee. *Hoyle v. Logan*, *supra*; *McRee's Heirs v. Alexander*, 3 Hawks, 332; 1 Dev. Law, 321.

The grant of defendant, when issued, did not hinder the plaintiff in asserting his superior rights of ownership, and affected his interests only incidentally as a cloud upon his title. There is no evidence that the defendant intended to perpetrate a fraud or injury upon the plaintiff by procuring a grant in prejudice to his known previous title, and the law never presumes a fraud or a wrong. As no fraud was committed against the plaintiff, he could not have avoided the grant under a direct proceeding, (*Hoyt v. Rich*, *supra*), and he cannot raise in this action of ejectment the question of fraud as between the grantor and grantee, and thus look beyond the grant. *Spencer v. Lapsley*, 20 How. 264.

The phrase "color of title" signifies some written document which appears to be a title to land, but is not a good title. The object of the legislature in enacting the statute of limitations to quiet the possession of land and settle titles, was not to protect good titles, as they could be secured in an action at law, but colorable titles that were void and worthless unless accompanied by possession. Even a fraudulent deed may be color of title and become a good title if the fraudulent grantee holds actual adverse possession for seven years against the

owner, who has a right of entry and a right of action to recover possession, and is under no disability mentioned in the statutes. The adverse possession of the occupant exposes him to the action of the rightful owner, and if he neglects to assert his rights in the manner provided by law, he must accept the result of his own folly and negligence.

A deed void for fraud, under 13 Elizabeth, does not constitute color of title against creditors, as the possession of the fraudulent grantee is regarded as the possession of the fraudulent grantor, and not adverse to creditors. A creditor has no specific title to the land fraudulently conveyed, or right of action to recover possession. His right is enforced by selling the land under an execution founded upon a judgment for his debts. As soon as the land is sold, the purchaser acquires a title and right of action, and the fraudulent deed begins to operate as color of title. *Cowles v. Coffey*, 88 N. C. 340.

In some of the states statutes of limitation require that the colorable title which shall ripen into a perfect title shall be acquired and held in "good faith." This question of *good faith* is generally held to be material only when a person is claiming constructive possession under color of title, and does not apply where there is a *disseizin* of the true owner, and an actual, open, and adverse possession, which exposes the claimant to an action by the true owner.

There is no provision as to good faith in the statute of limitations of this state. This statute is a peremptory and inflexible rule of law, which terminates the right of the legal owner, and protects the adverse claimant in his actual possession, not out of regard to the merits of his case, but for the reason that the real owner has acquiesced in an adverse possession so long that he is not entitled to a remedy for the enforcement of his legal title. In such a case the only inquiry is, has the actual possession been sufficiently open, hostile, and continued for the time required by the statute, as against a person not under disability, and having a right of entry and right of action? A statute so manifestly remedial and beneficial in its object ought to be liberally construed by the courts, so as to extend, rather than restrict, its operation. *Reddick v. Leggat*, 3 Murph. 539.

The admitted fact that plaintiff became *non compos mentis* soon after the statute began to operate, cannot be availed of in this action; for it is a well-settled general rule that when such a statute has once begun to run, no subsequent disability will restrain its progress.

After a careful consideration of the briefs, the case argued, and the pleadings, I think that judgment should be entered for defendant. It is so ordered.

*In re ROBERTS, Habeas Corpus.*¹

(District Court, S. D. Georgia, E. D. May 5, 1885.)

1. INTER-STATE EXTRADITION—JURISDICTION OF FEDERAL COURTS.

The federal and state courts have concurrent jurisdiction in cases of extradition. The judgments of the latter do not conclude the former on this federal question, but are entitled to great respect, and are strongly advisory.

2. SAME—INDICTMENT FOR FELONY AGAINST SEVERAL DEFENDANTS.

Under the New York statutes an indictment against several defendants, charging grand larceny,—a felony,—is good without averments showing the degrees of guilt, whether as principal in the first or second degree, or as accessory before or after the fact.

3. SAME—ALLEGATION OF INCORPORATION.

It seems that an allegation that a defendant stole the bonds of the Bethlehem Iron Company, without alleging the corporate character of such company, is insufficient; but the safer and better rule is to remit the question to the court of the state in which the indictment was found.

4. HABEAS CORPUS—WHAT MAY BE INVESTIGATED UPON.

In a case arising on writ of *habeas corpus*, sued out to determine the legality of an arrest under proceedings for extradition, the court cannot investigate the question as to the guilt or innocence of the defendant.

5. "FUGITIVE FROM JUSTICE"—WHO IS.

One who goes into a state, and commits a crime, and returns home, is a much a fugitive from justice as though he had committed a crime in the state in which he resided and then fled to some other state.

Roberts, president of the Augusta Bank, had been arrested by executive warrant of the governor of Georgia, issued on the requisition of the governor of New York. While in the custody of the agent of the latter state, the writ was sued out by the prisoner.

J. C. C. Black, Hook & Montgomery, George A. Mercer, and H. D. D. Twiggs, for petitioner.

Frank H. Miller, Chisolm & Erwin, and Boykin Wright, contra.

SPEER, J. The constitution of the United States, art. 4, § 2, provides that a person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on the demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime. This provision of the organic law received the careful consideration of the federal convention. Certain changes were made in phraseology showing the settled purpose of its framers to make it the policy of the Union to surrender in one state the fugitives from justice in another. It is a settled rule of interstate comity, and imposes an absolute obligation on each state in a proper case made before its chief executive officer, to surrender and facilitate the extradition of parties charged with crime in the other states of the Union. By the act of congress of 1793, (section 5278 of the Revised Statutes,) appropriate legislation for the enforcement of this constitutional provision was had; and this legislation has itself received the

¹ Reported by W. B. Hill, Esq., of the Macon bar.

lofty sanction afforded by the approval by the supreme court of the United States of its constitutionality and effectiveness to enforce the original compact between the states upon this subject, so important to the punishment of crime and the maintenance of social order. *Prigg v. Com.* 16 Pet. 539. Nor have the several states been tardy in the enactment of auxiliary legislation to accomplish the object for which the national law is framed; and the state of Georgia is direct and explicit in its enactments to this end. See Code, §§ 54-58.

While the duty of the executive is thus plainly marked out, it is also the province of the courts on inquiry, by means of *habeas corpus*, to determine the legality of the detention of the party whose extradition is sought; and since the federal legislation of necessity is invoked to extradite the prisoner, the courts of the United States have jurisdiction to determine the question of the legality of his arrest. Rev. St. 735. The courts of the state have also concurrent jurisdiction of the same question, but the resulting judgments of this jurisdiction are not necessarily decisive, and do not conclude the courts of the United States on this federal question, though they are entitled to great respect, and are strongly advisory.

In the case before the court, the duly-authenticated copy of the indictment of the defendant and one Walton for the offense of grand larceny, said indictment purporting to have been returned by the grand jury of the state and county of New York, together with the requisition of the governor of the state of New York, and the consequent order of the governor of Georgia, is presented as the warrant for the arrest and proposed extradition.

It is objected by the counsel for the relator that the indictment does not show a proper charge of crime. It is urged that the crime set out, to-wit, grand larceny, is a felony, and that the indictment is against several defendants, and that there are no averments showing the degrees of the guilt, whether as principal in the first or second degree, or as accessory before or after the fact. This objection, in the opinion of the court, would have been dangerous to the validity of the indictment, it being a felony, under the rules of the common law. This indictment, however, must be considered in the light of the statutory regulations pertinent thereto in the state of New York, and we find that in that state parties charged with felony are indicted jointly, precisely as were misdemeanors at common law. 2 Rev. St. N. Y. § 698.

In New York it appears that this rule applies to the whole range of felonies, and, as a consequence, it follows that principals in the second degree may be indicted and prosecuted as principals in the first. This is the doctrine of the common law, where the punishment is the same. Archb. Crim. Pl. (8th Amer. Ed.) 63. The objection, therefore, is not sustained.

It is further objected to the legality of this detention that the in-

dictment does not properly allege the ownership of the bonds alleged to have been stolen, and that the allegation that they were the bonds of the Bethlehem Iron Company, without alleging the corporate character of such company, is a fatal defect. Unquestionably there is authority pointing to this conclusion. After careful and anxious consideration of this question the court feels it to be improper that it should discharge the defendant on this ground, and thinks it in every view safer and the better rule to remit the question of the sufficiency of the indictment to be tried and determined by the courts of the state in which it was found. The settled policy of the government being to facilitate the extradition of fugitives charged with crime, and, in view of the great importance of this policy to the commercial prosperity of the country and the integrity in business transactions between the citizens of the several states, it would be a dangerous precedent, and as well in conflict with eminent authority, to hold that such matters of technical irregularity must deny the extradition.

Certain affidavits are also offered by the relator, the practical effect of which is a denial of guilt. It is sufficient to say that the court in this proceeding will not consider that question. A proper charge of crime having been presented to the court, it is our undoubted duty to decline to investigate the guilt or innocence of the prisoner. The authorities upon this question are numerous, conclusive, and adverse to the contention of the counsel for relator. It would be otherwise were the arrest made upon preliminary process, and before indictment. In that event investigation would be had, at least, to disclose if there be a prosecution in good faith, and if there be probable cause to suspect the guilt of the party accused.

It is further urged, and with great apparent confidence, by the distinguished counsel for the relator, that the facts do not show that the relator is a fugitive from justice. It is the opinion of the court that one who goes into a state and commits a crime, and then returns home, is as much a fugitive from justice as though he had committed a crime in the state in which he resided and then fled to some other state.

With the other considerations personal to the relator, advanced by counsel, the court can properly have no concern. The law is inexorable, and the court is but its servant, and must, like all others, obey its teachings. The writ is disallowed, and the petition of the relator dismissed.

UNITED STATES *ex rel.* WAGNER v. GIBBON.¹*(District Court, D. Nebraska. April 8, 1885.)*

ENLISTMENT OF MINOR—CONSENT OF GUARDIAN—FALSE AFFIDAVIT AS TO AGE.

A minor over 16 years of age, who, at the time of his enlistment, makes affidavit that he is 21 years of age, will not, on his own application, be released on *habeas corpus*, on the ground that he was a minor at the time of his enlistment, and that the written consent of his guardian was not obtained,

Habeas Corpus.

DUNDY, J. George M. Wagner, the relator, enlisted in the regular army, at Fort Omaha, on the twenty-third day of September, 1882, to serve for five years. At that time and place, he went before Lieut. Butler D. Price, a duly-authorized recruiting officer, and made his application, in due form, to join the army. He made affidavit before the recruiting officer that he was *21 years of age*, and that there was no legal impediment existing to his enlistment. After serving 19 months, he has evidently tired of the service, and now seeks to be discharged, *solely* on the ground of minority at the time of enlistment. Gen. Gibbon, who is temporarily in command of the department of the Platte, made return to the writ, and hearing was had on the merits of the application.

The proof produced seemed to establish the fact that the relator was born in Lincoln county, Illinois, on the fourth day of July, 1864. At the time he enlisted his parents were dead. Prior to his enlistment he had a guardian, duly appointed by an Illinois court, and that guardian never did at any time, so far as known, give his written consent to the enlistment of his ward. There is nothing in the laws of the United States that makes it unlawful for a minor over 18 years of age to enlist in the army. He is certainly competent to make such a contract under some, though possibly not under all, circumstances. If the natural guardians—that is, the parents—be living, they are entitled to the services and the custody of the minor until he attains his majority. If the natural guardians are dead, and a *lawful* guardian exists, he is also entitled to the custody of his ward until he attains his majority. Hence it is that the law requires the written consent of parent or guardian to the enlistment of a minor, in order to make it valid. But this limitation on the right of minors to enlist, applies only to those who have a parent living, or who have a lawful guardian at the time of the enlistment. A minor 18 years old can, undoubtedly, make a valid contract of enlistment, binding on all concerned, if he has neither parent nor guardian at the time of making such contract.

When congress revised the laws, it recognized the right of the parents to the custody, service, and control of their minor children, and the right of guardians to the custody and control of their wards; and if either see proper to exercise such control they cannot be deprived

¹ Reported by Robertson Howard, Esq., of the St. Paul bar.

of the right to do so in such cases without they give their written consent for the enlistment of minor or ward. It is possible that this right may be asserted and maintained at any time during the existence of the minority or guardianship, if the party entitled to the *custody* of the minor or ward makes proper application therefor. But it seems to me that this law was made for the exclusive benefit of parents and guardians, so as to the better enable them to perform the parental or guardians' duty. This they might not be able to do if the minor or ward owed obedience to another authority. The same reason does not apply to the minor or ward; and, so far as he is concerned, especially in this and similar cases, I can see no good reason for holding that a contract of enlistment, made under such circumstances, must be declared absolutely void as against the party enlisting, though it may be so as against the parents or guardian, if no written consent, be given for the enlistment. The guardian does not here seek the custody and control of his ward. It is the ward who comes into court and asks to have declared absolutely null and void his own deliberate act and deed, after he had stood by the same for more than 18 months. This, I think, cannot be done; more especially when the enlistment was one of the very fairest, and when the recruit swore positively that he was 21 years old at the time of enlistment. He was perfectly well advised of what he was doing when he made the oath, as he himself admitted on this hearing. He must not be permitted to take advantage of his own wrong under such circumstances, nor to stultify himself in such an unusual manner.

The prayer of the petitioner is therefore denied, and he is remanded to the custody of the respondent.

ELLISON v. HARTRANFT.

(Circuit Court, E. D. Pennsylvania. April 23, 1885.)

CUSTOMS DUTIES—DRESS GOODS COMPOSED IN WHOLE OR IN PART OF WOOL.

The distinction between goods composed wholly of wool and other purely animal products and such as are only in part so composed, maintained; following treasury department decision No. 6,331.

At Law.

F. P. Prichard, for plaintiff.

J. K. Valentine, *contra*.

BUTLER, J. When the question involved was first brought to the notice of the treasury department, the language "all such goods," used in the proviso to the paragraph beginning "Women's and children's dress goods," in the act of 1883, c. 121, Sched. R. N. (St. p. 505,) was held to apply to the same goods only, described by the

same language when employed a little earlier in the paragraph; and consequently the operation of the proviso was confined by the secretary to goods manufactured exclusively of animal product—wool, hair, etc. When the question was afterwards submitted to the attorney general, he adopted the same view of this language in the proviso; but, evidently mistaking the limited sense in which it was before used, he applied it to the entire paragraph, so as to include in its operation or effect goods manufactured *in part* of other materials. That the original construction by the secretary was correct, we do not doubt. Not only does it conform to a correct reading of the paragraph when considered by itself, but it is consistent with the spirit of recent legislation by congress on the subject to which it relates. It continues the distinction between goods composed *wholly* of wool and other purely animal products, and such as are only *in part* so composed, while a different construction would obliterate this distinction, as soon as the new standard of value, mentioned in the proviso, is reached.

Judgment must accordingly be entered for the plaintiff.

In re JOSEPH, Bankrupt.

(Circuit Court, S. D. New York. 1885.)

1. BANKRUPTCY—COMPOSITION—REFUSAL OF DISCHARGE.

An adjudication that a bankrupt is not entitled to a discharge will not bar proceedings for a composition with his creditors.

2. SAME—COMPOSITION, HOW CONSIDERED ON REVIEW BY CIRCUIT COURT.

Whether it is expedient to accept the percentage offered by a bankrupt is a question primarily for the creditors to determine. And although the percentage may be very small, when they have determined it, and their action has been approved by the district court, the circuit court, upon review, will not interfere.

In Bankruptcy.

WALLACE, J. The bankrupts applied for a discharge and were opposed by some of their creditors under the provisions of section 5110, and their discharge was refused. Thereafter they proposed a composition, and the majority of the creditors resolved to accept it. The district court approved the terms, and ordered the recording of the resolution. The creditor who opposed the composition has petitioned for a review of the order of the district court, and now insists that the application of the bankrupts for their discharge, and the denial thereof by the court, was a bar to the proceedings for a composition. An adjudication that a bankrupt is not entitled to a discharge may conclude him from obtaining a discharge upon a subsequent application in the same proceeding. *Re Brockway*, 21 Blatchf. 136; S. C. 23

FED. REP. 583. But there are no decisions which have been brought to the attention of the court holding that such an adjudication is an estoppel to proceedings in composition. The contrary was decided by Judge BLATCHFORD, *In re Odell*, 16 N. B. R. 501. It is not apparent why it should have any such effect. A decision, however formal and conclusive, that a bankrupt has been guilty of acts of commission or omission which deprive him of the right to a discharge, when he applies for one as a matter of statutory privilege, does not purport to adjudge that he cannot adjust his debts with his creditors, either by a voluntary arrangement or by a compromise under the provisions of the bankrupt act.

The bankrupt act provides two modes by which a bankrupt may be discharged from his debts: one by an application to the court showing that he has complied with the requirements of the law, and that all the conditions exist which entitle him to a discharge; and another by effecting a composition with his creditors. If he pursues the first mode, the opposition of a single creditor may defeat a discharge, although all the other creditors consent. If he adopts the second, a majority of his creditors, in a proper case and with the approval of the court, may determine that all his debts shall be satisfied upon specified conditions, and the proceedings in bankruptcy be practically terminated, against the objections of a minority of creditors. There is nothing in the language of the act, or indicated by its general scheme and policy, which compels him to elect between adopting the one or the other of these two modes of obtaining a release from his debts, or which precludes him, if he adopts one and fails, from adopting the other afterwards. Even if he has obtained his discharge by the first mode, there is nothing in the act which prevents him from offering terms to his creditors and effecting a statutory payment of his debts by a composition.

The provisions which authorize a composition are highly beneficial to creditors. They allow the majority, under proper circumstances, to close the bankruptcy proceedings without waiting the often slow processes of official administration, and they offer an incentive to the bankrupt to co-operate by putting it out of the power of a single creditor, or a minority of creditors, to defeat his discharge. In the absence of any expressed restrictions in the law, it should not be held that any act or omission of a bankrupt can operate to prejudice the creditors from entering into a composition whenever they deem it best to do so.

No other specific objection is urged against the composition. Although the percentage offered by the bankrupt, and accepted by the creditors, was very small, the question whether it was expedient to accept it was primarily one for the creditors to determine; and after they have determined it, and their action has been approved by the district court, this court upon review will not interfere. *Re Wronkow*, 15 Blatchf. 38; *Re Wilson*, 16 Blatchf. 112. It has been assumed

that the opposing creditor had a right to be heard in the proceedings. It is therefore not necessary to determine whether the objections to his appearance, which have been urged, are well taken. Whether the judgment he has obtained against the bankrupts, after their discharge was refused, and before the composition, is affected by the composition proceedings, is a question which does not arise here, but is more properly to be considered by the court in which he has obtained his judgment.

The order of the district court is affirmed.

CARY and others v. WOLFF and others.

(*Circuit Court, S. D. New York.* February 7, 1885.)

1. PATENTS FOR INVENTIONS—PATENTABILITY—SPIRAL SPRINGS—USE OF HEAT.
Patent No. 116,266, dated June 27, 1871, and granted to Alanson Cary, *held* a patentable invention.

2. SAME—INFRINGEMENT.

Patent No. 116,266 *held* infringed by defendants by their use of the Cary process for the same purpose, and with the same result, although they use a higher degree of heat.

In Equity.

Robert H. Duncan and Samuel A. Duncan, for orators.

Charles D. Adams and Frederick H. Betts, for defendants.

WHEELER, J. This suit is brought upon letters patent No. 116,266, dated June 27, 1871, and granted to the orator Cary, for an improvement in mode of tempering springs. The specification sets forth that the invention relates to spiral springs usually made in conical form, of steel wire, used in upholstering chairs, sofas, and for bed-bottoms; describes the manner of making them by coiling and forcing hard-drawn steel wire to the proper shape, whereby the outer portion of the wire is stretched, and the inner portion crushed, and its strength, elasticity, and durability greatly reduced; states the discovery that subjecting them to a degree of heat known as spring-temper heat, about 600 deg., more or less, for about eight minutes, will restore the wire to its normal condition by producing a complete homogeneity of the metal, and greatly increases their value. The claim is for the method of tempering furniture or other coiled springs substantially as described. The defendants subject such springs, after being coiled, to a degree of heat beyond the range of what is known among artisans in tempering steel as spring-temper heat, and beyond 600 deg., for the purpose of restoring the elasticity and strength of the wire to its normal condition. They set up want of patentable novelty in the invention, and deny infringement of the patent, as defenses to the suit.

If the patent was for the process merely of tempering steel by merely subjecting it to heat it would apparently be anticipated in several ways. That process was known to experts and artisans and described with particularity in books before the date of this invention. The process of the patent does not merely add temper as a quality to steel which did not have it before; it restores the lost strength and elasticity of the wire consequent to the displacement of the particles of which it is composed by the process of making it into springs. The discovery was that the application of heat would effect that restoration, which is a different thing from tempering. Subjection to heat for casting and tempering, and to produce malleability and for various other purposes, was well enough known, but it was not known for this purpose until it was applied to this kind of springs in their peculiarly weakened state. The discovery was of a new application of an old process which produces a new and highly useful result. Wire bells for clocks were made to have sonorous properties by the same process, in kind, but for a different purpose and with a different result. What seems to be the nearest to this is the method of shaping and spacing the coils of hair balance springs for marine clocks by coiling the wire into a mould of the required shape, called a snail, and subjecting it to heat while there in shape to make it retain its place. But there was no displacement of the particles, of which the wire was composed, by distortion, and the process was not a restoration of any lost quality, but a mere shaping of the wire into the article desired. That the discovery of this effect of restoration by this mode was new hardly admits of question upon the evidence. Experts called by the defendants admit that they did not believe the result would be produced until they saw the process tried in connection with this litigation. And that this production of a new and useful result by a new application of a process, although old, is patentable seems to be clear. *Crane v. Price*, 1 Webst. Pat. Cas. 393; *Smith v. Goodyear Co.* 93 U. S. 486; *Loom Co. v. Higgins*, 105 U. S. 580.

It is claimed that the application of this process to the very purpose of restoring this kind of springs was known to and made by J. Joseph Eagleton prior to the invention by Cary, upon which knowledge the application for letters patent No. 122,001, as involved in *Eagleton Manuf'g Co. v. West, Bradley & Cary Manuf'g Co.* 111 U. S. 490, S. C. 4 Sup. Ct. Rep. 593, was founded. Eagleton, however, appears to have done nothing in this direction to such springs but to japan them and bake on the japan at a degree of heat lower than will produce good results in restoring strength and elasticity; and neither he, nor those who followed up his application, appear to have known of the benefits of the subjection of the strained spring to heat until after Cary's invention. What they knew and did would not bring the knowledge of Cary's discovery to others any more than to themselves, nor affect the validity of his patent. *Colgate v. W. U.*

Tel. Co. 15 Blatchf. 365; Tilghman v. Proctor, 102 U. S. 707. The patentee was the meritorious discoverer of this application and effect of the process, and his patent for it appears to be valid.

The defendants use Cary's process for the same purpose, and with the same result, although they use a higher degree of heat. The patent does not limit the process to any precise heat. The substance of the patented invention is taken, and the use of more heat does not make the process different in principle from the patented process. *Tilghman v. Proctor, supra*. The extent of the infringement is not important now. Any infringement entitles the orator to a decree.

Let a decree be entered for an injunction and account according to the prayer of the bill, with costs.

CARY and others v. LOVELL MANUF'G Co., Limited.

(Circuit Court, W. D. Pennsylvania. June 12, 1885.)

PATENTS FOR INVENTIONS—INFRINGEMENT—PRELIMINARY INJUNCTION—PREVIOUS ADJUDICATION AS TO VALIDITY OF PATENT.

Upon a motion for a preliminary injunction, where infringement is clear, the court will accept and follow an adjudication sustaining the patent made in another circuit, on a final hearing, and after full consideration.

In Equity.

George H. Christy, W. C. Witter, and W. H. Kenyon, for complainants.

John K. Hallock and Wm. Bakewell, for defendant.

ACHESON, J. This case is now before the court on a motion for a preliminary injunction.

The suit is upon letters patent No. 116,266, granted on June 27, 1871, to Alanson Cary, whose invention relates to spiral springs, usually made in a conical form, of hard-drawn steel wire coiled and forced to proper shape. In the ordinary operation of bending or coiling the wire into springs, the metal (the specification states) is unavoidably weakened, the outer portion of the wire coil being drawn or stretched, while the inner portion is crushed or shortened. The invention consists in a process for restoring to the wire of the spring the strength and elasticity which it lost by this distortion, and this is effected by subjecting the spring, after it has been completed in the usual manner, for about the space of eight minutes, to "a degree of heat known as 'spring-temper heat,' which is about 600 degrees more or less," whereby a complete homogeneity of the metal is produced, and increased strength, elasticity, and durability are imparted to the spring. The claim of the patent is for "the method of tempering furniture or other coiled springs," substantially as described.

For the last 10 years this patentee has been involved in constant litigation in defending or enforcing his rights under his patent. In June, 1875, the Eagleton Manufacturing Company brought suit against parties manufacturing springs under the Cary patent, for an infringement of letters patent granted December 19, 1871, to one Eagleton, substantially covering the invention described and claimed in the previous patent to Alanson Cary. This suit, which involved the question of priority of invention as between Cary and Eagleton, resulted favorably to the former, as will appear by the opinion of the supreme court delivered May 5, 1884, in *Eagleton Manuf'g Co. v. West, etc., Manuf'g Co.* 111 U. S. 490; S. C. 4 Sup. Ct. Rep. 593. In the mean time these complainants, in October, 1879, brought suit in the United States circuit court for the Southern district of New York, against Raphael H. Wolff and others, for the infringement of the Cary patent. In that suit the defendants, (among other defenses,) by their answer, denied the validity of the patent, denied that Alanson Cary was the first inventor of the patented process, alleged prior uses and prior publications in great numbers, denied that the invention was a new or useful one, and also denied the fact of infringement. The litigation in that case was most protracted and expensive. A very large amount of testimony, by experts and other witnesses, was taken therein. The case was hotly contested throughout, and on the part of the defense the most strenuous efforts were made to defeat the patent. The able counsel for the defendants were assisted by experienced experts. The case was elaborately argued on final hearing in the fall of 1884. In February, 1885, Judge WHEELER filed an opinion sustaining the patent, finding infringement, and directing a decree in favor of the complainants. *Cary v. Wolff, ante*, 139.

I have been thus particular in recounting the facts connected with this litigation because I am now asked upon this interlocutory hearing to consider the question of the validity of the patent as open, and to disregard the decision made in the Second circuit. The defendants' counsel earnestly contend that the theory upon which the court there sustained the patent is false. The rationale of the Cary invention, according to Judge WHEELER, is this:

"The process of the patent [he says] does not merely add temper as a quality to steel which did not have it before; it restores the lost strength and elasticity of the wire consequent to the displacement of the particles of which it is composed, by the process of making it into springs. The discovery was that the application of heat would effect that restoration, which is a different thing from tempering." *Ante*, 140.

Now, it will be observed that this is the expressly declared theory of the patent itself, and it was accepted as sound by the patent-office, and this, (as Mr. Cary states in his affidavit,) after tests were made by the examiner personally. And if it be true that the theory of the restoration of strength and elasticity, lost by the distortion of the wire in the coiling of it, was not questioned in the *Wolff Case* by either

counsel or expert, this very fact tends strongly to create confidence in the soundness of that theory.

The defendant's theory, as set forth in Mr. Lovell's affidavit, is that the loss of strength and elasticity is due, not to the coiling of the wire into springs, but to the previous cold drawing of it, and that the restorative effect of the Cary process is no other or different from that which was, prior to his invention, well known in the art to result from a partial reheating and gradual cooling of steel which had been hammered, rolled, or otherwise manipulated, the elasticity of which had been thereby impaired or partially destroyed. But I am not yet satisfied that this is the true theory of the Cary process, and for the present I think it is my duty to follow here the conclusion of the court in the Second circuit. Upon this question it seems to me the case comes fairly within the general rule, that upon a motion for a preliminary injunction, where infringement is clear, the court will accept and follow an adjudication sustaining a patent made in another circuit on a final hearing, and after full consideration. *Green v. French*, 4 Ban. & A. 169; *Mallory Manuf'g Co. v. Hickok*, 20 FED. REP. 116; *Coburn v. Clark*, 24 O. G. 399; S. C. 15 FED. REP. 804. Adhering, then, for the time being, to Judge WHEELER's view touching the rationale of the Cary invention, I see nothing in the *ex parte* affidavits now presented which should lead me to reject his decision at this preliminary stage of the case.

Moreover, there are cogent reasons which induce me to adopt the course I have just indicated. The defendants were not ignorant of the pendency of the *Wolff Case*. It is shown that for at least three years before that litigation closed, their Mr. Lovell was fully informed in respect to it. He watched the case with interest as it progressed, and several times conversed with Wolff about the suit, and the chances of a successful defense therein, expressing the hope that Wolff might win. It was his interest to defeat the Cary patent in that contest, and he had every opportunity of assisting in the defense by giving information or otherwise. But he did not do so, nor did he even suggest to the defendants therein the theory of the Cary process upon which he now insists. In this regard the case here is not unlike that of *Robinson v. Randolph*, 4 Ban. & A. 163, in which, on a motion like the present one, the court declined to listen to an affidavit alleging a new defense. Again, during the pendency of the *Wolff Case*, and with full knowledge of the risk taken, the defendants embarked in the manufacture of coiled springs by the infringing process. Still further, the two adjudications above mentioned, establishing the complainant's rights, have been obtained after a most tedious litigation, attended with great expense, and the patent has now only three years to run. And, finally, I am convinced that an injunction is the only efficacious remedy for the complainants under all the circumstances.

Upon the question of infringement the case is free from difficulty

or doubt. It is quite clear to me that the defendants have been using the Cary process. It may, indeed, be true that they have been using a higher degree of heat than that specially mentioned in the patent; but so did the defendants in the case of *Cary v. Wolff*. So long as the springs are kept below a red heat, the substance of the invention (as Judge WHEELER says) is taken. *Tilghman v. Proctor*, 102 U. S. 707. Nor, in my judgment, is it at all material that the defendants cool their springs by plunging them into cold water. This also was the practice of the defendants in the *Wolff Case*. The beneficial results are secured by subjecting the springs to the prescribed heat, and the patent is altogether silent as to the manner of cooling. And if the springs are not raised to a red heat, it is immaterial whether air-cooling or water-cooling is practiced.

Let a preliminary injunction issue.

JENSEN *v.* KEASBEY and others.

(Circuit Court, E. D. Pennsylvania. April 28, 1885.)

PATENTS FOR INVENTIONS—EVIDENCE—ANTICIPATION—PEPTONE-PEPSIN.

Anticipation will not be established by evidence of publications that were nothing more than suggestions and speculations of scientific writers who had never tested the practicability of their suggestions or demonstrated the truth or value of their speculations.

In Equity.

Joshua Pusey, for complainant.

Jerome Carty, for respondent.

BUTLER, J. That the plaintiff's patented product, "peptone-pepsin," is of great utility and patentable (if not anticipated) is undoubted. The alleged infringement is conclusively proved. The defenses—*First*, that for more than two years prior to the patentee's application this article had been exposed to sale; and, *second*, that it had been described in certain publications,—are not sustained by the proofs. No such article is shown to have been so on sale, and no such process as employed by the plaintiff, or article manufactured by him, is shown to have been thus described. Pepsin had been manufactured and sold for many years, but no "peptone-pepsin," such as this patent describes. The publications relied upon show nothing more than suggestions and speculations of scientific writers, who had never tested the practicability of their suggestions or demonstrated the truth or value of their speculations.

A decree will be entered accordingly.

HOSPES, Surveyor General. etc., v. O'BRIEN and others.¹

(Circuit Court, D. Minnesota. June, 1885.)

1. FEDERAL COURTS—PENDENCY OF SUIT IN STATE COURT.

An action pending in a foreign jurisdiction cannot be pleaded in abatement of an action in a domestic forum, even if there be identity of parties, of subject matter, and of relief sought: and where one suit is pending in the state court and another is commenced in a federal court having jurisdiction within the same territorial limits, the second suit will not as a matter of course be abated.

2. LOGS AND LUMBER—CONSTITUTIONALITY OF GEN. ST. MINN. 1878, CH. 32, TIT. 3, § 25—SCALING LOGS.

Section 25, tit. 3, c. 32, Gen. St. Minn. 1878, is not unconstitutional.

3. SAME—REPEAL OF LAW.

Gen. St. Minn. 1878, c. 32, tit. 3, § 25, has not been repealed and is still in force.

This suit was commenced in the district court of Washington county, Minnesota, and is removed to this court. The complainant is the surveyor general of logs and lumber, appointed by the governor of the state of Minnesota for the First lumber district, and charges that the defendants have conspired and confederated together to prevent him and his lawfully appointed deputies from discharging the duties enjoined by law. The complaint sets up in detail the character of the rivers and waters in the district and the amount of logs cut, and other matters about the intermixing and intermingling of logs run down the rivers, and facts tending to show an effort to embarrass the complainant in faithfully performing his duties. A preliminary injunction was issued, an answer is filed by the defendants, and the record in this court contains the complaint, answer, and a writ of injunction issued. A motion is made by plaintiff to remand, and a motion is also made by defendants to dissolve the injunction and dismiss the suit.

Searles, Ewing & Gail and *J. N. & I. W. Castle*, for complainant.

Fayette Marsh and *Clapp & Macartney*, for defendants.

NELSON, J. The motion made by complainant to remand the cause to the state court is denied. The reasons assigned by defendants for granting the motion to dissolve the injunction and dismiss the suit are—"First. Want of jurisdiction in the state court of Minnesota to maintain the action. Second. Complainant had no capacity to sue. Third. The law of Minnesota upon which he bases his right of action is unconstitutional and void: (1) that it is an unjust discrimination against a part of a certain class of people engaged in business which is general throughout the state; (2) that it is a violation of the commercial clause of the constitution of the United States so far, at least,

¹ Reported by Robertson Howard, Esq., of the St. Paul bar.

as it attempts, to apply to logs which were cut in another state and stopped for the purpose of rafting or fitting for market, or logs cut in Minnesota and destined for foreign market. *Fourth.* Not an inspection law. *Fifth.* The law is repealed."

These points of controversy were met and very fully answered in the opinion of the district court of Washington county, granting the writ of injunction, and, agreeing to the general result reached by that court, I have very little to add. The want of jurisdiction in the district court of Washington county to entertain this suit is earnestly pressed, and it is insisted that the district court of St. Croix county, Wisconsin, having concurrent jurisdiction with the Minnesota courts, on the waters of St. Croix lake, has first obtained jurisdiction of the subject-matter of this suit and such jurisdiction is exclusive. The complaint alleges, which is admitted by the answer, that a suit has been instituted in the circuit court of St. Croix county, Wisconsin, by some of the defendants, against the complainant prior to the commencement of this suit, and an injunction issued, which was served on one of the complainant's deputies, and this proceeding is urged as a bar. The judicial decisions are not uniform on this question, but in no case is the rule, broadly stated by defendant's counsel, applied, to-wit: "That where two courts have concurrent jurisdiction, that which first attaches becomes exclusive, and the other court is left without jurisdiction as to the subject-matter of the suit pending in the court first taking jurisdiction, or as to the question in dispute between the same parties or privies." The supreme court of the United States, in *Stout v. Lye*, 103 U. S. 66, stated a rule of pleading: "That where suits between the same parties in relation to the same subject-matter are pending at the same time in different courts of concurrent jurisdiction, a judgment on the merits in one may be used as a bar to further proceedings in the other." And in *Taylor v. Carryl*, 20 How. 583, and *Payne v. Hook*, 7 Wall. 425, that "in all cases of conflict between jurisdictions of * * * concurrent authority, that which has first acquired possession of the *res* which is the subject of litigation, is entitled to administer it." But these decisions do not go to the extent advanced by counsel. The cases of *Insurance Co. v. Brune's Assignee*, 96 U. S. 588, and *Stanton v. Embrey*, 93 U. S. 548, settled the doctrine that an action pending in a foreign jurisdiction cannot be pleaded in abatement of an action in a domestic forum, even if there be identity of parties, of subject-matter, and of relief sought. The doctrine urged by counsel only applies to courts of the same sovereignty; and even in cases of the character spoken of, where one suit is pending in the state court, and another is commenced in a federal court having jurisdiction within the same territorial limits, it is not settled that the second suit is, as a matter of course, to be abated. See *Radford v. Folsom*, 4 McCrary, 528; *Hurst v. Everett*, 21 FED. REP. 218. I think, therefore, the district court of Washington county had jurisdiction to entertain this suit, even if it be con-

ceded that the suit commenced in Wisconsin is identical in parties, subject-matter, and relief sought.

Again, the law is not unconstitutional and void, for the reasons assigned. The following is the statute, (section 25, tit. 3, c. 32, Rev. St. Minn.):

"It shall be the duty of the surveyor general of the First district to scale, or cause to be scaled, all rafts, brails, or lots of logs which may pass down or through Lake St. Croix, before passing out of said Lake St. Croix; also all rafts, brails, or lots of logs run through, or gathered into, any side booms or lake booms for sawing or other use, within the limits of said district, subsequent to the scale of the St. Croix Boom Corporation's boom, and before using or passing out of said Lake St. Croix; and all parties having logs in his or their possession, which have not been scaled by the surveyor general, as set forth in this section, shall, before sawing, using, or running away said logs, give notice to the surveyor general, in due time, that he may cause the same to be scaled. All logs thus scaled shall be entered on the surveyor general's books in their proper places."

This enactment is a part of the law providing for the inspection of logs. It answers the latest definition promulgated by the supreme court of the United States. In *People v. Compagnie*, 107 U. S. 62, S. C. 2 Sup. Ct. Rep. 87, Justice MILLER, delivering the opinion of the court, says: "What is an inspection? Something which can be accomplished by looking at, or weighing, or measuring, the thing to be inspected, or applying to it some crucial test." It is not void for discrimination. If, for any cause, in the judgment of the legislature of the state, the public good required this law to be applied to a particular lumber district, it is within its discretion to so apply it. The legislature is the sole judge of the existence of such cause, and courts should sustain the law if it can be upheld upon any view of necessity which may have been in the legislative mind. The state derives no revenue from the measurement and scaling of logs, and the only object of the law is to ascertain whether the logs are fit for commerce, and to protect the citizens and market from fraud. This law is not in violation of the commercial clauses of the constitution of the United States. Such legislation now exists, or has at some time existed, in nearly all the states. Persons and property are subject to restraint to secure the general comfort and prosperity. Laws regulating traffic and merchandise of all kinds are on the statute books of all the states. They are impediments and restraints of trade in some sense, but not necessarily, for that reason, regulations of interstate or foreign commerce, within the meanings of the constitution. While it is inconvenient to be hampered with inspection of this particular article of commerce, a court, for that reason, should not abrogate the law. The correction is with the legislature of the state. In Michigan boards of trade are authorized to appoint inspectors, and the general inspection of logs by state officials is repealed. The laws of New York compelling inspection of merchandise were repealed in 1843, and later the constitution forbade the enactment of such laws except in defined

cases. Without pursuing the subject further, I am of the opinion that the law is valid, and has not been repealed.

Motion to dissolve the injunction and dismiss the suit is denied.

BLAIR v. ST. LOUIS, H. & K. R. Co. and others.¹

(Circuit Court, E. D. Missouri. June 30, 1885.)

CORPORATIONS—CONVEYANCE OF ENTIRE ASSETS—PRIORITY OF RIGHT AS BETWEEN UNSECURED CREDITOR OF GRANTOR AND MORTGAGE CREDITOR OF GRANTEE.

A., a corporation, being largely indebted to B. and others, its stockholders and officers organized C., a new corporation, and transferred to it all of A.'s assets, in consideration of stock in C., and of C.'s assuming A.'s liabilities. C. thereafter mortgaged the property so transferred to D., to secure an issue of bonds. At the time of the execution of the mortgage B.'s claim had not been reduced to judgment, but D. accepted the mortgage with notice of it. B. has since obtained judgment against C. *Held*, that his lien upon the property transferred is superior to D.'s.

In Equity.

Demurrer to evidence tending to prove the allegations of the cross-bill and answer of Josiah Fogg. For opinion upon demurrer to answer and cross-bill, see 22 FED. REP. 86. See, also, *Fogg v. St. Louis, H. & K. R. Co.* 17 FED. REP. 871.

Theodore G. Case, for complainant.

Jas. Case and *Geo. D. Reynolds*, for Fogg.

TREAT, J. The demand of Josiah Fogg to charge the assets of the old and new corporations, prior in right to the mortgage sued on, is presented to the court in the form of a demurrer to the evidence taken before the master. The principles on which this demand is to be determined have heretofore been fully considered. The present inquiry pertains solely to *notice* given of such prior demand. The transferred assets were greater than the assumed obligations by the new corporation. Hence all persons subsequent in interest with notice of such equitable lien take subordinate thereto. The evidence discloses that, although the transfer from the old to the new corporation was not formally recorded, all the parties were sufficiently informed with respect thereto. The equitable doctrine applies, viz., that they took subject to the prior equitable lien. Demurrer overruled.

Ordered that the demand of Josiah Fogg be allowed as an equitable lien prior in right to the mortgage sued on.

¹ Reported by Benj. F. Rex, Esq., of the St. Louis bar.

ANHEUSER-BUSCH BREWING ASS'N v. PIZA.

*(Circuit Court, S. D. New York. 1885.)***TRADE-MARK—GEOGRAPHICAL NAME—"ST. LOUIS LAGER BEER"—FRAUDULENT SIMULATION OF LABELS—INJUNCTION.**

Complainant, a brewer in St. Louis, Missouri, made, and exported to Panama and South American ports, beer in bottles, with a label bearing the words, "St. Louis Lager Beer." Defendant, a shipper of beer from New York city, and a competitor of complainant in trade in Panama and South America, labeled his bottles "St. Louis Lager Beer." *Held*, that although complainant could not have an exclusive property in the words "St. Louis," as a trade-mark, or the exclusive right to designate his beer by the name of "St. Louis Lager Beer," yet, as his beer had always been made at that city, his use of the designation upon his labels was legitimate; and that defendant, whose beer was made in New York, should be enjoined from diverting his trade by simulating his labels, or representing, in any other way, his products as those of complainant.

WALLACE, J. The complainant, a corporation doing business at St. Louis, Missouri, has for many years been accustomed to export its beer in bottles with a label bearing the words, "St. Louis Lager Beer." It had acquired a considerable market for its product in South America and Panama. During this time there were many other manufacturers and vendors of lager beer at St. Louis, but so far as appears none of them had an export trade, and none of them were accustomed to use labels with the words "St. Louis Lager Beer" printed upon them. The defendant is a shipper of beer at New York city, and a competitor of the complainant in trade at Panama and various places in South America. The affidavits show beyond doubt that in these places the beer, which is known as "St. Louis Lager Beer," is in demand, and it is doubtless because of this fact that the defendant, whose beer is made in New York, labels his bottles so as to represent that his beer is made at St. Louis, and so as to represent that his firm are the sole agents of the "St. Louis Lager Beer," at New York. He alleges that purchasers of beer at Panama and the other places in question in South America do not discriminate between the complainant's article and other beer made in the United States, but buy it simply because they suppose St. Louis lager beer is beer produced in the United States as distinguished from German and English beer. This may be true; but if it is, it does not seem to be conclusive against the right of the complainant to the injunction which he seeks. As the goods of the parties go to the same markets it can hardly fail to happen that the complainant will lose sales, and the defendant will get customers, in consequence of the defendant's acts.

Although the complainant cannot have an exclusive property in the words "St. Louis" as a trade-mark, or an exclusive right to designate its beer by the name "St. Louis Lager Beer," yet, as its beer has always been made at that city, its use of the designation upon its labels is entirely legitimate; and if the defendant is diverting complainant's

trade by any practices designed to mislead its customers, whether these acts consist in simulating its labels, or representing in any other way his products as those of the complainant, the latter is entitled to protection. It is no answer for the defendant, when the complainant asks for protection, to say that it has no exclusive right to designate its product in the manner it has, although this might very properly be asserted by a competitor selling beer made at St. Louis, or who, by reason of any circumstances, might be entitled to represent his product as originating there. *Canal Co. v. Clark*, 13 Wall. 322.

It must be assumed, upon the facts as they are now disclosed, that complainant, by its enterprise and the quality of its product, had acquired a foreign market for its beer under the designation of "St. Louis Lager Beer;" that no one else, having a right to use this designation, was a competitor of the complainant in this market until the defendant became one; and that the defendant has attempted to interfere with the complainant's trade and divert it to himself by selling a different article under the same name, and in this behalf has been guilty of false and deceitful conduct towards the public. It is manifest that the complainant's trade must be more or less injured by the defendant's acts.

The case is similar in some of its facts to that of *Newman v. Alvord*, 51 N. Y. 189. There the plaintiff used the word "Akron" to designate a cement manufactured by him at the village of Akron, New York. The defendant, who was a manufacturer at another place in the same state, was enjoined from designating his cement as "Akron Cement," although he prefixed his own name and added the real place of its manufacture. In the opinion delivered in that case by EARL, J., it was assumed that other persons at Akron had the right equally with the plaintiff to call their cement "Akron Cement;" but he added:

"Yet it is quite clear that the plaintiffs, upon the facts, are entitled to protection against the defendant. It is sometimes said in the cases to which our attention has been called that the claimant to a trade-mark must have the exclusive right to it. This form of expression, I apprehend, is not strictly accurate; the right must be exclusive against the defendant. It is generally sufficient in such cases if the plaintiffs have the right and the defendant has not the right to use it. The principle upon which the relief is granted is that the defendant shall not be permitted, by the adoption of a trade-mark which is untrue and deceptive, to sell his own goods as the goods of the plaintiff, thus injuring the plaintiff and defrauding the public."

The following cases, in which a party has been protected in the use of the name of a place to distinguish a particular business or product, are apposite: "Glenfield Starch," in *Wotherspoon v. Currie*, L. R. 5 H. L. 508, 513; "Anatolia Liquorice," *McAndrew v. Bassett*, 10 Jur. (N. S.) 492; "Sexio Wine," in *Seixo v. Provezende*, L. R. 1 Ch. App. Cas. 192.

It is unnecessary for present purposes to consider whether the complainant has a valid trade-mark or can have a technical trade-mark in the name "St. Louis." It is sufficient that it was lawful for the com-

plainant to use that name to designate its property; that by doing so it has acquired a trade which is valuable to it; and that the defendant's acts are fraudulent and create a dishonest competition detrimental to the complainant. Upon the argument of this motion the impression was entertained that the "Piza label No. 2" was not such a simulation of the complainant's label as would be likely to mislead purchasers. Upon further consideration this impression has been removed. It is not unreasonable, in view of the defendant's purpose to deceive the public by adopting this label, to resolve any doubt which may remain in favor of the complainant.

The motion for an injunction is granted.

CENTRAL TRUST Co. and another v. TEXAS & ST. L. RY. Co. and others.¹

(Circuit Court, E. D. Missouri. June 24, 1885.)

1. RAILROAD MORTGAGES—FORECLOSURE SUIT—DELAY IN ANSWERING—EXPENSES OF RECEIVERSHIP.

Where a foreclosure suit was instituted against a railroad company and a receiver was appointed, and intervening demands were adjudicated and receiver's certificates issued for the preservation of the property, which was run at a loss,—all with the defendant's consent,—and about 16 months after the appointment of a receiver, and when the case was about to be closed, the defendant, without producing any affidavits excusing the delay or explaining its original consent, and without offering to provide for the interest due and expenses incurred, and which might thereafter be incurred by the receiver, requested leave to file an answer which set up irrelevant issues: *held*, that the application must be denied.

2. SAME—JURISDICTION—GOOD FAITH—RECEIVERSHIPS.

Semble, that courts have the right, where their interposition is invoked, to hold that the proceedings are instituted in good faith; and that, where a court takes possession of property in foreclosure proceedings, it should not hold possession and administer it through its receivers for other than the original purpose disclosed in the suit.

In Equity. Application of defendant corporation for leave to file answer to original bill.

Butler, Stillman & Hubbard and Elencious Smith, for complainant.
Dyer, Lee & Ellis, for defendants.

TREAT, J. The original bill in this case was filed January 12, 1884, on which day an interlocutory decree was entered by Judge McCrary, reciting the assent of the defendant corporation thereto, and appointing a receiver with the authority therein named. Under that decree and appointment the court has hitherto proceeded, adjudicating intervening demands and authorizing the issue of the receiver's certificates for the preservation of the property in the interest of all concerned. After repeated intimations from this court that the fore-

¹ Reported by Benj. F. Rex, Esq., of the St. Louis bar.

closure proceedings must be brought to final decree, and, if need be, the property sold and all interests connected therewith finally adjusted, the defendant corporation asked leave (out of time) to file an answer. The decision of the court with respect to said application was made on the first day of this month.¹ The terms prescribed in said decision have not been complied with. No excuse is given why said defendant corporation, after assenting to said interlocutory order, and appearing herein as early as January 12, 1884, now seeks to disturb all that has been done both under its express and implied assent. Nor does it, despite the original default of interest and subsequent default, and the expenses incurred by the issue of receiver's certificates and otherwise, for the preservation of the property, state that it is ready and willing to provide therefor. It is obvious from the records of the court that no such proffer could be made, and consequently that the present application can only produce useless delay, to the great injury of all concerned, inasmuch as the administration of the road by the receiver has not heretofore met, and is not likely hereafter to meet, past and accruing obligations. If the receivership is to be continued under accruing defaults, some party litigant should become responsible therefor. The United States circuit court in Texas has already ordered the sale of so much of this road on August 4th, next, as is within its jurisdiction. It is apparent that it is necessary for the interest of all parties that the sale of so much of said road as is within the jurisdiction of this court should be made at the same time.

There is imperfectly disclosed in the various papers presented, and suggestions made, that there had been disappointments and differences of views among those who hoped to rescue the road, and possibly prevent a foreclosure sale. With such outside negotiations and controversies this court has nothing to do. Its jurisdiction has been invoked with the consent of all concerned, and exercised for more than 16 months, in the course of which the property has been preserved and obligations incurred under its express authority. It is now too late for the court to reverse all its actions and prolong this controversy without security offered, to the advantage of no one. Courts, when their interposition is invoked, have the right to hold that the proceedings are instituted in good faith. When acting accordingly, and appointing receivers, they ought to insist on as early adjudication as the due course of practice exacts, and not to hold possession and administration of the property through receiverships for other than the original purposes disclosed in the suit. It is no part of their functions to run railroads or business enterprises for other than the short period pending the filing of the bill and the final decree. All such cases should be speeded to as early a conclusion as practicable and at the least possible expense.

The case before the court furnishes an apt illustration. If the ap-

¹See 23 FED. REP. 846.

plication of the defendant corporation, under the circumstances stated, is to be granted, a court may be betrayed into administering railroads and issuing obligations for an indefinite period of time regardless of the bad faith of the parties to the suit. The terms heretofore prescribed with respect to submitting an application by this defendant corporation have not been complied with, inasmuch as irrelevant issues are again brought forward, and no affidavits excusing the delay or explaining its original consent are produced. It must be further considered that the pretense of non-forfeiture has no foundation in fact. Therefore, under the affidavits submitted, the application is unwarranted as to the merits.

Application denied.

CENTRAL TRUST Co. and another v. TEXAS & ST. L. RY. Co. and others.¹

(Circuit Court, E. D. Missouri. June 24, 1885.)

RAILROAD MORTGAGES — FORECLOSURE SUITS — DELAY IN ANSWERING DEFENSE BY BONDHOLDER.

Where a foreclosure suit was instituted against a railroad company, and a receiver was appointed, with the defendant's consent, and intervening claims were adjudicated, and the road was run at a loss by the receiver, and receiver's certificates were issued for the preservation of the property, and after the defendant had been refused leave to file an answer, and more than 16 months after the receiver's appointment, and when the court was about to close the whole case, a bondholder appeared, and without any tender on his part to become responsible for what had occurred, or what might from his delay thereafter occur, stated that there had been no default when the foreclosure suit was instituted, and asked leave to appear and defend, *held*, that his position was no better than that of the defendant, and that his application could not be granted.

In Equity.

The course followed by the defendant herein is explained in the opinions delivered upon applications for leave to file an answer, reported in 23 FED. REP. 846, and *ante*, 151. The applications of the defendant having been denied, Mr. Bagnell now appears and states in substance that he holds bonds of the defendant; that the foreclosure suit was instituted without any default on the defendant's part in the payment of interest or otherwise; that a sale of the road would result in a great loss to the bondholders; and that an application by the defendant for leave to file an answer has been refused; wherefore Mr. Bagnell asks leave to appear and defend.

Jeff. Chandler, for Bagnell.

Eleneious Smith and Butler, Stillman & Hubbard, for complainant.

Dyer, Lee & Ellis, for defendant.

¹Reported by Benj. F. Rex, Esq., of the St. Louis bar.

TREAT, J. This application has been presented on the hypothesis that the defendant corporation had not appeared, or through default had not been allowed to appear. At the request of the court it has been presented before the decision of the application made by the defendant corporation itself, in order that the whole subject might be fully considered at the same time. As intimated in the opinion heretofore given, individual stockholders or bondholders who are not content with the action had in their behalf by their trustees or others charged with their interest, should take, with due diligence, for their individual protection, the course required in such cases, becoming individually responsible for the consequences of the litigation. The views stated in *Hawes v. Oakland*, 104 U. S. 450, and the rule of the supreme court consequent thereon, fully indicate what should be done in all such cases. There may be many technical considerations why, at this stage of the proceeding, said individual applicant should not be permitted to appear and defend in the form by him presented. The court wishes, however, to place its decision on broader grounds. The defendant corporation, of which he was a shareholder, and the trustee representing his bonded interests, have been before the court for 16 months, assenting to and causing its action. At this time, when the court is about finally to close the whole case, there is no equity, under any allegations by him made to justify his appearance for and instead of the railroad and trust corporations, to open and prolong a litigation to the apparent injury of all concerned, without a tender on his part to become responsible either for what has occurred or what from his delay may hereafter occur. The records of this court show that the continuance of the receivership involves constant loss to the bondholders and others as to their dues. At whose expense, therefore, is said railroad to be necessarily operated hereafter? His position, therefore, after the long delay named, is no better than that of the corporation itself.

Application denied.

GOLDSMITH v. GILLILAND.

(Circuit Court, D. Oregon. July 3, 1885.)

1. SUIT TO QUIET TITLE—PARTIES.

Where a number of persons claim undivided interests in real property adversely to one in possession of the same, the latter may maintain a suit to quiet his title against any or all of such claims, and neither of said persons or adverse claimants is a necessary party to a suit for that purpose against the other.

2. PLEA IN ABATEMENT FOR DEFECT OF PARTIES TO A BILL.

A plea to a bill for a defect of parties consists of new matter, and is called a

pure plea, and therefore need not be supported by an answer; by it the defendant admits the case made by the bill, but objects that for want of parties the plaintiff cannot have the relief to which he may be otherwise entitled.

Suit to Determine Adverse Claim to Real Property.

George H. Williams and George H. Durham, for plaintiff.

Seneca Smith, per se. and other defendant.

DEADY, J. This suit is brought by the plaintiff, a citizen of New York, to have his title to an undivided five-eighths of the east half of the Danforth Balch donation quieted, as against the claim of the defendants, citizens of Oregon, of an estate or interest therein adverse to him. The case was before this court on demurrer to the bill on February 13, (22 FED. REP. 865,) and to the amended bill on May 20, (23 FED. REP. 645.) It has now been heard on a plea in abatement to the amended bill for a defect of parties defendant.

Briefly, the plea sets forth that the plaintiff and each of the defendants, and also Max Goldsmith, of New York, and W. B. Walker and Emma Dickinson of Washington Territory, own an undivided interest in the premises; and that such parties each "claim" to own a certain undivided interest therein, stating the portion claimed by each; and that the defendants and said Walker claim such interests under certain deeds made after the year 1870, by the four children of Danforth and Mary Jane Balch, to-wit, John, Dan, Louis, and Emma Balch, now Emma Dickinson, whose interest in the land, as appears from the amended bill, was sold at their guardian's sale prior to that time, to-wit, September 24, 1870, under which sale the plaintiff claims, and said Emma Dickinson *nee* Balch, as heir of her parents; and concludes that said Max Goldsmith, W. B. Walker, and Emma Dickinson are not, but ought to be, "made parties to the said amended bill," and prays the judgment of the court, whether the defendants shall be compelled to make any other or further answer thereto. On the argument numerous objections were made to this plea. They may be conveniently condensed as follows:

1. The point made by the plea should have been made by demurrer. This objection is not well taken, because it does not appear from the bill who owns two of the three-eighths of the premises not claimed by the plaintiff, and therefore the point could not have been made by demurrer, that certain persons,—for instance, Max Goldsmith, Walker, and Dickinson,—have or claim an interest therein, and should therefore be made parties to the bill. The bill only shows that five-eighths of the premises belong to the plaintiff, and one-eighth to Joseph Teal, but as there are eight-eighths in the whole, the necessary inference is that there are two other eighths owned by some other person or persons; but who they are does not appear, and for aught that does appear, they may belong to the defendants.

2. The plea is not supported by an answer. This is a pure plea, consisting wholly of new matter. It admits the case made by the bill, but maintains that the plaintiff cannot have relief in this suit on

account of defect of parties in his bill. Such a plea never requires an answer in support of it. Story, Eq. Pl. §§ 660, 670, 745; Eq. Rule 32.

✓ In section 745, *supra*, Story says:

"Although a plaintiff may be fully entitled to the relief he prays, and the defendant may have no claim to the protection of the court which ought to prevent its interference, yet the defendant may object to the bill, if it is deficient to answer the purposes of complete justice. This is usually for want of proper parties, and if the defect is not apparent on the face of the bill, the defendant may plead the matter necessary to show it."

3. The plea does not negative the allegations of the bill. But being a pure plea—one which admits the allegations of the bill—it need not and ought not to negative them also.

4. The plea is double and offers no issue. A plea may consist of many particulars, but if they all conduce to a single point or conclusion, it is not open to the objection of duplicity. This plea undertakes to show that Walker and Dickinson claim undivided interests in this property under the same title that the defendants do, to-wit, the title of the four minor children of Danforth and Mary Jane Balch, subsequent to and notwithstanding the alleged sale by their guardian, and therefore they ought to be made parties to the bill.

This suit is brought against the defendants because they claim an interest in the premises adverse to the plaintiff, and, so far as Walker and Dickinson are concerned, the plea merely alleges that they also claim an interest therein, under the same title with the defendants. All the matters in the plea tend to this conclusion or point, and if the plaintiff wants to put the same in issue, he can deny the allegation that these persons make any such claim, and if the issue is found in his favor, that disposes of it. However, it is not apparent on what ground Max Goldsmith is named in this plea, as there is no pretense that he is in the same boat with the defendants, or claims an interest in the premises adversely to the plaintiff. This was practically admitted by counsel for the defendants on the argument, and if necessary his name may be stricken from the plea.

5. Max Goldsmith, Walker, and Dickinson are not necessary parties, and being non-residents of the district cannot be made parties without depriving the court of jurisdiction.

Under section 8 of the judiciary act of 1875 (17 St. 472) Max Goldsmith might be made a party to this suit by order of the court, although he is a citizen of New York; but although said section is general in its terms, and provides that any person who is not found in the district where a suit is brought to remove a cloud upon the title of real property, may be served wherever he may be found, by order of the court, yet it must be construed as not including a person resident in a territory, because the jurisdiction of the United States courts, where the same depends on the citizenship of the parties, does not extend to a case between a citizen of a state and ter-

ritory. *Watson v. Brooks*, 8 Sawy. 320. It follows that if Walker and Dickinson are indispensable parties, this plea must be allowed and the suit dismissed, for they cannot become parties without ousting the jurisdiction of the court.

The rule on the subject of parties to a suit in equity cannot be better stated than by Mr. Justice BRADLEY, in *Williams v. Bankhead*, 19 Wall. 571. He says:

"The general rule as to parties in chancery is that all ought to be made parties who are interested in the controversy, in order that there may be an end of litigation. But there are qualifications of this rule arising out of public policy and the necessities of particular cases. The true distinction appears to be as follows: "*First*. When a person will be directly affected by a decree, he is an indispensable party, unless the parties are too numerous to be brought before the court, when the case is subject to a special rule. "*Secondly*. Where a person is interested in the controversy, but will not be directly affected by a decree made in his absence, he is not an indispensable party, but he should be made a party if possible, and the court will not proceed to a decree without him, if he can be reached. "*Thirdly*. Where he is not interested in the controversy between the immediate litigants, but has an interest in the subject-matter, which may be conveniently settled in the suit, and thereby prevent further litigation, he may be a party or not, at the option of the complainant."

And see *Barney v. Baltimore*, 6 Wall. 284; *Ribon v. Railroad Cos.* 16 Wall. 450; *Mallow v. Hinde*, 12 Wheat. 197; and *Elmendorf v. Taylor*, 10 Wheat. 167, to the same effect.

The act of February 28, 1839, (section 737, Rev. St.,) which gives the United States courts the right to proceed in a cause, and give judgment between the parties properly before it, in the absence of one or more defendants, not inhabitants of or found within the district, has been construed in harmony with the rule as here laid down; so that, even under this statute, the court will not and cannot hear and decide a case in the absence of an indispensable party, or one to be directly affected by its judgment. *Barney v. Baltimore*, 6 Wall. 285.

Counsel for the defendants maintain that unless a complete determination of the controversy can be had without the presence of Walker and Dickinson, they must be brought in; and in support of this position he cites and relies on Pom. Rem. §§ 369, 371, 418, 419. But it must be remembered that the writer is speaking of the rule under the Code, (N. Y. Code, § 122; Or. Code, § 40,) which peremptorily provides that "when a complete determination of the controversy cannot be had without the presence of other parties (than those before it) the court shall order them to be brought in." Under this rule, not only indispensable parties must be brought before the court, but also all those in the second and third of Mr. Justice BRADLEY's categories; in short, all those who have an interest in the controversy or the subject-matter.

This rule, which, by the way, Pomeroy says "is to a great extent a dead letter," (Pom. Rem. 422,) might be enforced in the state tribu-

nals, where absent parties may be brought before the court by the publication of a summons; but in the United States courts, where this practice does not prevail except in a few instances, its application would deprive them of their jurisdiction in a great many cases.

In *Field v. Lownsdale*, 1 Deady, 293, this court held that a suit brought to quiet title against a number of persons who claimed, as tenants in common, an interest in certain premises adversely to the plaintiff, that the interest of each one of the defendants was separate and distinct from the others, and therefore there could be a final determination of the controversy, so far as it concerned either of them, without the presence of the other defendants, as parties in the cause, and therefore that one of said defendants who had the requisite citizenship, might, as to herself, remove the cause from the state court under the act of July 27, 1866, (14 St. 306.) This case is exactly in point. Admitting that the defendants and Walker and Dickinson claim each an interest in this property adverse to the plaintiff, as set forth in the plea, they must claim as tenants in common, and therefore the claim of each is separable and distinct from the other, although it may arise in the same way and be established by the same proof. The case falls within the third of Mr. Justice BRADLEY's categories. Walker and Dickinson have an interest in the subject-matter, and their claim being of the same nature as the defendants, and growing out of the same circumstances, they might be joined in this suit, at the option of the plaintiff, as a matter of convenience to him; and even if it fell within the second category the plea would be insufficient, under the circumstances, for Walker and Dickinson cannot be brought within the jurisdiction of the court.

This suit is merely the converse of the legal action to recover possession of real property. If the plaintiff was out of possession, and the defendants and Walker and Dickinson were in possession, claiming to own the land as tenants in common, even under the same title, the plaintiff could bring an action against either or all of them to recover the possession. And being in possession, and menaced by the adverse claims of these parties, he may maintain this suit to quiet his title against any or all of them who are or may be brought within the jurisdiction of the court, as he may think convenient. And the fact that the determination of the controversy in this suit will not settle any controversy the plaintiff may have with Walker and Dickinson, touching any claim they may make to the property, is not a matter which concerns these defendants. It will not inconvenience or prejudice them if the plaintiff chooses or is compelled to try this question over again in some other forum with those parties, with even a different result. Each of the parties now before the court has an opportunity to allege and prove whatever interest he may have in the premises, and the judgment of the court will be a final determination, as between them, of the controversy. Nor is there any danger that by this means the several interests claimed by the various parties named in

the plea may become confounded and lose their identity, as suggested by counsel for the defendants. The interests of tenants in common, though several and distinct in the abstract, are possessed in common; and therefore, as Blackstone says, (2 Book, 191,) "they all occupy promiscuously," "because none knoweth his own severally." None of these parties can be said to own or claim any particular eighth or fraction thereof of these premises, but simply an eighth or fraction thereof, which can only be located and identified by partition.

The plea is insufficient, and is therefore overruled.

SALENTINE v. MUTUAL BENEFIT LIFE INS. CO. (Two Case.)

(Circuit Court, E. D. Wisconsin. June, 1885.)

1: LIFE INSURANCE—DEATH OF INSURED BY HIS OWN HAND.

A policy of life insurance provided that in case the insured should die by his own hand the policy should be void, except that in case he should die by his own hand while insane, the amount to be paid by the company should be the sum of the premiums actually paid thereon, with interest. *Held*, that it was competent for the company thus to contract, and thus to limit the extent of its liability upon the happening of the contingency named. *Held, also*, that there was no repugnancy between the different clauses in the policy declaratory of liability, and it appearing that the insured committed suicide when insane, the company was only liable for the amount of the premiums paid by the insured, with interest.

2. SAME—INSANITY—ELECTION TO REFUND PREMIUMS, OR PAY SUM INSURED.

It was stipulated in a certain other policy of life insurance that in case the insured should die by his own hand the policy should be void; but if the insured, at the time of taking his life was insane, the company would pay the sum insured, or refund the premiums actually received, with interest, according to its judgment of the equities of the case; which option was declared to be distinctly reserved by the company, and made part of the contract. *Held*, that it was competent for parties so to contract, and that the stipulation was valid. *Held, also*, that the right of the company to exercise the option reserved in the policy, could not be waived until it should be shown that the insured, at the time of taking his life, was insane, and that the company was not required to elect which sum it would pay within the time named in the policy for payment, —which was 60 days after notice and proof of death,—regardless of the actual time, when it was shown that the insured was insane when he committed the act of self-destruction.

3. SAME—NOTICE OF ELECTION.

Conceding that it was the duty of the company to give the plaintiff notice of its election within a reasonable time after notice and proof of his death, *held*, that notice of such election, given within little more than three months after notice and proof of death, and before suit commenced, was sufficient; that the option reserved was duly exercised, and that the company was liable only for the amount of the premiums paid on the policy, with interest.

On the tenth day of September, 1881, the defendant insurance company issued its policy of insurance, No. 105,844, by which it insured the life of Peter Salentine in the sum of \$2,000, thereby agreeing to pay that sum to the plaintiff, the wife of the insured, within 90

days after due notice and satisfactory proof of the death of the said Peter Salentine. The policy contained, among other things, this provision:

"Provided always, and it is hereby declared to be the true intent and meaning of this policy, and the same is accepted by the assured upon these expressed conditions, namely, * * * in case the insured shall die by his own hand * * * this policy shall be void, null, and of no effect; except that in case he shall die by his own hand while insane, the amount to be paid by the company on this policy shall be the amount of the premiums actually paid thereon, with interest."

On the twentieth day of September, 1883, the defendant company issued its certain other policy of insurance, No. 115,218, by which it insured the life of the said Peter Salentine in the further sum of \$3,000, and thereby promised and agreed to pay said sum to the plaintiff, Katherine Salentine, within 60 days after notice and proof of the death of the insured. This policy contained the following provision:

"That if the insured shall die by his own hand * * * this policy shall be void. If, however, it shall be shown that the insured, at the time of taking his life, was insane, the company will pay the sum insured, or refund the premiums actually received, with interest thereon, according to its judgment of the equities of the case. This option is distinctly reserved by the company, and is made a part of this contract."

These were suits upon the two policies of insurance mentioned, and the plaintiff sought to recover the full amount of the policies, with interest. As a defense to the suit founded on policy No. 105,844, the defendant alleged in its answer—

"That the insured died by his own hand; that he purposely, willfully, and knowingly took his own life; that the defendant is informed and believes that it is claimed on the part of the said plaintiff that said Peter Salentine at the time he took his life was insane. Whether or not said insured then was insane, this defendant has no knowledge nor information sufficient to form a belief, but insists that if so, said plaintiff is entitled to recover only the premiums actually paid on account of said policy, with interest, and says that it is and always has been ready and willing, and has offered, prior to the commencement of this action, to repay such premiums and interest to the plaintiff."

In its answer to the plaintiff's complaint in the suit founded on policy No. 115,218, the defendant made substantially the same allegations as those contained in its answer before referred to, but alleged further—

"That the plaintiff, prior to the commencement of this action, through her agent and attorney, made a claim that said Peter Salentine was insane when he took his life, and that this defendant thereupon, in accordance with the terms of said policy, elected, according to its judgment of the equities of the case, to repay to the plaintiff the sum insured, with interest thereon, and notified said plaintiff thereof, and offered to pay the same to the plaintiff, but that the plaintiff refused to accept the same. And this company does now elect, and is ready and willing to repay to plaintiff the premium actually received, with interest thereon."

The two cases were consolidated and tried together; and it was stipulated at the trial that the jury might make its special finding of facts in the form of a special verdict, the court reserving its ruling upon the questions of law involved, with the understanding that, upon the determination of these questions, a general verdict might be entered in accordance with the legal conclusions reached by the court upon the facts so found by the jury. By the verdict of the jury the following facts were found: That the policies of insurance were respectively issued as alleged; that Peter Salentine took his own life on the sixth day of January, 1884; that he was at the time insane; that he was not morally responsible for the act, but understood and knew the physical consequences of the act; that notice and proof of death were duly given and furnished to the defendant within the time required by the policies; that the amount of the premiums paid by the deceased on policy No. 105,844, was \$272.80, which included interest thereon to January 6, 1884; that the amount of the premiums paid on policy No. 115,218, including interest to the date last named, was \$59.51; that all premiums on both policies had been paid at the time of the death of the insured, and that before the commencement of these suits, and on the fifth day of May, 1884, the defendant notified the plaintiff that it would only refund the premiums received by it from the deceased on policy No. 115,218. The jury further found that the defendant on the fourteenth day of March, 1884, notified its local agent at Milwaukee that it had concluded to repay the premiums paid, with interest, on the policies in suit, by letter of that date. Upon this finding of facts by the jury, and upon the construction of the policies contended for by the plaintiff, it was insisted by her counsel that she was entitled to recover the sum of \$2,000 on policy No. 105,844 and the sum of \$3,000 on policy No. 115,218. This contention was opposed by the claim of the defendant company that it was only liable upon either policy for the amount of the premiums paid thereon by the insured in his life-time, with interest.

E. P. Smith, D. G. Rogers, and N. Pereles & Sons, for plaintiff.

Jenkins, Winkler & Smith, for defendant.

DYER, J. That the plaintiff is not entitled to recover upon policy No. 105,844 more than the amount of the premiums actually paid by the insured thereon, with interest, seems very clear. The rule of construction applicable to the policy is elementary; namely, that effect must be given to every part of the contract. The plaintiff's contention would reject the clause limiting the extent of liability in case of suicide while insane, as repugnant to previous clauses in the policy. But there is in fact no repugnancy or inconsistency between the different provisions of the contract in relation to liability. The contract provides that in case the insured shall die by his own hand the policy shall be void. By repeated adjudications of the courts, it has become settled law that the legal effect of this clause, standing alone, is that death by his own hand, when the insured was insane, would not relieve

the company from liability, but that the commission of the act of suicide when sane, would defeat a recovery on the policy. But in direct connection with this clause stands another, in the form of an exception or proviso, which declares a qualified liability of the company in case the insured should die by his own hand when insane. It was entirely competent for the company thus to contract, and to declare that in case of suicide when insane the company would be liable only for the amount of the premiums paid on the policy, with interest; and the policy was accepted by the insured presumably with knowledge on his part that in a certain contingency the liability of the company was thus limited. It is competent for an insurance company to stipulate against intentional self-destruction, whether it be the voluntary act of an accountable moral agent or not. *Bigelow v. Berkshire Life Ins. Co.* 93 U. S. 284. In the opinion of the court in that case, Mr. Justice DAVIS said:

"The insurers in this case have * * * sought to avoid altogether this class of risks," (meaning risks in case of suicide, sane or insane.) "If they have succeeded in doing so, it is our duty to give effect to the contract as neither the policy of the law nor sound morals forbid them to make it. If they are at liberty to stipulate against hazardous occupations, unhealthy climates, or death by the hands of the law, or in consequence of injuries received when intoxicated, surely it is competent for them to stipulate against intentional self-destruction, whether it be the voluntary act of an accountable moral agent or not. It is not perceived why they cannot limit their liability if the assured is in proper language told of the extent of the limitation, and it is not against public policy."

If, therefore, it is competent for the insurer to stipulate against self-destruction, whether the act be committed when the insured is sane or insane, it is not perceived why it is not equally competent for the insurer, in the policy it issues, to limit the extent of its liability in case of suicide when insane. Nor is such limitation in any true sense repugnant to previous general declarations of liability, especially where all the provisions stand in connection with each other, and, therefore, under well-settled rules of construction, must be so construed as to enforce the intention of the parties unambiguously expressed. But upon the theory of repugnancy between the different provisions of the policy in relation to liability, counsel for the plaintiff invokes the rule as to repugnant clauses sometimes applied to conveyances of real estate, or other instruments under seal, namely, that a grant in general cannot be restrained by subsequent clauses limiting the extent of the grant; or, as the maxim is stated in 4 Greenl. Cruise, 177: "Where there are conflicting declarations of the use in the same instrument, the first shall prevail, the maxim being the first deed and the last will." And *Barney v. Miller*, 18 Iowa, 466; *Drew v. Drew*, 28 N. H. 489; *Thornhill v. Hall*, 2 Clark & F. 22; *Green Bay & M. Canal Co. v. Hewett*, 55 Wis. 96, 104; S. C. 12 N. W. Rep. 382,—are cited as authorities in support of the proposition that the limitation of liability expressed in the exception in this

policy is to be rejected as repugnant to other preceding clauses. But all that was held in *Barney v. Miller* was that, where a deed of conveyance contains a general description of the property sought to be conveyed which is definite and certain within itself, and is followed also by a particular description, the latter will not restrict the grant made by the former. And the court are careful to say that "this is a rule of construction, and is, of course, limited to the cases which are within it. Where the general description is indefinite and uncertain, and reference to the particular description must be had in order to ascertain with certainty the subject of the grant, in such cases, the rule does not apply. But then the whole language will be taken together, and though it may be ambiguous, or even contradictory, if, upon the whole instrument, there is sufficient to manifest the intention of the parties, with reasonable certainty, that will suffice."

The same rule was applied in *Drew v. Drew*; but in that case the court say:

"The whole language of the deed is to be considered together, and effect is to be given, if it may be, to every part. It is well said by PHELPS, J., in [*Hibbard v. Hurlburt*,] 10 Vt. 178: 'It is a well-settled rule that the whole instrument must be taken together. Each clause is to be regarded as qualified by others having reference to the same subject, and the intent is to be gathered from the whole. If, then, by any rational construction the several parts can be made to harmonize and to consist with the obvious general intent of the maker, there can be no good reason for rejecting any part, or denying it its legitimate effect.' No word or clause or sentence is to be rejected or overlooked, if a reasonable and consistent construction can be given to it. In former times something has been made to depend upon the order of sentences or the part of the instrument where qualifying or restrictive words were found; but the general rule is now settled that their natural effect and weight is to be given to every part of the language used, in whatever part of the instrument it is found."

In *Thornhill v. Hall* it was stated as a rule of the courts in construing written instruments, that when an interest is given, or an estate conveyed, in one clause of the instrument, in clear and decisive terms, such interest or estate cannot be taken away or cut down by *raising a doubt* upon the extent and meaning and application of a subsequent clause, nor by inference therefrom, nor by any subsequent words that are not as clear and decisive as the words of the clause giving that interest or estate.

In *Green Bay & M. Canal Co. v. Hewett*, *supra*; there was a deed which declared in the granting clause that the grantor released, quit-claimed, and conveyed all his claim, right, title, and interest, of every name and nature, legal and equitable, in and to the land. Independent of this clause, and not standing in connection with it, was another, which declared that the interest and title intended to be conveyed was only that acquired by the grantor by virtue of a certain other deed previously executed to him. And it was held that the two clauses were inconsistent, and that the granting clause must prevail. Here there were two clearly conflicting clauses. As the court says in its opinion: "Two

conflicting intentions were clearly expressed, one just as clearly and emphatically as the other, and the old rule was applied, that the former clause should stand and the latter be rejected." But the court was careful to observe further that this was to some extent an arbitrary rule of construction, and because arbitrary, should not be resorted to except in cases of absolute necessity. "If, from the whole instrument, the true intent of the parties can be gathered, that intention should prevail." See, also, an instructive note on the subject in 4 Greenl. Cruise, 174.

As before remarked, no repugnancy in the provisions of this policy with reference to liability is perceived; and applying to the case well-recognized rules of construction, none of the cases referred to sustain such a determination of the rights of the parties under this policy as is contended for by counsel for the plaintiff. Indeed, the distinction between the case in hand and those cases seems so plain, and the rule of construction to be applied so clear, as to forbid serious discussion of the question; and the court is of the opinion that by virtue of the clauses in the policy relating to liability of the company, the jury having found that the insured died by his own hand when insane, the recovery of the plaintiff upon the policy in question, must be limited to the amount of the premiums paid by the insured on the policy, amounting to \$272.80, with interest at 7 per cent. from January 6, 1884.

The observations made and conclusions announced in relation to the validity of the clause in policy No. 105,844, limiting the extent of liability of the company in case of self-destruction by the insured when insane, and concerning repugnancy between that clause and others which precede it, apply with equal force to policy No. 115,218, and nothing need be added upon that branch of the case. But as to the last-mentioned policy,—the provisions of which are somewhat different from those contained in the other policy,—it is further contended by the plaintiff that the option reserved by the company to pay the sum insured, or to refund the premiums received, was lost or waived by the alleged neglect of the company to give notice to the beneficiary of its election, within the period contemplated by the policy, or required by law; and, therefore, that it is now liable for the full amount of the insurance named in the policy. The clause here in question, as we have seen, provides that "if it shall be shown that the insured, at the time of taking his life, was insane, the company will pay the sum insured, or refund the premiums actually received, with interest thereon, according to its judgment of the equities of the case. This option is distinctly reserved by the company, and is made a part of this contract."

To the point made in the brief of plaintiff's counsel, that the company could not thus make itself the arbiter or judge of the amount it would pay, it need only be replied that nothing in that respect is perceived in this provision which is not the legitimate subject-matter of

contract between the parties, or contrary to public policy. It is not like the case of a policy which provides that the whole matter in controversy, including even all right of recovery, shall be submitted to arbitration, which shall be final and conclusive. The provision in question does not attempt to deprive the party of his right to invoke the authority of a court of competent jurisdiction upon points of difference arising under the contract. Liability to pay some amount is admitted, and the effect of the whole clause is simply to reserve to the insurer an option either to pay the sum insured, or the premiums received, with interest, upon the happening of a certain event. One or the other the insurer *must pay*, as the fact may be ultimately determined with reference to sanity or insanity. That this option must be seasonably declared by the company to the beneficiary may, for the purposes of this case, be taken as a proposition not open to dispute. When the right to exercise the option must be regarded as waived or lost by delay in giving notice to pay one sum or the other, is the real point in the present contention. The death in this case occurred January 6, 1884. Notice and proof of death were duly given. The undisputed evidence shows that the proofs were received by the company, January 12th. The policy provides that the company will make payment within 60 days after due notice and proof of death, which time expired March 28th. It is urged by counsel for the plaintiff that, to avail itself of the right to refund the premiums received, with interest, the company should have given notice of its election so to do within the time, after notice and proof of death, thus fixed in the policy, for payment; and that, by failing so to do, it now has no right to exercise the option reserved in the policy. But this view of the contract cannot, I think, be maintained, for it seems clear from the provision of the policy which has been previously quoted, that the right of the company to exercise the option could not be waived or lost until it *should be shown* that the insured, at the time of taking his life, was insane. And this might not be shown in the proofs of death, and perhaps not until insanity should be established in due course of judicial investigation. The company could not be required to exercise the option until it was shown that the death was one that called for its exercise. Conceding that prompt action was required on the part of the company, there could be no fatal laches until it was clearly made to appear that the insured, at the time of self-destruction, was insane. And I take it this means that the fact shall be shown by competent and sufficient evidence. At all events, the company, I think, would have the right to exact that character of evidence before it would be chargeable with such laches as would occasion a loss of the right to exercise the option reserved in the contract. The contention of the plaintiff that her right of action to recover the full sum insured became a vested right at the expiration of 60 days from the time of giving notice and making proof of death, in the sense that the accruing of such right operated to deprive the defendant of the right

at any time thereafter to exercise the option it had reserved, is, it seems to me, erroneous, because all the various provisions of the policy must be considered together, and, if possible, made so to harmonize, as to carry out the true intention of the parties; and in that view, such effect should be given to both the 60-day clause and the option clause as will not make the operation of one destroy the other. That such would be the effect is plain, if we were to hold that the option must be exercised within the 60 days after notice and proof of death, without regard to the actual time when it was shown that the insured was insane when he committed the act of self-destruction.

Upon a reasonable construction of the provisions of the policy, therefore, I am of the opinion that the failure of the company to give notice of its election under the option clause within 60 days after notice and proof of death, would not *necessarily* cause a waiver or loss of the right to exercise the option reserved. It is an admitted fact in this case that the proofs of death furnished to the company did not show that the insured was insane when he took his life. Nor did they state how the death occurred. It is true that the proofs were accompanied by a copy of the inquest and verdict of the coroner's jury; but that would not be evidence against the plaintiff in favor of the company. And, certainly, its efficacy would be no greater against the company than in its favor. In view of the language of the option clause which gives to the company, *when it shall be shown* that the insured at the time of taking his life was insane, the right to say whether it would pay the sum insured, or refund the premiums actually received, with interest, I am not prepared to hold that the option reserved might not be exercised even upon trial of the case, after the introduction of competent and legal evidence establishing insanity at the time of self-destruction. But it is not necessary so to hold in this case, for the jury has found that on the fifth day of May, 1884, and before the commencement of this suit, the company notified the plaintiff that it would only refund the premiums received by it from the deceased on policy No. 115,218; and that on the fourteenth day of March of that year it gave to its local agent at Milwaukee a notice of similar purport. Conceding, then, that it was the duty of the company to give to the plaintiff notice of its election within a reasonable time after notice and proof of death, the question is, was not the notice of May 5th given within a reasonable time? I am of the opinion that it was, and that there was no such laches on the part of the company as caused a waiver or loss of its right to exercise the option reserved in the contract.

This question has been argued by the plaintiff's counsel as if the election to pay the lesser sum were the enforcement of a forfeiture. But this is not a correct view of the case. A forfeiture implies a loss of all rightful claim and relief from all liability. But here the company agreed, in any event, to pay one or the other of two sums of money. As before observed, it was competent for the parties thus to contract.

A breach of such a contract occurs only when neither of the sums is paid *after it has been shown* that the insured was insane when he took his life. The question is rather one of the measure of damages which the plaintiff is entitled to recover, than one involving the enforcement of a forfeiture in the sense in which the question of forfeiture has been urged upon the consideration of the court.

Cases are cited in the briefs of counsel in support of his contention, which I think can hardly be regarded as applicable to the question in judgment. They are cases in which, for example, it was held that if a contract be made in the alternative to do one of two things *by a certain day*, the party has until that day to elect which of them he will perform; but if he suffers that day to elapse without performing either, his contract is broken, and his right of election lost; or cases where one of the contracting parties was to do one thing or another *within a given time*, and was entitled to notice from the other party, in order to know which thing he was to do; or cases where an *obligee* had reserved an option to himself by which he could control the event on which the duty of the obligor depended; or cases where a loss of valuable rights would result from the failure to declare an option which had been reserved within a prescribed time. These cases are distinguishable from the case in hand. For here the contract is not to do one of two things *by a certain day*. Nor has the failure of the insurer to give earlier notice of his election to refund the premiums, caused the plaintiff any loss of rights which she would otherwise possess. As before observed, it was not until it should be shown that the insured was insane at the time of self-destruction, that the company could be called on to elect whether it would pay the sum insured, or refund the premium, with interest. Nor is the case, I think, even by analogy or upon principle, like others referred to on the argument, where, upon proofs of loss being received and retained by the insurance company, without objection, it was held that in a suit upon the policy, a technical defense that the proofs were insufficient could not be entertained. Here, notice was given that the company elected to refund the premiums, with interest, and would pay nothing more, within little more than three months after notice and proof of death. These suits were begun, and the expenses incident thereto were incurred, after this notice was given. And, giving to the contract a construction in accordance with what seems to be the clear meaning of its provisions, and the true intention of the parties, the conclusion of the court is that the option reserved in the policy has been duly exercised by the company, and must be recognized as efficacious for the purpose for which it was exercised; and, therefore, that the liability of the company, upon this policy, as upon the other, is limited to the amount of the premium actually received by the company, with interest, which on the sixth day of January, 1884, amounted to \$59.51, as found by the jury.

GRAY v. PHILADELPHIA & R. R. Co.

(Circuit Court, N. D. New York. June 24, 1885.)

MASTER AND SERVANT—RAILROAD COLLISION AT CROSSING—NEGLIGENCE OF EMPLOYEES OF BOTH ROADS—RIGHT OF EMPLOYEE TO RECOVER—DOCTRINE OF FELLOW-SERVANTS.

Where a fireman on a railroad train is injured by a collision at a crossing of two roads, brought about by the concurring negligence of the engineer on his train, and of the employees of the other road, his right to recover damages for such injury from the other road will not be defeated by reason of the negligence of the engineer.

Motion for New Trial.

Mitchell & Mitchell, for defendant.

Parker & Countryman, for plaintiff.

WALLACE, J. This suit was brought to recover damages for personal injuries sustained by the plaintiff, in a collision between a locomotive of the Lehigh Valley Railroad Company, upon which he was a fireman, and a train of cars belonging to the defendant. The collision took place at a point where the roads of the two railway companies intersect and cross each other, known as the "Bound Book Crossing." A signal station was maintained at this crossing by the Lehigh Valley Company in charge of a signal-man, who was selected by that corporation, and was in its employ. By the system of signals which had been adopted, and were in force at the time of the collision, a red signal indicating danger was constantly shown to both roads, until an approaching train at the distance of a third of a mile from the crossing asked for permission to pass by a signal from the engine. If, in answer to the engine's signal, a white signal was displayed at the station, the engineer was at liberty to proceed with his train. If, on the other hand, the red signal remained displayed, it was his duty to stop his train. The plaintiff, in discharge of his duty as a fireman in the employ of the Lehigh Valley Company, was upon an engine of that company, in charge of an engineer carrying a superior officer of the company upon a special errand: and the engine was proceeding to cross the Bound Book Crossing, when the collision occurred. The evidence authorized the jury to find that the safety signal was displayed to the plaintiff's engine in response to the signal of the engineer for permission to cross, and that the danger signal was displayed to the engineer of the defendant's train in response to his signal for permission to cross. The evidence also established that the engineer of the plaintiff's engine was guilty of negligence in attempting to cross, notwithstanding he had received permission to do so by the proper signal; that he saw defendant's train was making for the crossing, either in disregard of the proper signal to the engineer of that train, or under a misapprehension; that his attention was called to this circumstance by Mr. Pickle; that he had reason to

suppose a collision would take place if he proceeded, yet, having ample time to stop his engine and avoid collision after notice of danger, did not do so.

The jury were instructed that if they found that the collision ensued by reason of the negligence of the engineer of the defendant, concurring with the negligence of the engineer of the Lehigh Valley Company, the plaintiff was entitled to recover, provided there was no concurring negligence upon his part. They were instructed that, although he was not in control of the engine upon which he was employed, it was his duty to be observant, so far as practicable, of the situation, and to do what he could to promote the safety of the enterprise in which he was engaged; but that it did not follow that he was negligent because he did not attempt to stop the engine himself or insist upon the engineer's doing so.

It was left to the jury to determine, as a question of fact, whether, under the circumstances, his conduct amounted to a concurrence in the conduct of the engineer; and they were instructed, if he did thus concur, he was not entitled to recover. The defendant requested the court to instruct the jury that the plaintiff, being a fellow-servant with the engineer of the Lehigh Valley Company, and being engaged in a joint enterprise with him, could not recover if they found that the engineer's negligence contributed to the collision. This instruction was refused, and the refusal is now assigned as error, for which a new trial should be granted.

The instructions given were certainly as favorable for the defendant as could reasonably be required. Although the plaintiff was a fellow-servant of the engineer, he was a subordinate, and had no control over the movements of the locomotive. If he was not guilty of any personal negligence, and did not countenance the negligent conduct of his fellow-servant, upon reason, and according to the weight of authority, he ought not to be precluded from a recovery against the defendant. If he could maintain an action against his fellow-servant and the defendant jointly, he can, at his election, pursue either severally. Upon the facts found by the jury, he was no more accountable for the misconduct of the engineer than a passenger would be, or than the owner of a cargo would be for the negligent acts of the carrier whom he has employed to transport his property. If he had occupied such a relation to the transaction he could recover against either or all of the offenders whose acts contributed to his injury. *The Atlas*, 93 U. S. 302; *The Washington*, 9 Wall. 513; *The Titan*, 23 FED. REP. 413; *Eaton v. Boston & L. R. Co.* 11 Allen, 500; *Webster v. Hudson River R. Co.* 38 N. Y. 260; *Barrett v. Third Ave. R. Co.* 45 N. Y. 628; *Spooner v. Brooklyn City R. Co.* 54 N. Y. 230; *Lockhart v. Lichtenthaler*, 46 Pa. St. 151. See *Town of Albion v. Hetrick*, 90 Ind. 545; *Wabash, St. L. & P. Ry. Co. v. Shacklet*, 105 Ill. 364; *Cuddy v. Horn*, 46 Mich. 596; S. C. 10 N. W. Rep. 32.

The defendant relies upon the English cases of *Thorogood v. Bryan*,

8 C. B. 115, and *Armstrong v. Lancashire & Y. Ry. Co.* L. R. 10 Exch. 47. In *Thorogood v. Bryan* it was held that the plaintiff, an ordinary passenger in an omnibus, injured by the joint negligence of the driver of the omnibus and of the defendant, must be taken to be identified with the driver of the omnibus; and if want of care on the part of the driver of the omnibus conduced to the accident, the plaintiff could not recover against the defendant. This ruling has been generally criticised, and its correctness repudiated by text writers of authority, and is in plain conflict with the great preponderance of judicial opinion in this country. The case of *Armstrong v. Lancashire & Y. Ry. Co.* was decided upon the authority of *Thorogood v. Bryan*.

In *Robinson v. New York C. & H. R. R. Co.* 66 N. Y. 11, it was held that a person who accepts an invitation to ride with another competent to control the vehicle is not chargeable with his negligence; and contributory negligence upon his part is no defense in an action against a third party for injuries resulting from a collision; and that if the plaintiff was free from negligence, although the driver might have been guilty of negligence which contributed to the injury, the action could be maintained. CHURCH, C. J., in delivering the opinion, said: "It is no excuse for the negligence of the defendant that another's negligence contributed to the injury for whose acts the plaintiff was not responsible."

In *Dyer v. Erie Ry. Co.* 71 N. Y. 228, it was held that where one travels in a vehicle at the invitation of the owner or driver over whom he has no control, no relationship of principal and agent exists between them, and he is not responsible for the negligence of the driver, and contributory negligence on the part of the driver is not imputable to the passenger and is no bar to a recovery against a negligent third party for injuries resulting from a collision.

The reasoning in both of these cases proceeds upon the ground that the negligence of one person is not to be imputed to another merely because both of them are engaged in a common enterprise, when the latter has no control in fact, or by reason of superior authority, over the conduct of the former. It is otherwise where they are engaged in an enterprise, the character of which presupposes conjoint management, and therefore mutual responsibility for each other's acts as in *Beck v. East River Ferry Co.* 6 Rob. 82.

It is not apparent how the circumstance that the persons engaged in the common enterprise are fellow-servants can qualify the application of the principle to be deduced from these cases. That circumstance is important only as it bears upon the question of the employers' responsibility to one servant for the negligence of a fellow-servant. As between themselves, the servants of a common employer are liable to each other for negligence precisely as though the relation of fellow-servant did not exist. The cases in Massachusetts holding otherwise are generally disapproved by the commentators. Shear. &

R. Neg. § 112; Whart. Neg. § 245; 2 Thomp. Neg. 1062; Add. Torts, 145. See, also, *Hinds v. Harbou*, 58 Ind. 121.

The exemption of the employer from liability to a servant for the negligence of a fellow-servant rests upon the implied undertaking of the servant to assume the risks necessarily incident to the service in which he engages, including the risks of the negligence of his fellow-servant in discharging duties which the employer cannot be expected to discharge personally. There is no reason why a third person, with whom there is no such implied undertaking, should be entitled to avail himself, as a defense to his own negligence, of the contributory negligence of a fellow-servant of the injured party any more than of the contributory negligence of a stranger. As to him, personal negligence on the part of the injured party would seem to be the only just criterion of contributory negligence. In the case of *Paulmier v. Erie R. Co.* 34 N. J. Law, 151, it was held that a servant, injured by the combined negligence of his master and of a fellow-servant, could recover against the master upon the ground that the master was one of two joint wrong-doers, and as such responsible to the servant. It would follow as a corollary that it does not lie even with an employer to insist that the contributory negligence of one servant can be imputed to a fellow-servant as a defense to the employer's negligence. Certainly a stranger cannot occupy any better position than the employer.

There are two adjudications in this state opposed to the doctrine of *Armstrong v. Lancashire & Y. Ry. Co.*: *Perry v. Lansing*, 17 Hun, 34; *Busch v. Buffalo Creek R. Co.* 29 Hun, 112. In both of these cases it was held that a defendant whose negligence contributed to the injury of an employe could not escape liability because the negligence of a co-employe of the plaintiff also concurred. This is believed to be sound law.

The motion for a new trial is denied.

NORTHWESTERN TRANSP. CO. v. CONTINENTAL INS. CO.

(Circuit Court, E. D. Michigan. June 8, 1885.)

1. GENERAL AVERAGE—STRANDING—REPAIRS.

Repairs to a ship, rendered necessary by a voluntary stranding, are the subject of a general average contribution, and are a charge upon underwriters who have insured the ship against total loss and general average.

2. MARINE INSURANCE—STRANDED AND ABANDONED VESSEL—REPAIRS.

A ship which had been voluntarily stranded and abandoned to the underwriters, was raised by them and tendered back to the owner without being repaired, and without an offer to pay the expense of the repairs rendered necessary by the stranding. *Held*, that the owner was under no obligation to receive her, and that the underwriters must be deemed, as matter of law, to have accepted the abandonment.

3. SAME—RIGHTS OF UNDERWRITERS.

When an insured vessel is stranded and abandoned, there are three courses open to the underwriters: they may accept the abandonment and pay for a total loss; they may allow the vessel to lie on the beach and contest the owner's right to abandon; or they may elect to raise and repair her, and if they can do this for less than half her valuation, they may return her to her owner and thus avoid paying a total loss; but in so doing they must act promptly, that the owner may be repossessed of his property without unnecessary delay.

4. SAME—VESSEL SUBJECT TO MORTGAGE—WRITTEN ABANDONMENT.

A stranded vessel owned by a corporation was abandoned to the underwriters by an instrument in writing, signed by the president of the corporation, who, at the same time, held a mortgage upon her in his individual capacity. *Held*, that as he would be estopped to set up the mortgage against the underwriters, the abandonment conveyed to and vested in them "an unincumbered and perfect title to the subject abandoned."

On Motion for a New Trial.

This was an action upon a policy of insurance upon the steamer *Manitoba*, whereby the plaintiff was insured in the sum of \$10,000 against total loss and general average only. On the sixth of November, 1883, the steamer left Port Arthur upon Lake Superior, bound for Sarnia, and in the course of her voyage reached the harbor of Southampton on Lake Huron, November 11th. The wind was then blowing from the south-west. On arriving at the harbor she bore toward the north breakwater, got out her moorings, and laid along-side of the breakwater. About half past 5 o'clock the wind suddenly veered to the north-west, and came down in a terrific gale, which increased to a hurricane, and caused the steamer to part her moorings and drift into the harbor. Both her anchors were dropped and the cable of the small anchor parted. The steamer then dragged her large anchor with full scope of chain, and dropped away to leeward, and, with the aid of her engines, was held from going on the beach till about 4 o'clock the next morning, when her large anchor-chain parted. She was then run inside the breakwater, and, to save her from going ashore, the end of her large hawser was gotten out to a snubbing-post, which, however, snapped and was carried away at once. All her lines were then gotten out on her starboard side and made fast to piles, which held the steamer for about an hour and a half, when a terrific blast from the north-west struck her with such force as to part her lines and tear away her starboard side and stanchions from her gang to her stern. To save her from being totally wrecked and lost the steamer was then voluntarily stranded on the inside of Chantry island.

So fierce was the storm that it threatened to carry the steamer away from the place where she was stranded, and the full force of her engines was needed to keep her from drifting off. The storm continued, with but little intermission, for about eight days. To prevent greater loss and damage to the steamer from pounding on the gravel bottom, she was scuttled where she was stranded. The place was rocky and dangerous, and she suffered large damages by reason of pounding and rolling upon the rocks and boulders after she was

stranded. On or about the thirteenth of November, the passengers, to the number of 16, were removed. The steamer was without cargo, except 160 barrels of salt fish, which had been taken on board at some port on Lake Superior, and which were also removed at the same time, and landed at Southhampton. The steamer was unable to free herself, and the assistance of a wrecking-tug and steam-pumps was required for the purpose. Efforts were made as promptly as possible by the plaintiff to rescue and care for the steamer, and considerable expense was incurred in such undertaking.

The underwriters were immediately notified of the stranding of the steamer, and sent their agent with a wrecking-tug and pumps for the purpose of relieving her. Upon the arrival of the insurance agent, he co-operated with the master of the steamer in the work of attempting to rescue her, and continued his efforts in co-operation with the master and crew of the steamer, until about the thirtieth of November, when he left her, and informed the plaintiff of his intention of leaving her in her then stranded situation until the next spring. The steamer was left there until about the first of June, when she was finally gotten off by the aid of certain tugs, steam-pumps, and pontoons employed by the underwriters, and brought to the port of Detroit, where she was still lying in a wrecked and damaged condition till after the commencement of suit. The steamer was valued in her policies at \$36,000; and was insured at the time of her loss in the sum of \$30,850.

The above facts were all stipulated in writing. Upon the trial of the case it was shown that no offer was made by the insurance companies to repair the damages suffered in consequence of the voluntary stranding, or to pay the cost of such repairs, but she was tendered back to the plaintiff in her damaged condition after she had been repaired sufficiently to keep her afloat. On the thirteenth of December, and after the efforts to rescue the steamer that season had ceased, Mr. Beatty, the president of the plaintiff corporation, after protesting against her being left on the beach during the winter, addressed to each of the insurance companies the following letter:

"NORTHWESTERN TRANSPORTATION COMPANY, (LIMITED.)

"SARNIA, December 13, 1883.

"DEAR SIR: The steamer Manitoba, of the Northwest Transportation Company, (Limited,) was insured in your company in May last against total loss and general average, fire clause exempted. She had to be beached in the harbor of Southhampton during the storm of the eleventh and twelfth of November, or in the morning of the 12th, and still remains there, during which time efforts had been made to take her off but without success. Before Mr. Riordon, your general agent, left for another wreck, he advised me of his intention to leave the steamer Manitoba there until spring. To this I gave my distinct refusal, stating that she must be got off this fall, and that I was prepared to pay my proportion of the expense. An offer was obtained from Mr. Murphy, of Detroit, that he would furnish a complete outfit for taking the steamer off for \$500 per day, or \$10,000 under a guaranty to take

her off or no pay, which offer was refused by your agent; and ordered the steamer to be laid up in opposition to my instructions to proceed and take the steamer off. Regarding her as a wreck I accordingly abandoned her to the insurance companies' agents, and now notify you that I have abandoned the steamer to you.

Yours truly,

JAMES H. BEATTY,

"Pres. N. W. Trans. Co. (Limited)."

There was also testimony tending to show that there was a mortgage on this vessel given July 14, 1884, to James H. Beatty, president of the company, which was still outstanding and unpaid, to the amount of about \$70,000, at the time the proofs of loss were served.

The court directed a verdict for the plaintiff for the full amount of the policy, and thereupon defendant moved for a new trial.

Moore & Canfield, for plaintiff.

Maynard & Swan, for defendant.

BROWN, J. Defendant insured the *Manitoba* against total loss and general average. The stipulation expressly shows that the steamer was voluntarily stranded on Chantry island to save her from total loss. The liability of the defendant for its proportion of the general average expenses incurred by reason of the stranding was admitted, but it was assumed that such liability was limited to the cost of getting her off, taking her to Detroit, and to such repairs as were necessary to keep her afloat. The insurers having performed this much of their undertaking, she was surveyed and tendered back to her owners. No offer was made to repair the damages occasioned by her stranding, or to pay the cost of such repairs; the company taking the ground that all permanent repairs were a particular average, for which, under their policy, there was no liability. There was no attempt made to separate the damages received before the stranding, which consisted of the loss of "her mooring lines, and the tearing away of her starboard side and stanchions from her gang to her stern," from the much more serious damage she incurred by her being "scuttled, and pounding and rolling upon the rocks and boulders," after she was run ashore.

Repairs rendered necessary by a peril of the sea are ordinarily treated as a particular average, for which the companies would not be liable under a policy of this description; but where a vessel has been voluntarily run ashore to save her from a total loss, we understand that all the damages thereby occasioned, including the expense of repairs as well as of getting her off, are the subject of a general average contribution. We have considered the case of *Fowler v. Rathbones*, 12 Wall. 102, as decisive of this point.

The testimony in this case tended strongly to show that the expense of relieving and repairing this steamer would have exceeded 50 per cent. of her value, and hence that the insured had the right to abandon her, except so far as such right might be restricted by the particular terms of the policy, providing "that the insured shall not have the right to abandon the vessel, in any case, unless the amount which

the insurers would be liable to pay under an adjustment as of a *partial* loss, shall exceed half the amount insured." A similar clause was construed by Mr. Justice MATTHEWS, in *Wallace v. Thames & Mersey Ins. Co.* 22 FED. REP. 66, to authorize the owners to abandon when the amount of the repairs, (less one-third new for old,) added to the expense of raising the vessel and taking her to a port of safety, exceeded half her agreed value. This, however, was said in a case where the vessel was accidentally stranded and wrecked by a peril of the sea, and the decision was put upon the ground that the expense of getting her off was not strictly general average. If the same rule were applied to a case of voluntary stranding, the right of the owner in this case to abandon would be clear; but we are inclined to think that this case falls rather within the ruling of *Reynolds v. Ocean Ins. Co.* 22 Pick. 197, recognized by Judge MATTHEWS, in which it was held that where a vessel is *voluntarily* stranded, the expense incurred in getting her off was to be considered as coming within the principle of general average, and to be adjusted as a general average, and not as a partial loss; and hence that the same could not be included in the estimate of damage in determining whether the insured was authorized to abandon.

We do not find it necessary, however, to express a decided opinion upon this point, as the right of the plaintiff to recover as for a total loss was put upon the ground that defendant, by its conduct, was shown to have accepted the abandonment, and is, therefore, precluded from insisting that the circumstances were not such as authorized the plaintiff to abandon. There is no doubt that an underwriter may, by his conduct, make himself liable for a constructive total loss when there is no right to abandon, and no intent on his part to accept the abandonment, and even an express refusal to accept it. If he takes possession of the vessel for the purpose of raising, repairing, and returning her to the owner, he is bound to proceed with diligence. Thus, in *Copelin v. Insurance Co.* 9 Wall. 461, the underwriter took possession of the vessel to raise and repair her, but did not tender her back to the owner for more than six months after she was injured, nor make the repairs so thorough as to amount to a complete indemnity. Mr. Justice STRONG, speaking for the court, said:

"In holding longer than was necessary for making repairs, they must be regarded as acting not as insurers, but as owners; for they had no other authority than that of owners for their failure to return within a reasonable time. Their action was, therefore, a substantial recognition and acceptance of the abandonment of which they had been notified, for in no other way had they become owners. On no other theory can this delay be considered lawful."

See, also, *Peele v. Suffolk Ins. Co.* 7 Pick. 254; *Reynolds v. Ocean Ins. Co.* 1 Metc. 160; *Norton v. Lexington Ins. Co.* 16 Ill. 235; *Younger v. Gloucester Marine Ins. Co.* 1 Spr. 236; S. C. 2 Curt. 322; *Provincial Ins. Co. v. Leduc*, L. R. 6 P. C. 224.

Counsel for defendant distinguished these cases from the one under consideration in the fact that the underwriters took possession of the vessel for the declared purpose of raising and *repairing* her, before restoring her to the owners, while in this case it is claimed there is no evidence of an intention to repair, the companies undertaking only to raise her, and then tender her back to the plaintiff. But if it be once established that the companies were bound to repair or pay the expense of repairing, the damages occasioned by the voluntary stranding, we think that, having taken possession of the vessel for the purpose of raising her and tendering her to her owners, they were bound to go on and complete their undertaking. As observed by Mr. Justice MILLER, in *Copeland v. Security Ins. Co.* Wool. 289: "The conditions of these policies, supported by the law, require that the vessel, when tendered, should have been in such a condition that the plaintiff, when receiving her, should have full indemnity for all the injury which was covered by the policy." In that case the vessel was insufficiently repaired, and it was insisted by the defendant that, inasmuch as the plaintiff did not point out to them the defects, he was bound to receive the boat, make the necessary repairs, and look to a future action at law to reimburse him the expenses; at all events, that he could not recover the full value of the vessel by refusing to receive her, until he did point out the deficiencies of which he complained, and give the defendant an opportunity to supply them; but the court held the plaintiff justified in refusing to receive the vessel. The claim in this case is substantially the same, viz., that the plaintiff was bound to receive back the vessel when tendered, and look to an action at law against the company to reimburse it for the expense of repairs. But if the underwriter may not tender her back imperfectly repaired, may he make such tender after she is gotten off and temporarily repaired? We think not. Having taken possession of her under an obligation to indemnify the owner for the entire loss occasioned by the voluntary stranding, we think the company must be conclusively presumed to have acted with the intention of doing their whole duty in that regard, and that they cannot discharge themselves of any portion of their obligation. Had the stranding been accidental, and the repairs a particular average, (and this was evidently the assumption of the companies,) the plaintiff might have been bound to take the vessel back; but, under the circumstances, the tender could not be made without at least an offer to pay the cost of such repairs as were rendered necessary by her stranding.

It is true that in the Massachusetts cases the court found that the underwriter took possession with the intention of raising, *repairing*, and restoring the vessel to the owners, but this intention only became material, if at all, by reason of the clause in the policy that the acts of the insurers in recovering, saving, and preserving the property insured should not of themselves be considered, as it had formerly been, an acceptance of the abandonment; the courts adding the proviso

that due diligence be used in this connection. A reference to the cases in the order of their date is instructive as showing the origin of the clause in question. The earliest cases arose out of the wreck of the *Argonaut*, in March, 1821. In this case the ship went upon the rocks, suffered much damage, and was abandoned to the insurers. The companies caused the vessel to be taken from the rocks, and, having made certain repairs on her, offered to restore her to the plaintiffs. The plaintiffs contended that the vessel had not been sufficiently repaired, nor within a reasonable time, and the expense of the repairs would exceed 50 per cent. of her value. One of the companies was sued by libel on the admiralty side of the district court of Massachusetts; another was sued in the state court. In the first case, (*Peele v. Merchants' Ins. Co.* 3 Mason, 27,) Mr. Justice STORY held—*First*, that the owners had the right to abandon under the circumstances, even if the injury was less than half the value. *Second*, that in estimating the half value there was not to be a deduction of one-third new for old, as in case of partial loss; that the half value which authorized an abandonment was half the sum which the ship, if repaired, would be worth, after repairs made. *Third*, that the underwriters had no right to take possession of the ship either to move her or to repair her, without the consent of the owners; that these acts of taking possession, etc., after the abandonment, were, in point of law, an acceptance of the abandonment, since the underwriters could not be justified in them, except as owners of the property. In the other case, (*Peele v. Suffolk Ins. Co.* 7 Pick. 254,) against another company, the supreme court of Massachusetts held that the underwriter might take possession of the ship, and repair her, and if the repairs were made for less than half the value, might restore her to the assured; but unless the repairs were made within a reasonable time, the insurer forfeited his right to return her and should be considered as having accepted the abandonment.

In consequence of the decision of Mr. Justice STORY, the policies were amended so as to provide that the acts of the insured or insurers in recovering, saving, and preserving the property should not be considered a waiver or acceptance of the abandonment; and that the insured should not have the right to abandon in any case, unless the amount which the insurers would be liable to pay, under an adjustment as of a *partial* loss, should exceed half the amount insured. The effect of the first amendment was considered by Mr. Justice SHAW in the case of *Reynolds v. Ocean Ins. Co.*, which was twice before the supreme court of Massachusetts, reported in 22 Pick. 191, and 1 Metc. 160. It was argued in this case that whether the acts done by the insurers towards saving the property were done promptly and actively, or tardily and negligently, could make no difference; and that, whatever was the character of such acts, they were protected by the policy from being regarded as evidence of an acceptance of the abandonment. "Supposing this view to be correct, still taking possession

of the vessel for another and distinct purpose, is not within this provision in the policy. The act is qualified by the intent and purpose with which it is done. If done solely with a view to save the property, the underwriters were at liberty to do such acts or not as they should see fit, and do them in their own time. If done with the intent to repair and restore the vessel, then it was to be done with reasonable diligence and dispatch, on peril of making the vessel their own, by taking her into custody." The learned judge here appears to make a distinction between acts done with the view simply to save the property, and similar acts done with the view, not only of saving the property, but of restoring it to the owners. The language used in this opinion is not entirely clear. There could be no other purpose in getting the vessel off except "to save the property." If done to save the property for *themselves*, and the property is actually taken by the underwriters, they would undoubtedly be held to have accepted the abandonment. If done to save it for the *owner*, they are equally liable, unless they proceed with diligence. In this view we find it difficult to perceive how the intent with which the act is done can be decisive of the rights of the parties. We should say that they would depend rather upon what was actually done than upon the intent with which it was done.

The whole law upon the subject may be summed up as follows: When an insured vessel is stranded and abandoned there are three courses open to the underwriters: They may accept the abandonment and pay for a total loss; they may allow the vessel to lie on the beach, and insist that there was no right to abandon; or they may elect to raise and repair her, (if bound to repair,) and if they can do this for less than half her valuation, they may return her to the owners and thus avoid paying for a total loss; but in so doing they must act promptly, that the owners may be repossessed of their property without unnecessary delay. *Marraud v. Melledge*, 123 Mass. 176.

The object of the clause in the policy was to prevent the mere act of taking possession and rescuing the property being treated as, *ipso facto*, an acceptance of the abandonment. The companies wished to reserve the right to raise, repair, and restore the vessel within a reasonable time. But in the *Peele Case* it was held that they were not at liberty to touch her in any way without being held as accepting the abandonment. The policies now not only give them the right to interpose to recover the vessel, but in case the owner should do this, and then refuse to repair, the underwriters may then, after recovery, cause the same to be repaired for account of the insured; but, having once made their election to raise the vessel, we do not understand that they are at liberty to stop short of full performance, or to tender her back to the owners without complete indemnity for the loss. In this view of the law, as the facts herein stated were undisputed, there was no question for the jury, and they were properly instructed to re-

turn a verdict for the plaintiff. *Peele v. Merchants' Ins. Co.* 3 Mason, 27.

Certain exceptions were taken to the form of the abandonment, which, we think, are untenable. The policy requires the abandonment to be in writing, signed by the insured, and delivered to the company; and that it shall be efficient, if accepted, to convey to and vest in the insurers an unincumbered and perfect title to the subject abandoned. The abandonment in this case is contained in the letter of December 13th, signed by the president of the plaintiff corporation. Under the circumstances, we think this act was within the scope of his authority, and that his signature as president indicates sufficiently that it was the act of the corporation. It is true, the president held a mortgage upon the steamer, in his individual capacity, and that the title of the plaintiff was incumbered to the extent of this mortgage at the time the abandonment was made; but we think that Mr. Beatty, in signing the abandonment as president, would be estopped to set up his individual mortgage against the insurance company. *Herm. Chat. Mortg.* 355; *Hayes v. Livingston*, 34 Mich. 387; *Dann v. Cudney*, 18 Mich. 289; *Truesdail v. Ward*, 24 Mich. 117; *Meister v. Birney*, Id. 435.

The motion for a new trial must be denied.

STATE OF KANSAS *ex rel.* ATTORNEY GENERAL v. SOUTHERN KANSAS RY. CO.¹

(Circuit Court, D. Kansas. June 2, 1885.)

RAILROAD COMPANY—FORFEITURE OF LAND GRANT—FAILURE TO BUILD ROAD—
MANDAMUS.

Where a portion of a grant of land to a railroad company has lapsed, and been forfeited by reason of the failure of the company to build a certain part of its road within the time named in the grant, *mandamus* will not lie to compel the railroad company to build that portion of the road to which the forfeiture of the grant attaches.

On February 12, 1853, the legislature of the territory of Kansas incorporated the Leavenworth, Lawrence & Fort Gibson Railroad Company, and authorized it to construct a railroad from Leavenworth via Lawrence to the southern boundary of the territory. On the third of March, 1863, the congress of the United States passed an act granting lands to the state of Kansas to aid in the construction of certain roads. The first part of the section reads as follows:

"Be it enacted by the senate and house of representatives of the United States of America, in congress assembled, that there be, and is hereby, granted to the state of Kansas, for the purpose of aiding in the construction—*First*, of

¹From Kansas Law Journal.

a railroad and telegraph from the city of Leavenworth, by way of the town of Lawrence, and via the Ohio City crossing of the Osage river, to the southern line of the state, in the direction of Galveston Bay, in Texas, with a branch from Lawrence, by the valley of the Wakarusa river, to the point on the Atchison, Topeka & Santa Fe Railway, where said road intersects the Neosha river; *second*, of a railroad from the city of Atchison via Topeka, the capital of said state, to the western line of the state, in the direction of Fort Union and Santa Fe, N. M., with a branch where this last-named road crosses the Neosha, down said Neosha valley to the point where the first-named road enters the Neosha valley,—every alternate section of land, designated by odd numbers, for ten sections in width on each side of said roads, and each of its branches."

The fourth section of such act prescribed the terms under which the grant is made. It reads as follows:

"Section 4. And be it further enacted, that the lands hereby granted to said state shall be disposed of by said state only in the manner following: That is to say, when the governor of said state shall certify to the secretary of the interior that any twenty consecutive miles, either of said roads or branches, is completed in a good, substantial, and workman-like manner, as a first-class railroad, and the said secretary shall be satisfied that the said state has complied in good faith with this requirement, the said state may cause to be sold all the lands granted as aforesaid, situated opposite to and within ten miles of the line of said section of road thus completed, extending along said completed section of twenty miles of road, and no further. And when the governor of said state shall certify to the secretary of the interior, and the secretary shall be satisfied that another section of said road or branches, twenty consecutive miles connecting with the preceding section, is completed as aforesaid, the said state may cause to be sold all lands granted and situated opposite to and within the limit of ten miles of the line of said completed section of road, and extending the length of said section; and so from time to time until said roads and branches are completed. And when the governor of said state shall so certify, and the secretary of the interior shall be satisfied that the whole of said roads and branches, and telegraph, are completed in a good, substantial, and workman-like manner, as first-class railroads and telegraph, the said state may cause to be sold all remaining lands granted and selected for the purposes indicated in this act, situated within the said limits of twenty miles from the line thereof, throughout the entire length of said road and branches: *provided*, that if any part of said road and branches is not completed within ten years from the passage of this act, no further sale shall be made, and the land unsold shall revert to the United States."

On the ninth of February, 1864, the legislature of the state of Kansas passed an act to accept such grant, and making the Leavenworth, Lawrence & Fort Gibson Railroad the beneficiary. On the twenty-fifth of May, 1864, a copy of the resolution of acceptance was filed in the office of the secretary of state, and is as follows:

"Resolved, by the president and board of directors of the Leavenworth, Lawrence & Fort Gibson Railroad Company, that said company hereby accepts said grant of lands, according to the stipulations of said act of the legislature of the state of Kansas and of the congress of the United States."

The railroad company constructed its road from Lawrence southward to the south line of the state, but never built that portion of its road from Leavenworth to Lawrence. By foreclosure proceedings the property and franchise of the Leavenworth, Lawrence & Fort Gibson

road passed to defendant. And now the state applies for a writ of *mandamus* to compel the defendant to complete its entire line, by building that portion from Leavenworth to Lawrence.

W. A. Johnston, Atty. Gen., *Edward Stillings*, and *Thomas P. Fenlon*, for relator.

James Hagerman, for defendant.

BREWER, J. I shall notice but a single question, for that is decisive. The relator does not insist that by the charter authorizing the railroad company to build its road from Leavenworth, a duty was imposed to complete the whole line which can be enforced by *mandamus*, but rests the case upon the land grant and its acceptance, claiming that thereby a contract obligation was assumed by the company which the courts will enforce by *mandamus*. Conceding, for the purposes of this case, that contract obligations of a similar nature may sometimes be enforced, yet where the parties in their contracts expressly provide a penalty for a breach, such penalty will exclude any other remedy; and in this contract the parties have named a penalty for any breach. The grant provides that upon the completion of each consecutive 20 miles of road it shall become operative as to alternate sections, and that, upon the failure to complete the road within 10 years, the unearned lands revert to the United States. In other words, this reversion or forfeiture is the penalty for failure to complete the road. The grant does not prescribe at what point in the line the work shall be commenced. It was within the option of the company to commence at Leavenworth, the northern *terminus*, or at the southern boundary of the state, or at any intermediate point.

It might have commenced at the northern and southern *termini* at the same time, and, upon the completion of 20 miles from each *terminus*, would have been entitled to the alternate sections adjacent thereto. When it completed any 20 consecutive miles, it earned the alternate sections adjacent, and if it failed to complete any portion of the road within 10 years, it lost all interest in the adjacent lands. Suppose it had never built a mile of road during the 10 years, and so earned none of the lands, could it be seriously claimed that *mandamus* would lie to compel such construction in the face of this provision,—that by its failure the whole grant had failed; and if that be true in case of total failure, is it not equally true in case of partial failure? The parties prescribed the terms of the contract, and what should be the result in the case of a failure of the beneficiary to perform. As was well said by the counsel for the defendant, this application in some respects represents a bill for a specific performance; and where the whole consideration has failed, and the plaintiff is powerless to perform on his part, would a court of equity compel a defendant, receiving nothing, to perform? Clearly, the defendant would be entitled to receive the consideration if obliged to perform his contract, and if the consideration was lost, the contract to perform would not be enforced. The case of the *State v. Southern Minn. Ry. Co.* 18 Minn.

40, (Gil. 21.), arose upon a very similar state of affairs, and is very closely in point, and the conclusions reached by that court are in accord with the views above expressed.

The motion to quash the writ will be sustained, and judgment accordingly.

DYER and another v. NATIONAL HOD ELEVATING Co.

(Circuit Court, E. D. Pennsylvania. April 23, 1885.)

PATENTS FOR INVENTIONS—SCOPE OF INVENTION.

A patent for a mere improvement in the department of mechanics to which it belongs, must be limited to the arrangement of the device claimed as new, and cannot be so expanded as to embrace different substituted devices that perform some of the functions of the patent, or produce the same general effect.

In Equity.

Joshua Pusey, for complainant.

Charles Howson, contra.

MCKENNAN, J. As the patent in this case is for an improvement merely in the department of mechanics to which it pertains, it must be limited in its scope to the "arrangement" of devices described and claimed in it as new; and it cannot be expanded to apply to substituted devices, different in character and dissimilar in form, merely because they perform some of the intended functions of the patented devices, or because the same general result is effectuated by both.

The second claim of the patent—which is the only one necessary to be considered—is for the "arrangement of the ropes or cables, *m, m*, clamp-bolts, *i, i*, and cross-bars, *J, J*, substantially as and for the purposes set forth." This "arrangement," as described, provides for the use of two cross-bars, to be attached to the ropes or cables at each end by means of clamp-bolts, which pass through the cross-bars, and encircle the cables, and thus hold the bars in place by pressure upon the cables, by relaxing which pressure the cross-bars may be moved up or down, and any desired adjustment in length of the cables be secured. In the upper cross-bar are V-shaped notches for holding hods filled with bricks or mortar, which are prevented from tilting by the lower cross-bar, against which the handles of the hod rest. In this "arrangement" it is obvious that notches capable of holding clamp-bolts in place by compression, clamp-bolts, and two cross-bars, are essential constituents.

In the hoisting apparatus made and used by defendant, a cable of different material and form, and without the essential capabilities of the cable described in the patent, is employed; and in no sense, except that of carrying the weight to be lifted, can it be regarded as an equivalent of the latter. It is made of iron, with links of a peculiar

form, so that it is altogether unadapted to the application of clamp-bolts, the use of which is indispensable to the adjustability of the cable. Hence it lacks an essential feature of the patented "arrangement." Besides this, the cross-bar, which sustains the hods, is attached to the cable by a depression in one of the links, in which it rests, and is held by a simple screw passing through the cross-bar and the cable link. And, finally, but one cross-bar is used, in which are V-shaped notches to hold the hods, which are prevented from tilting by bars projected from each side of the V. With these notable differences in form and function, these devices cannot be identified by any rule of equivalency, and hence we cannot adjudge the defendant guilty of infringement.

The bill is dismissed, with costs.

UNDERWOOD v. WARREN and another.¹

(Circuit Court, E. D. Missouri. June 10, 1885.)

PATENTS FOR INVENTIONS—TRACK-DRILLS.

The combination covered by letters patent No. 205,927, issued to F. J. Underwood for an improvement in railroad-track drills, is not infringed by the use of the device described in letters patent No. 186,225, by the addition of a vertical screw with a thumb-piece, for the purpose of holding the sliding block in position.

In Equity.

G. M. Stewart and Britton A. Hill, for complainant.

Parkinson & Parkinson, for defendants.

TREAT, J., (orally.) The case of *Underwood v. Warren and March* is a suit for infringement of a patent. Most of the elements of this case have been heretofore considered, and the views of the court will be found in 20 FED. REP. 697.

All that is necessary to determine the question now presented can be expressed in a very few words. The Underwood patent, No. 205,927, dated July 9, 1878, is a combination patent. The defendants use the Belan patent, of which they are the proprietors, which patent was issued November 18, 1876, numbered 186,225. Both of these patents are for ratchet-drills in connection with rails, or more especially fish-plates on rails. The Belan patent consisted of two parallel bars, with clamps extending therefrom to hold them in position, and clamped to the railroad bar; and in order to operate the drill there was a movable block between the bars, with a horizontal screw running through it at the particular point where it was desired to bore the railroad bar. By screwing up horizontally the boring apparatus,

¹Reported by Benj. F. Rex, Esq., of the St. Louis bar.

the end could be effected. It was ascertained, however, that such a device was not sufficiently rigid to effect the end; hence the subsequent patent, fully described in the opinion heretofore given by the court, which is a combination patent. Instead of taking two parallel bars through which slides a movable block with the horizontal screw, the new patent takes only one bar with a mortice-block sliding on it, to be held in position, as occasion requires, by a wedge on the side of it, or as stated, "any other equivalent device." But the force of plaintiff's patent is in the combination; that is, the taking of a single bar with a mortice-slide and a wedge, or an equivalent contrivance as a vertical screw, to keep it in position while the ratchet-drill is boring a hole through the fish-plate, or the bar to which the fish-plate is to be attached. There is no element in the Underwood patent which is not in the Belan patent, except that in the Underwood combination there is a single bar instead of two parallel bars, with an addition which makes a separate claim of what is called a bail, whereby the single bar can be raised or lowered so that you may bore horizontally.

That is sufficient for a general description. It so happens that the proprietors of the Belan patent have everything that they had before, only they have chosen, in order to hold the sliding block in position more firmly than had been done under the original Belan patent, to bore vertically through it, and by means of a screw and a thumb-piece to hold it firmly in position. Now, it is a most familiar principle in the law of patents that one who has a combination cannot sue for an infringement any person who does not use his entire combination. If he has chosen to insert in his combination elements that are unnecessary, his patent meets with very little favor. In this particular case, however, there is no infringement of his combination at all. The averment seems to be that by using a vertical screw with a thumb-piece, which is the most familiar mechanical element to hold a slide in position, the defendants have infringed this complainant's combination. They have not used the combination, nor any new element of it.

The bill is dismissed. There is no infringement.

HOLIDAY and others v. MATTHESON and others.

(Circuit Court, S. D. New York. 1885.)

PATENTS FOR INVENTIONS—UNCONDITIONAL SALE OF PATENTED ARTICLE IN FOREIGN COUNTRY—RIGHT OF PURCHASER FROM VENDEE TO USE OR SELL IN UNITED STATES.

The owner of a patent in the United States for an invention, who has sold the patented article in England without restriction or conditions, cannot treat as an infringer one who has purchased the article in England of the vendee of the patentee, and restrain him from using or selling the article in the United States.

WALLACE, J. This motion for a preliminary injunction raises the question whether the owner of a patent in the United States for an invention, who has sold the patented article in England without restriction or conditions, can treat as an infringer one who has purchased the article in England of a vendee of the patentee, and can restrain him from using or selling the article here. This question has been decided adversely to the complainant in this court upon a motion to punish the defendants for contempt in violating an injunction obtained in a former suit between the parties; and it was held by Judge WHEELER in substance that the sale carried all the rights to the article which the complainants, the vendors, had, including the right to use it or sell it whenever the complainants could do so. *Holiday v. Mattheson*, Op. MS. That decision is controlling upon this motion, but it is proper to add that the reasons upon which it proceeds are satisfactory, and would prevail if the question were an original one between these parties and in this court.

When the owner sells an article without any reservation respecting its use, or the title which is to pass, the purchaser acquires the whole right of the vendor in the thing sold: the right to use it, to repair it, and to sell it to others; and second purchasers acquire the rights of the seller, and may do with the article whatever the first purchaser could have lawfully done if he had not parted with it. The presumption arising from such a sale is that the vendor intends to part with all his rights in the thing sold, and that the purchaser is to acquire an unqualified property in it; and it would be inconsistent with the presumed understanding of the parties to permit the vendor to retain the power of restricting the purchaser to using the thing bought in a particular way, or in a particular place, for a limited period of time, or from selling his rights to others. It is quite immaterial whether the thing sold is a patented article or not; or whether the vendor is the owner of a patent which gives him a monopoly of its use and sale. If these circumstances happen to concur the legal effect of the transaction is not changed, unless by the conditions of the bargain the monopoly right is impressed upon the thing purchased; and if the vendor sells without reservation or restriction, he parts with his monopoly so far as it can in any way qualify the rights of the purchaser.

The purchaser does not acquire any right in the monopoly, but he does acquire the right of unrestricted ownership in the article he buys as against the vendor, including, as an inseparable incident, the right to use and enjoy it, and to transfer his title to others. *Bloomer v. McQuewan*, 14 How. 549; *Goodyear v. Beverly Rubber Co.* 1 Cliff. 348; *Washing-machine Co. v. Earle*, 3 Wall., Jr. 320; *Bloomer v. Millinger*, 1 Wall. 340, 351; *Mitchell v. Hawley*, 16 Wall. 544, 548; *Paper Bag Cases*, 105 U. S. 770; *Day v. Union Rubber Co.* 3 Blatchf. 494; *McKay v. Wooster*, 2 Sawy. 373; *Wilder v. Kent*, 15 FED. REP. 217.

The cases like *Hatch v. Adams*, 22 FED. REP. 434, and *Societe, etc., v. Tilghman's Pat. Sand Blast Co.* 25 L. J. Ch. 1, relied on by the complainants, have no application to a case like this. When the owner of a patent sells the patented article under circumstances which imply that the purchaser is not to acquire an unqualified property in the thing purchased, as where a license accompanies the transfer, the purchaser's rights are limited to the extent of the monopoly granted to him. Those cases involved the extent of the monopoly acquired in a patented article under a license or territorial right from the owner of the patent, the article having been originally sold under the license.

The motion is denied.

CORNELLY v. MARKWALD.

*(Circuit Court, S. D. New York. 1885.)***PATENTS FOR INVENTIONS—INFRINGEMENT—COSTS—EXPENSE OF MODEL.**

The expense of obtaining a model of an infringing machine cannot be deemed a taxable disbursement in favor of the prevailing party.

WALLACE, J. The clerk properly refused to tax the item of \$150 in plaintiff's bill of costs for the expense of obtaining a model of the defendant's infringing machine. Irrespective of any question as to the propriety or necessity of procuring such a model, the expense incurred cannot be deemed a taxable disbursement in favor of the prevailing party. The reasons why such an item should not be allowed, are fully stated in the opinion of the court in *Woodruff v. Barney*, 1 Bond, 528, and in *Hussey v. Bradley*, 5 Blatchf. 210. It is obvious that it would subject litigants in patent cases to onerous and sometimes to oppressive burdens, if parties were permitted, at their discretion, to procure models, and tax their unsuccessful adversaries with the expense. The question is not an open one. See, also, *Wooster v. Barker*, 23 FED. REP. 49.

The taxation is affirmed.

BUST v. CORNELL STEAM-BOAT Co.

(Circuit Court, S. D. New York. July 1, 1885.)

TOWAGE—NEGLIGENCE—EVIDENCE—INSTRUCTION—NEW TRIAL.

Under the circumstances of this case the question of negligence was a question for the jury to determine, and the verdict not being so manifestly against the weight of the evidence as to warrant the court in setting it aside, and the instructions of the court fairly presenting the question of negligence to the jury, a motion for a new trial is denied.

Motion for New Trial.

This action is brought to recover damages occasioned by the negligence of the defendants in failing to tow properly the plaintiff's canal-boat Minnie F. Howe from Newburgh to New York on the evening of October 4, 1881. In the last tier, directly behind the canal-boat, was a spile-driver, which became disengaged and was forced by the winds and waves violently against the stern of the canal-boat, causing the loss and injury complained of. Evidence was given tending to show that the spile-driver became unmanageable because of the giving way of a cleat to which the backing-line was fastened. The spile-driver drew but little water and carried no crew. Her deck was nearly covered by a house which caught the wind, no matter from what quarter it was blowing. She was an unwieldy, top-heavy, and dangerous craft to place in proximity to other boats. The action was tried at the April circuit, 1885, and resulted in a verdict for the plaintiff. The defendants now move for a new trial upon the grounds,—*first*, that the verdict is against the weight of evidence; and, *second*, that there was error in one of the instructions to the jury.

James L. Bishop, for plaintiff.

Enos N. Taft, for defendants.

COXE, J. The verdict was not so manifestly against the weight of evidence as to warrant the court in setting it aside. The proposition now to be determined is, not whether the court is in accord with the jury upon the facts, but was there a question of negligence which should have been submitted to them? If so, the court cannot disturb the verdict without intrenching upon the province of the jury, unless it is so clearly against the evidence as to justify the conclusion that they, through ignorance, depravity, or gross partiality, failed to comprehend their duty. There is nothing here to warrant such a presumption. It may be conceded that the defendants' version of the transaction was maintained by witnesses, who, in number and intelligence, more than balance those produced by the plaintiff; but this concession avails the defendants nothing. The jury were justified in finding, if they saw fit to do so, that the defendants had not, in the fulfillment of their contract with the plaintiff, done all that a careful and prudent navigator should do in the making up and management of the tow. It was permissible for them to say that it was not

wise or prudent to start upon a night voyage with such an unruly craft as the spile-driver so near a helpless boat, at a time when the wind was aft, and, according to one of the witnesses, ominous signals were in the sky. The determination of the jury ought not to be interfered with. *Davey v. Aetna Life Ins. Co.* 20 FED. REP. 494; *Gilmer v. City of Grand Rapids*, 16 FED. REP. 708, 711; *Mengis v. Lebanon Manuf'g Co.* 10 FED. REP. 665; *Blanchard's Gunstock Turning Factory v. Jacobs*, 2 Blatchf. 69.

But it is urged that the court fell into error in instructing the jury as follows:

"If you find that the only fault in the case was an improper cleat upon the spile-driver, that would not, of itself, be sufficient to charge the defendants, unless you find also that the facts were of such a character that the defendants knew, or ought to have known, of the defective character of the cleat."

Upon this branch of the evidence, then, the following propositions were submitted: *First*, was there an improper cleat, and, if so, was the injury occasioned solely by reason thereof? *Second*, did the defendants know of the defect, or could it have been discovered by the exercise of ordinary care and diligence on their part? It is insisted that there is no evidence that the defendants knew, or were chargeable with knowledge, of want of sufficiency in the cleat. That it proved inadequate is not disputed. It gave way from the bolts being pulled out through the deck of the spile-driver, fairly indicating, from the standing-point of the plaintiff, that it was improperly fastened; that the wood to which it was attached was decayed, or that in size, construction, or position, it was incapable of bearing the strain placed upon it. It is obvious that some of these defects could have been discovered at a glance; others by a careful examination, and others still only by a minute and thorough inspection, which the defendants were not required to make. Whether the defendants should have discovered the defect depended upon various questions which the jury only were competent to decide. The mere happening of the accident, if they adopted the plaintiff's theory regarding it, was alone sufficient to raise a presumption of negligence. For instance, they might have found that the cleat broke early in the night before the winds and waves became boisterous. On the contrary, they might have adopted the defendants' theory that it broke from a peril of the sea; because of the sudden, angry, and unexpected tempest. That the prior finding, unexplained, would be sufficient to inculcate the defendants can hardly be doubted. On the one hand the defendants were not held to the strict rule applicable to common carriers, and on the other their duties were not confined to the less onerous obligations which a master owes to his employes. They occupied a medium ground between the two. They were bailees for hire, having life and property in their keeping, and they were required to exercise ordinary care, skill, and prudence, in arranging and navigating the tow. Whether they fulfilled their obligations in these respects, was, upon all the evi-

dence, a question of fact for the jury, and not a question of law for the court. For these reasons it is thought that the instruction complained of was not erroneous, but was as favorable to the defendants as they could reasonably ask. Of the many authorities upholding the foregoing propositions, a few, which may be regarded as more or less controlling in this court, are here given. *Rose v. Stephens & C. Transp. Co.* 20 Blatchf. 411; S. C. 11 FED. REP. 488; *Robinson v. New York Cent. & H. R. R. Co.* 20 Blatchf. 338; S. C. 9 FED. REP. 877; *Rintoul v. Same*, 17 FED. REP. 905; *Alden v. Same*, 26 N. Y. 102; *Worster v. Forty-Second St. R. Co.* 50 N. Y. 203; *Mullen v. St. John*, 57 N. Y. 567; *Lyons v. Rosenthal*, 11 Hun, 46; *The Quickstep*, 9 Wall. 665; *The M. M. Caleb*, 10 Blatchf. 467, 471; *The Sweepstakes*, Brown's Adm. 509, 514.

The motion for a new trial is denied.

THE RESCUE.

(District Court, W. D. Pennsylvania. June 20, 1885.)

1. TOWAGE—EXEMPTION FROM NEGLIGENCE.

An understanding that a tow-boat should not be responsible for damages to the tow upon a contemplated trip, would not exonerate the tow-boat from the consequences of actual negligence in the performance of the service undertaken.

2. SAME—DAMAGES.

The general rule is that the damages recoverable for injury to a vessel by a collision should not exceed her then value.

In Admiralty.

D. T. Watson, for libellant.

Knox & Reed, for respondent.

ACHESON, J. The evidence, as a whole, scarcely warrants the conclusion that there was any express agreement relieving the Rescue from that measure of care and diligence which the law imposes upon a tow-boat. But if the conversation between John Jackson and W. C. Jutte was as the latter testifies, still it would not exonerate the tow-boat from the consequences of actual negligence in the performance of the service undertaken. *Powell v. Pennsylvania R. Co.* 32 Pa. St. 414. The contract, however, having been entered into with the prospect of encountering ice, there was no culpability in undertaking the trip; and it may be conceded also that if there was any increased risk arising from the presence of ice, the libellant should be held to have accepted that hazard. The real question in the case then is whether the Rescue was forced upon the flat-boat by the pressure of the ice or struck it negligently.

And here the weight of evidence is most decidedly against the

Rescue. In backing towards the flat after the tow-boat had broken the ice and opened a way to Jackson's float, there was a plain lack of that degree of care which the occasion called for. As no one was left on the flat to warn off the Rescue as she approached, it was imperative that some one should have been on watch at the stern of the tow-boat. Conceding that the pilot is correct when he says the flat could be seen from the pilot-house "every time I looked at her," still he had his other appropriate duties to perform and could not closely and constantly watch the flat. Hence, as he himself states, the stern of the tow-boat was only about seven or eight feet from the flat when he rang the stopping-bell, and the headway was not arrested in time. The flat was not only hit by the Rescue, but one of her wheel-arms, coming down on the top of the flat, forced it under water. Undoubtedly, the collision could have been avoided by the exercise of proper care. The proof is clear that the disaster was altogether the result of culpable negligence on the part of the Rescue.

The libelant's claim, so far as it relates to the expense of raising and repairing the flat-boat, is well made out; but the item of demurrage must be disallowed. The evidence as to actual loss here is somewhat vague, and I incline to think there was unnecessary delay in raising the flat. The controlling reason, however, for denying demurrage is that the other damages allowed are probably as much as the flat was reasonably worth when she was sunk. Now, the general rule is that the damages allowed for injuries to a vessel should not exceed her value at the time of collision, (*The Venus*, 17 FED. REP. 925,) and there is nothing in this case to take it out of that rule.

Let a decree be drawn in favor of the libelant for \$459.21, with interest from July 1, 1884, and costs.

THE WM. KRAFT.

(District Court, W. D. Pennsylvania. June 17, 1885.)

PURCHASE OF VESSEL—NOTICE OF LIEN—ESTOPPEL.

While respondents were negotiating for the purchase of a steam-boat, a lien-creditor notified them of his claim, and warned them not to buy until it was settled; but subsequently informed them that it was settled, at the same time remarking that they ought to see that they got a good bond; thereupon the respondents completed the purchase, and paid the price, taking the customary bond of indemnity against liens generally. *Held*, that such creditor was estopped from asserting that said claim was a lien against the boat in the hands of the respondents, to the prejudice of the respondents and their surety in said bond.

In Admiralty.

Albert York Smith, for libelants.

Knox & Reed, for respondents.

ACHESON, J. While the respondents were negotiating for the purchase of the steam tow-boat Wm. Kraft, Joseph Short, one of the libelants, notified them of the claim in question, and warned them not to buy until it was settled; but afterwards he returned to the respondents and informed them that the claim had been settled. The respondents then consummated the purchase, and paid the full consideration in cash and negotiable paper. So far there is no dispute as to the facts. But both respondents further testify that at the second interview Short told them the boat did not owe the libelants anything, and to go ahead and buy her. This Mr. Short denies; but I think the weight of the testimony here is with the respondents. Short's account of the matter is this: "I told him [Hodgson] the account was settled, and at the same time told him significantly that he should see that he got a good bond." But, if it be true that Mr. Short's language was that "the account was settled," the respondents had a right to infer, under the circumstances, that they were now at liberty to purchase without reference to this claim. Indeed, Short's conduct admitted of no other interpretation.

It is a customary thing for a purchaser of a steam-boat to take a bond of indemnity against liens, and the respondents would naturally regard Mr. Short's observation on that subject as a friendly suggestion having respect to other and secret liens. Such bond of indemnity against liens generally the respondents did take, as any prudent purchaser of a steam-boat would ordinarily do. It appears, however, that the solvency of the surety in this bond is now somewhat questionable. But the surety himself is entitled to protection against a claim which the creditors have waived, or estopped themselves from asserting.

I have carefully looked into the evidence, and am very clear that the libelants have estopped themselves from asserting a lien against the boat in the hands of these respondents. The fact is the claim *was* settled. True, the libelants took notes for part of it, but this circumstance was not disclosed to the respondents, or the surety in the bond of indemnity. Now, doubtless, the mere taking of a note does not operate to discharge a lien, and, as against the former owner of this boat, the lien might well be enforced, the notes being overdue and unpaid. But when the court is asked to enforce the claim as a lien, to the prejudice of the present owners and their surety, a very different question is presented. As against them good faith forbids the libelants to assert the claim.

Let a decree be drawn dismissing the libel, with costs.

BALLIN and others v. LEHR and others.*(Circuit Court, S. D. New York. April, 1885.)***REMOVAL OF CAUSE—ACT OF 1875—CITIZENSHIP—ALIENS.**

A., a citizen of New York, and B., a citizen of New Jersey, sued C., a citizen of Maryland, and D., a subject of Prussia, in the state court. *Held*, that the suit was removable to the United States circuit court.

Motion to Remand.

David Leventritt, for plaintiffs.

Samuel W. Weiss, for defendants.

WHEELER, J. One of the plaintiffs is a citizen of New York, and the other of New Jersey; one of the defendants is a citizen of Maryland, and the other a subject of Prussia. The act of 1875, (Supp. Rev. St. 174,) makes suits removable in which there is a controversy between citizens of different states, or between citizens of a state and foreign citizens or subjects. There are no citizens of the same state, nor citizens or subjects of the same foreign country, on opposite sides of the controversy in this suit. Each person on one side is a citizen of a state, and each person on the other is a citizen of another state or country. The statute uses the plural number only, but this includes the singular, and does not imply that there must be more than one citizen of the same state on one side of every controversy to make the suit removable. A suit in favor of one citizen of one state against one citizen of another state, or an alien, would be none the less removable, because there were not more than one of each class. There is no person here, as a party to this controversy or suit, who is not within the description of the statute as to all of his opponents. There is no occasion for any severance of causes of action or parties; the statute covers the whole. *Removal Cases*, 100 U. S. 457.

Motion to remand denied.

MAIRER v. OLMSTEAD and others.*(Circuit Court, S. D. New York. April, 1885.)***REMOVAL OF CAUSE—TIME OF REMOVAL—REPEAL OF REV. ST. § 639, CL. 2.**

The second clause of section 639 of the Revised Statutes was repealed by the act of 1875.

Motion to Remand.

J. D. McClelland, for plaintiff.

F. W. Angell, for defendant.

WHEELER, J. The removal of this cause from the state court being after a term at which it could have been tried, and therefore too late
v.24F, no.5—13

under the act of 1875, is sought to be sustained by the act of 1866, (subdivision 2 of section 639, Rev. St. U. S.) But that clause is held to be repealed by the act of 1875, (*Hyde v. Ruble*, 104 U. S. 407,) although it had been held otherwise previously, by various state and circuit courts.

Motion to remand granted.

DAVIES, Receiver, etc., v. MARINE NAT. BANK.

(Circuit Court, S. D. New York. April, 1885.)

REMOVAL OF CAUSE — ACTION AGAINST RECEIVER OF NATIONAL BANK—TIME OF REMOVAL.

A receiver of an insolvent bank commenced an action against the receiver of a national bank in the state court by summons, without any complaint setting out his cause of action, at a time early enough to make it triable at the April term of the court, if the pleading had been promptly put in; but the time of filing the complaint was extended to the April term, when plaintiff moved for an order for the examination of the officers of the national bank, to enable him to make complaint; and, in support of the motion, filed an affidavit stating that his cause of action arose out of the fact that the bank, of which plaintiff was receiver, had paid to defendant's bank illegal interest, and that by the statutes of the United States defendant became indebted to his bank for twice the amount so paid. If the examination had been had instantly, and a complaint been framed at once, the cause would not have been triable in due course until the May term, and at that term it was removed to the United States court. *Held*, that the cause was removable, and that the application for removal was made in time.

Motion to Remand.

William B. Hornblower, for plaintiff.

Charles W. Bangs, for defendant.

WHEELER, J. This suit appears to have been commenced in the state court by summons, without any declaration or complaint showing for what cause of action, at a time early enough to make it triable at the April term of that court, if the pleadings had been promptly put in. But the time of filing the complaint was extended until into the time of the April term. Then the plaintiff moved for an order for the examination of the officers of the defendant bank to enable him to make a complaint, and, in support of that motion, filed his affidavit setting forth what his cause of action was, as appears to be required in such proceedings. At that time, if the examination had been had instantly, and a complaint had been framed at once, the cause would not have been triable in due course until the May term of the state court, and at that term it was removed to this court. The affidavit stated that the cause of action arose out of the fact that the firm of which the plaintiff is receiver had paid to the defendant bank various sums of money as interest, in excess of the rate allowed by the laws of New York, and of that limited for the banks of the state

of New York, and that, by the provisions of the statutes of the United States, the defendant became indebted to the firm for twice the amount of the interest so paid. This motion to remand is made upon the grounds that the action does not appear to be one that is removable, and that the removal was too late. It is argued that the statement of the cause of action in the affidavit was for the purpose of the examination only, and that the complaint may be for some cause of action entirely different, and not arising under the laws of the United States at all; and that, as the case could have been tried at the April term, if the complaint and proceedings had been prompt, it was not removable after that term. *Pullman Palace Car Co. v. Speck*, 113 U. S. 84, S. C. 5 Sup. Ct. Rep. 374, is much relied upon in support of the latter proposition.

It is to be noticed that the statute under which the removal was had does not refer at all to the pleadings in the action for a guide. There is only to be a matter in dispute arising under the laws of the United States. The mode of bringing on the dispute, or of making its nature to appear, is left open. Act of March 3, 1875; Supp. Rev. St. 174, § 2. The plaintiff took such proceedings under the law of procedure of the state as required him to show forth his cause of action. When done as required, he had exhibited a cause of action arising obviously and confessedly under the laws of the United States as the matter in dispute. This has not been changed; and he does not now say that it could be changed, if he could be heard to say so at this stage. The cause, as made, appears to be clearly removable in character; and, from this statement of the case, it appears that the cause has not yet even progressed far enough so that it could be tried on its merits, of either law or fact, at any term. The defendant has not yet been called upon, or had any opportunity, to answer, or had anything to answer. A default could not be taken even so as to be followed by a judgment, for there is no declaration, or anything in the nature of one, on which to make up a judgment. This case appears to be outside of the principles of the case relied upon. *McLean v. Railway Co.* 17 Blatchf. 363.

Motion denied.

UNITED STATES *v.* ROSE.

(Circuit Court, D. California. June 23, 1885.)

1. PUBLIC LANDS—ACTION BY UNITED STATES TO ANNUL PATENT.

The United States has the same remedy in a court of equity, to set aside or annul a patent for land on the ground of fraud in procuring its issue, which an individual would have in regard to his own deed procured under similar circumstances; following *U. S. v. Minor*, 5 Sup. Ct. Rep. 836.

2. SAME—PROCEEDINGS BEFORE LAND-OFFICE—EFFECT OF JUDGMENTS AND DECREES.

The doctrine of the conclusiveness of judgments and decrees of courts as between those who are parties to the litigation, is not applicable to the United States in regard to the proceedings before the land-officers in granting patents for the public land.

Suit to Set Aside Patent.

J. M. Walling, for complainants.

Charles W. Kitts, (*Niles Searles* with him,) for defendant.

SAWYER, J. This is a suit in which, as in the case of *U. S. v. San Jacinto Tin Co.* 23 FED. REP. 279, upon an indemnity against costs given to the government by parties in interest, the indemnifying parties have been permitted to prosecute a suit in the name of the United States against the defendant, to set aside a United States patent. The grounds relied on for annulling the patent are that it was obtained upon fraudulent representations made to the register of the land-office, supported by perjury in the affidavits filed, stating the land to be non-mineral vacant land, when it is alleged to have been, in fact, known mineral land, and to have been in the actual possession of private parties, claiming and working it as mineral land, at the time of the entry in the land-office and of the issue of the patent. The fraud and perjury alleged constitute the grounds upon which it is sought to vacate the patent. In *U. S. v. White*, 9 Sawy. 125, although I entertained at the time grave doubts as to its applicability, I finally held, upon demurrer, that the case was governed by the principle established in *U. S. v. Flint*, 4 Sawy. 51-53, affirmed in 98 U. S. 61, and in *Vance v. Burbank*, 101 U. S. 519, and dismissed the bill.

I thought it better that the point should be settled by the supreme court for that, and all other contemplated cases, at that stage of the case. The value of the property turned out to be insufficient to give the supreme court jurisdiction. The question again arose in *U. S. v. Minor*, and in other cases, wherein the value was also insufficient to give the supreme court jurisdiction. And it was manifestly likely to arise in numerous other cases in this state. Still, being in doubt, and not fully satisfied as to the correctness of my former ruling, and the question being one of great importance, and certain to arise in a great number of other cases, I invited the district judge to sit with me, and, though not fully satisfied on the point, I adhered to my ruling in *White's*

Case. The district judge, though somewhat in doubt, taking a different view of the question, we divided in opinion, and, upon the request of the counsel for complainant, certified a division of opinion to the supreme court. Judgment was thereupon suspended in this and all other cases involving the same questions then pending until the point should be authoritatively settled in that case.

Towards the close of the last term, *Minor's Case* was decided by the supreme court, and distinguished from the cases upon which I had relied, and the views adopted in *White's* and *Minor's Cases* were overruled. The decision in *Minor's Case*, therefore, authoritatively settles in favor of complainant the main question presented by the demurrer, and relied on by defendant in this case.

Several questions are made as to the sufficiency of some of the material allegations of the bill. However it might be on special demurrer, I think, upon the whole, that they are sufficient upon a general demurrer, which only goes to a want of equity in the bill. Assuming the defendant to be correct upon all points discussed, upon the authority of *U. S. v. Minor*, 5 Sup. Ct. Rep. 836, the demurrer must be overruled, and leave given to answer to the bill on or before the rule-day in August; and it is so ordered.

DUNDEE MORTGAGE TRUST INVESTMENT Co. v. PARRISH, Chief of Police,
and others.

AMERICAN FREEHOLD LAND MORTGAGE Co., of London, v. GROVES,
Sheriff, etc., and others.

NEW ENGLAND MORTGAGE SECURITY Co. v. GROVES, Sheriff, etc., and
others.

(Circuit Court, D. Oregon. July 13, 1885.)

1. TAXATION—MORTGAGE TAX LAW OF 1862.

On the question of whether this act of the legislature conforms to the constitution of Oregon, this court follows the judgment of the supreme court of the state in *Mumford v. Sewell*, 11 Or. 67, and *Crawford v. Linn Co.* Id. 482; and on the question of conflict with the constitution of the United States, the ruling of this court in the *Dundee Mortgage Trust Investment Co. v. School-dist. No. 1*, 19 FED. REP. 359, and 21 FED. REP. 151, is followed.

2. SAME—AN ACT FOR RAISING REVENUE.

The mortgage tax law does not levy any tax or raise any revenue, but only provides that when a tax is levied or a revenue raised that mortgages shall contribute thereto as land.

3. SAME—UNEQUAL ASSESSMENT.

Where the law requires that mortgages shall be valued for taxation at their face value, and all lands at their "true cash value," and the assessor of a county willfully and uniformly values the mortgages on lands therein at their

face value, and the lands therein at only one-third of their cash value, such assessment is illegal, and the payment of the two-thirds of the tax thereby imposed on said mortgages may be enjoined.

4. SAME—TENDER OF PAYMENT OF TAX.

A suit to enjoin the collection of a tax cannot be maintained in the courts of the United States, unless it appears that the plaintiff has paid, or offered to pay, so much of said tax as he concedes to be due, or as may be shown that he ought to pay.

Suit to Enjoin Collection of a Tax.

John W. Whalley, W. D. Fenton, and Raleigh Scott, for plaintiffs, for whom also a written argument by *Thomas M. Cooley* was filed.

R. S. Strahan, John Burnett, James F. Watson, E. B. Watson, A. H. Tanner, H. Hurley, and William B. Gilbert, for the several defendants.

DEADY, J. These suits are brought by the plaintiffs, who are foreign corporations, to have the several defendants enjoined, as sheriffs of their respective counties, from collecting certain taxes levied by such counties upon sundry mortgages belonging to them, under the act of October 26, 1882, (Sess. Laws, 64,) commonly called "the mortgage tax law," by the sale of the same.

Motions for provisional injunctions on the bills and demurrers thereto, on the ground of the invalidity of the law and the illegality of the tax, were argued and submitted together. The bills are substantially the same, and from them it appears that the first two corporations are formed under the laws of Great Britain, the Dundee company having its principal office at the burg of Dundee, Scotland, and the London one at London, England; the third is formed under the laws of Connecticut, and has its principal office at Boston, Massachusetts,—and each is formed for the purpose of loaning money in this state on note and mortgage, which notes are made payable and kept without the state at such principal offices respectively; that the Dundee company, as assignee of two former companies of that place, and in its own right, is the owner of \$645,317.29 in value of such notes and mortgages, for money loaned in this state prior to the passage of said act, except \$90,000 thereof, upon which the various counties named in its bill levied a tax in 1884 amounting to \$9,927.32; that the Connecticut and London companies are the owners of such notes and mortgages, for money loaned in this state prior to the passage of said act, upon which a tax was levied by the several counties named, in their respective bills for the years 1883 and 1884, as follows: The Connecticut company, of the value of \$207,359 in 1883, and of the value of \$213,274 in 1884; and the London company of the value of \$112,368 in 1883, and of the value of \$114,027 in 1884,—upon the former of which a tax has been levied by said counties of \$7,414.63, and on the latter of \$3,914.77.

The objections made by the bills to the validity of the law and the legality of the tax may be summarized as follows: (1) The act is void because passed contrary to the constitution of the state in these par-

ticulars: (a) It is an act "for raising revenue," but originated in the senate instead of the house, contrary to section 18 of article 4 thereof; (b) it was not read by sections on three several days in each house, as required by section 19 of said article; (c) it involves double taxation, and distinguishes between secured and unsecured notes, and one and two county mortgages, and permits the indebtedness of residents to be deducted from their assessments, and forbids the same in the case of non-residents, contrary to section 1, article 9 thereof; (d) it provides that debts and mortgages may be sold for the non-payment of taxes the same as land; (e) it is a special or local law for the assessment and the location of taxes contrary to section 23 of said article 4; (f) the plaintiffs' mortgages are assessed in said counties at the nominal value of the debts secured thereby, while the other lands situated therein are assessed at but one-third of their value, thereby causing unequal and ununiform taxation of the same kind of property, contrary to section 1 of said article 9. (2) The act is void because in conflict with the constitution of the United States in these particulars: (a) It impairs the obligation of the contract whereby the mortgagor was to pay all taxes on the note and mortgage, and "in that it undertakes to change the *situs* of notes and mortgages" which, prior to said act, were owned and held elsewhere than in Oregon; (b) it impairs the negotiability of promissory notes secured by mortgage on real property; (c) the sale of the debt and mortgage involves the taking of private property without due process of law. (3) The assessment in Yamhill county is made, or about to be made, by the sheriff, and is therefore void.

The question of the validity of the act of 1882 was before the supreme court of the state in *Mumford v. Sewell*, 11 Or. 67, S. C. 4 Pac. Rep. 585, and *Crawford v. Linn Co.* Id. 482, S. C. 5 Pac. Rep. 738, and also before this court in *Dundee Mortgage Trust Investment Co. v. School-dist. No. 1*, 19 FED. REP. 359, and 21 FED. REP. 151.

In the cases decided in the state court it was held: (1) The state may tax a mortgage in the county where recorded without reference to the residence of the owner; (2) an act authorizing such a tax does not impair the obligation of any contract between the mortgagor and the mortgagee; (3) the original bill on file in the secretary of state's office shows that the act was read on three several days, as required by section 19 of article 4 of the state constitution, and that is sufficient; (4) the act is not in conflict with section 1 of article 9, nor section 32 of article 1 thereof, concerning uniformity and equality of taxation, and does not exempt two county mortgages from taxation, but leaves them subject thereto under previously existing laws; (5) the legislature may fix the *situs* of personal property for the purpose of taxation without violating the provision of the state constitution concerning equality of taxation; (6) the phrase "special law," as used in section 23 of article 4 of the state constitution is synonymous with "private law," and whether a law is public or private depends on the

subject-matter; and (7) the act in question is a public one, and therefore not a private or "special" one.

In the case before this court it was held: (1) Equity has jurisdiction to enjoin the collection of a tax levied under an invalid law, when necessary to prevent a multiplicity of suits; (2) the act in question does not impair the obligation of any contract between a mortgagor and a mortgagee concerning the payment of the tax on the mortgaged premises, or the debt secured thereby,—the state is no party to such contract, and its power to impose and collect taxes on persons, property, and business within its jurisdiction cannot be affected or restrained thereby; (3) the state may, so long as it does not trench on the constitution of the United States, tax all persons, property, and business within its jurisdiction or reach, and whether any person, property, or business is within its jurisdiction is not a federal question, and must be determined by the state for itself.

This court also held in that case that the act was void because in conflict with section 1 of article 9 of the state constitution, requiring uniformity in assessment for taxation; and also that the act was a special one, and therefore void, because in conflict with subdivision 10 of section 23 of article 4 thereof; and that the enforcement by the state of a tax levied under such an act is a deprivation of property without due process of law, contrary to section 1 of the fourteenth amendment of the constitution of the United States.

This court will follow the decisions of the state court touching the validity of this act when compared with the constitution of the state, and therefore all objections to the enforcement of this tax on that ground are out of place, and will be overruled without further consideration. *Greene v. Neal's Lessee*, 6 Pet. 291; *Stone v. Wisconsin*, 94 U. S. 181; *Town v. Perkins*, Id. 267; *Burgess v. Seligman*, 107 U. S. 33; S. C. 2 Sup. Ct. Rep. 10.

Conceding, then, that the judgments of the state court in *Mumford v. Sewell* and *Crawford v. Linn Co.*, so far as they declare the act to be in conformity with the state constitution, furnish the rule of decision in this case, and assuming that the rulings heretofore made by this court in *Dundee Mortgage Trust Investment Co. v. School-dist. No. 1.*, so far as the same relate to federal questions, will be followed, there are but two objections to the enforcement of the tax left for consideration: (1) The act is one for raising revenue, and therefore void because it did not originate in the house; and, (2), admitting the law to be valid, the tax is illegal because of the unlawful conduct of the persons who made the assessment of property in these counties, whereby the plaintiff's mortgages are valued and taxed at two-thirds more than the lands in the said counties.

In *Mumford v. Sewell*, *supra*, 71, Justice WALDO, speaking for the court, said: "Some of us have had considerable doubt whether the bill is not properly a bill for raising revenue, and therefore in violation of section 18 of article 4 of the state constitution because it

originated in the senate," and concludes that the point is not sufficiently clear, as then advised, to warrant the court in declaring the law unconstitutional on that ground. In *Crawford v. Linn Co.* the point does not seem to have been mooted.

But I am clear that this is not a bill for raising revenue. True, it provides that when revenue is to be raised mortgages shall contribute thereto as land; but it does not authorize or provide for levying any tax or raising a cent of revenue. A bill for raising revenue, or a "money bill," as it was technically called at common law, is a bill levying a tax on all or some of the persons, property, or business of the country for a public purpose; and the assessment, or listing and valuation of the polls or property preliminary thereto, and all laws regulating the same, are merely measures to secure what may be deemed a just or expedient basis for the levying of a tax or raising a revenue thereon. The constitution of the United States (section 7, art. 1) contains a provision on this subject similar to the one in the state constitution. It reads: "All bills for raising revenue shall originate in the house of representatives, but the senate may propose or concur with amendments, as on other bills." In speaking of this clause STORY, in his commentaries on the constitution, (section 880,) says: "And, indeed, the history of the origin of the power, already suggested, abundantly proves that it has been confined to bills to *levy taxes* in the strict sense of the words, and has not been understood to extend to bills for other purposes which may incidentally create revenue."

By the law in force at the passage of the act of 1882, personal property, including debts secured by mortgage, was listed to the owner in the county where he lived, and real property in the county in which it was situated, and both were required to be assessed for taxation at their "true cash value." Laws Or. 752. By the act of 1882 this proceeding was so far changed that a mortgage on real property, and the debt secured thereby, is assessed and taxed to the owner thereof in the county in which the land lies, and is required to be valued at the full amount of such debt, unless the property is not, in the judgment of the assessor, worth so much, in which case it must be assessed at its "real cash value."

The bills allege that the mortgages of the several plaintiffs are assessed by the assessors in the several counties at the nominal value of the debts, while the lands therein are only assessed at one-third of their value, thereby causing said lands to pay only one-third of the taxes that they ought to pay, and said mortgages two-thirds more than they ought to pay, which is not uniform but unequal taxation. Upon the strength of the case of *Cummings v. National Bank*, 101 U. S. 153, counsel for the plaintiffs insist that this discrimination against the plaintiffs' mortgages renders the assessment illegal. In that case the officers charged with the valuation of the property for taxation in Lucas county, where the bank was located, adopted a settled rule or

system by which real and ordinary personal property was estimated at one-third of its value, and moneyed capital at three-fifths of its value; and the state board of equalization increased the valuation of the bank shares to their full value. The bank paid one-third of the tax, and brought suit in the United States circuit court against the treasurer to enjoin the collection of the remainder. On consideration of the case in the supreme court, where it was taken by appeal, Mr. Justice MILLER said that "the bank has the same right under the laws and constitution of Ohio to be protected against unjust taxation that any citizen of the state has, and by virtue of its organization under the act of congress it can go into the courts of the United States to assert that right." The court held that the tax was illegal because the valuation of the property not only operated, but was intended to operate, unequally, in violation of the constitution of the state, which provided for the taxation of all property "by a uniform rule," "according to its true value in money;" and for this reason, and not, as claimed by counsel for defendants, that the unequal assessment was in violation of the act of congress relating to the taxation of the shares of the national banks, it granted the relief and allowed the injunction.

But counsel for the defendants also insist that these cases are not within the rule laid down in *Cummings v. National Bank*, because it does not appear that the unequal assessments here complained of were deliberately intended; and also, that before the plaintiffs can have relief on that ground, it must appear that there was some common design or fraudulent conspiracy among the assessors of these various counties to make an unequal and illegal assessment to the prejudice of the plaintiffs. But it is not necessary that there should be any actual conspiracy, or expressed design to disregard the law in this respect, on the part of the assessor to render an assessment illegal. Whenever the assessor of a district of a country as large as one of these counties uniformly estimates real property at only one-third of the value he places on mortgages, it is impossible to attribute the result to the infirmity of human judgment, and the only conclusion possible in the premises is that it was deliberately and willfully done in pursuance of a settled purpose or rule on his part; and where the same thing occurs in a number of counties in various parts of the state it is manifest that the action of the assessors is not only willful and deliberate, but that it is the result of general and well-understood custom to substitute this conventional value of real property for "the true cash" one which the statute requires. Indeed, the practice is so universal and well known that the court might take judicial notice of it, and safely assume that there is not an acre of land in Oregon that is valued for taxation at more than one-half its "true cash value," and that generally it is not valued at more than one-third of such value. Nor is it a sufficient answer to this to say, as counsel does, that land in Oregon does not yield an income of 6 per centum

to its owners on its assessed value; for the annual income of land depends not alone or largely on its value, but its use and management.

Probably two-thirds of the taxable land in Oregon is unused, except as wild pasture. The owners of this property do not expect any income from it, nor are they entitled to any. But they are getting the benefit, year by year, of its enhancement in value from the general growth and improvement of the country, to which they often contribute but very little. But it is not probable that the money of the country yields an income of more than 6 per centum. Certainly, if it is loaned at legal interest and pays the usual taxes it does not. Then, there is always a considerable portion of the capital lying idle, but still subject to taxation. And yet, in the nature of things, personal property, especially money, is more liable to escape taxation than land, and therefore it is that in a country governed largely by landowners, like Oregon, there is more or less undervaluation of land, upon the specious plea, more understood than expressed, that this is the only way to keep even with the moneyed capital of the country, and secure something like an equality of burdens between them. But, be this as it may, the state scheme of taxation is not based on the income derived from property, but its "true cash value," and therefore it is useless to institute a comparison between the productiveness of land and money.

Upon this phase of the case I am inclined to think the plaintiffs are entitled to relief against two-thirds of this tax; for, if the allegations in the bills are not sufficient as to the deliberation and uniformity with which the land was undervalued by the assessor, there is no doubt but what they can be truthfully made so.

But one of the grounds of demurrer to these bills is that, so far as this phase of the case is concerned, the plaintiffs are not entitled to relief in these suits, because it does not appear that they have paid or tendered so much of the tax as it appears they ought to pay. This objection is well taken. In *State Railroad Tax Cases*, 92 U. S. 617, the supreme court, in considering this question, say that, before a party can maintain a suit to enjoin the collection of a tax, he "must first pay what is conceded to be due, or what can be seen to be due on the face of the bill, or be shown by affidavits, whether conceded or not, before the preliminary injunction should be granted. The state is not to be thus tied up as to that which there is no contest by lumping it with that which is really contested. If the proper officer refuses to receive a part of the tax, it must be tendered, and tendered without the condition annexed of a receipt in full for all taxes assessed. * * * We lay it down with unanimity, as a rule to govern the courts of the United States in their action in such cases." To the same effect is the ruling in *National Bank v. Kimball*, 103 U. S. 783, and in *Huntington v. Palmer*, 7 Sawy. 355. The assessment of the plaintiffs' mortgages for 1884, in Yamhill county, is made by

the sheriff under section 3 of the old territorial act of January 26, 1855, (Laws Or. 769, § 98,) which authorized that officer to assess and collect a tax on any property which he might find had been omitted from the assessment roll, there being then no provision in the law for a board of equalization. It is suggested that this section was repealed by the act of October 25, 1870, (Sess. Laws, 52,) constituting the county judge, clerk, and assessor a board of equalization; and the suggestion is not without force.

It is also maintained that this section is void under the fourteenth amendment, because it deprives the party affected by the assessment of his property without due process of law, in that it makes the fiat of the sheriff, without notice to the owner, sufficient evidence that his property has been omitted from the assessment roll, and is of a certain value for the purpose of taxation, to which it is thereby made liable without any more to do. Under the rule, carefully laid down by the supreme court in *Davidson v. New Orleans*, 96 U. S. 104, I think this point is well taken. The listing and valuation of the property is done by the sheriff arbitrarily, and without notice to the owner, and there is no provision for correcting his action in either respect, but the collection of the tax follows immediately upon such listing and valuation, and by the sale of the property if necessary. Nor does section 4 of the same act, (Laws Or. 769, § 99,) which authorizes the sheriff, upon application of the party interested, to correct certain errors of the assessor, apply to an assessment made by the sheriff under section 3, nor would it be sufficient to make it due process of law if it did. The party aggrieved would still be without notice of the proceeding until the tax was demanded or the property seized for non-payment thereof. But this proceeding of the sheriff did not and does not excuse the plaintiffs from paying the proper tax on their mortgage in this county for the year 1884. Generally, it may be said that the levy and collection of a tax is a proceeding *in invitum*, to which the tax-payer is only passively a party. But when he becomes an actor in the matter, and seeks the aid of a court of equity to protect him against some threatened wrong in the premises, the situation is changed, and the rule applies: he who seeks equity must do equity; which in this case means that the plaintiffs must pay, or offer to pay, whatever they ought to have paid if they had been duly assessed in 1884, before they can invoke the aid of this court to enjoin the sheriff from collecting the tax upon this illegal assessment.

The motions for injunctions are disallowed, and the demurrer sustained.

MAYHEW and others v. WEST VIRGINIA OIL & OIL LAND CO. and others.*(Circuit Court, D. West Virginia. 1885.)*

RECEIVER—JUDICIAL SALE OF CORPORATE PROPERTY—CONTRACT—PURCHASE FOR CREDITORS—LIABILITY OF BIDDER FOR FAILURE TO MAKE PAYMENT—RESALE—CONFIRMATION OF SALE.

On motion (1) to confirm sale made to Charles H. Shattuck, March 17, 1885; (2) for a decree against J. N. Camden, personally, for the difference between his bid of \$173,050, October 1, 1884, and that of Shattuck, March 17, 1885, of \$119,100; (3) to set aside order entered November 3, 1884, canceling the bond of Thompson and Payne and Chancellor, and directing a return of the deposit of \$10,000.

WAITE, Chief Justice. The facts on which these motions depend are as follows:

Prior to the entry of the decree of November 17, 1883, an instrument in writing was prepared for the signatures of J. N. Camden, J. H. Carrington, W. H. Beach, A. C. Worth, Toledo National Bank, R. S. Blair, B. B. Valentine, and Heman Loomis, purporting to be a contract between these parties to protect their several interests in the suit, and to insure a sale of the property for an amount sufficient to pay the debts due to them respectively, in full. This paper was signed by Camden, Carrington, Worth, Valentine, and Blair before the decree was rendered. It has never been signed by the Toledo National Bank, nor by Beach. It provided in substance that at the sale under the decree Camden should purchase the property if it sold for a price less than the aggregate of all the claims adjudicated against it, with interest, costs, and expenses; that if such purchase should be made by him, the other parties would assign their respective claims under the decree, so that they might be used in payment of the purchase money; that Camden should execute and put on record a declaration of trust to the effect that he would hold and manage the property to the best advantage, without charge for his own time, and apply the rents, issues, and profits to the payment in full of the amount due on the decree in favor of Thompson, of which he (Camden) was the assignee, and divide the remainder monthly between Loomis and the other beneficiaries in the proportion of 40 per cent. to Loomis and 60 per cent. to the others, until their respective claims were fully satisfied; and that when the debts were all paid, Camden was to become the owner of the property free of all claims by the other parties, who were to execute the necessary releases for that purpose. Although this contract refers to the decree as already entered, in point of fact the entry was not made until after all the parties who have ever signed the contract had affixed their signatures.

The decree, as entered November 17, 1883, directed a sale of the property, and an application of the proceeds to the payment, with interest from that day, of the following debts:

1. William D. Thompson,	- - - - -	\$61,267 79
Richard A. Storrs,	- - - - -	47,663 29
Heman Loomis,	- - - - -	39,476 61
(All these debts have equal priority of lien.)		
2. James H. Carrington,	- - - - -	46,934 58
3. A. C. Worth,	- - - - -	2,650 08
4. W. H. Beach,	- - - - -	2,888 58
5. Toledo National Bank,	- - - - -	9,843 70
R. S. Blair,	- - - - -	593 16
(The debts due the bank and Blair having equal priority.)		

6. R. S. Blair,	-	-	-	-	-	592 66
7. Benjamin B. Valentine,	-	-	-	-	-	9,056 93
8. Heman Loomis,	-	-	-	-	-	49,111 16

The debt to Thompson had been assigned to and was owned by Camden at the time of the rendition of the decree.

At the time of the entry of the decree there was a large sum of money in the hands of the receiver applicable to the payment of the debts, and with the consent of Thompson (Camden) and Loomis, it was ordered that this be applied—*First*, to pay Storrs in full; and, with the assent of Loomis, *second*, to pay Thompson (Camden) in preference to him, (Loomis.) Under this order the following payments were made before May 1, 1884:

November 20, 1883.	To Storrs, in full,	-	-	-	\$47,687 12
	“ Camden,	-	-	-	\$27,190 93
January 2, 1884.	“ “	-	-	-	2,000 00
March 5, “	“ “	-	-	-	1,500 00
April 21, “	“ “	-	-	-	2,000 00
					<hr/> \$32,690 93

On the first day of May, 1884, the property was offered for sale under the decree by the commissioners appointed for that purpose. Camden was present at the sale, as were also the most of the creditors, either in person or by attorney. The president of the Toledo National Bank was there with the others, and if Camden had purchased the property under the contract, would have assigned the debt due the bank to be used in payment of the purchase money, upon the terms and conditions provided for in the contract. Beach had also executed an assignment of the debt due to him, and placed it in the hands of his attorney, who was present, to be delivered to Camden if he purchased under the contract. Camden did not, however, bid at all at this sale, and his reason for not bidding is given in his answer filed in this proceeding in these words:

“Respondent was advised and informed that the debt of Loomis was attacked in this honorable court, and that such proceedings were had that, by direction of the court as to the debt of said Loomis, the amount thereof should be paid into the registry of the said court, to await the determination of the proceedings in relation thereto, thus requiring a large sum of ready money to be paid for that purpose; and the said creditors not indicating any willingness to aid your respondent in raising said money, and this respondent, at the time said contract was entered into, not contracting or expecting to be called upon to advance any money upon his bid to purchase under said contract, the said contract not requiring him to do so, respondent was advised that it was not safe for him to bid unless he was prepared to pay at least the amount of the Loomis debt into court. Under this advice respondent declined or refrained from bidding at the first sale of the property, on the ground that he might incur a personal liability in bidding under the contract, if the amount of the Loomis debt was required to be paid into court to await indefinite litigation.”

All the creditors were desirous of having Camden make the purchase under the contract, and would have assigned their respective claims to him on the terms provided for, if he had so done. Of all this Camden was informed, and when he declined to buy, some of the other creditors joined together and ran the property up on the bidding to \$162,000. This was enough to protect the interests of all the creditors who were bidding; and when Charles H. Shattuck afterwards bid \$163,000, the property was struck off to him, no one offering more. Loomis was not among the creditors who joined in the bidding. Camden was present all the time, and made no objection to what was done. Shattuck, the purchaser, was the receiver appointed by the court to

collect the rents and profits of the property pending the suit. His purchase was made for the benefit of himself, Robert Garrett & Sons, and some others. The others were certain stockholders of the West Virginia Oil & Oil Land Company, who had joined together for that purpose.

Camden was a stockholder and president of the Camden Consolidated Oil Company, a West Virginia corporation, having its principal office in Parkersburg. He was also a stockholder in the Standard Oil Company. These two companies were, more or less, connected in business. At some time after this sale, but at what precise time does not appear from the evidence, Camden left this country on a visit to Europe. Before leaving, however, he employed Charles Marshall, of Baltimore,—said to have been at the time the general attorney of the Camden Consolidated Oil Company,—to resist a confirmation of the sale. The ground of his objection to the sale was, as he states in his answer, that as Shattuck was the receiver of the property sold, he stood in such a confidential and trust relation to the parties as to prevent him from buying.

On the tenth of June, Loomis filed exceptions to the report of sale of the commissioners, on the following grounds: (1) Inadequacy of price; (2) misleading and doubtful expressions of the court in the course of certain proceedings, the object of which were to set aside or modify the decree in favor of Loomis; (3) surprise; (4) incompetency of the receiver to buy; and (5) uncertainty of the amount to be paid Loomis from the proceeds of the sale. The exceptions were signed by B. M. Ambler, as counsel for Loomis. No other exceptions were taken to the confirmation of the sale. Before the motion for confirmation came on for hearing, the secretary of the Camden Consolidated Oil Company opened negotiations with William P. Thompson and Oliver H. Payne,—the one a vice-president and the other treasurer of the Standard Oil Company,—upon the subject of raising the bid of Shattuck, with a view of procuring an order for a resale of the property. Thompson was a stockholder in the Camden Consolidated Oil Company, and a brother-in-law of Camden. The motion for confirmation came on for hearing June 18th. When the exceptions as to the insufficiency of the price were under argument, Mr. Marshall or Mr. Ambler was asked by the court whether it was proposed to submit an offer of a larger sum for the property in case a resale should be ordered. To this question an affirmative answer was given, and within a short time thereafter a telegram, of which the following is a copy, was received by the clerk:

"CLEVELAND, 6-19, 1884.

"To L. B. Dellicker, Clerk U. S. Court: If there should be a resale of the West Virginia Oil and Oil Land Co. property, under decree of November 17, 1883, we bind ourselves to bid not less than \$173,000, and if knocked down to us, to pay therefor.

[Signed]

"W. P. THOMPSON.
"O. H. PAYNE."

About the same time, the secretary of the Camden Consolidated Oil Company got information from Thompson and Payne that such a telegram had been sent, and he thereupon instructed Mr. Marshall to present the offer to the court, which was done. The court thereupon announced its determination to set aside the sale and offer the property again, if Thompson and Payne would secure their offer by depositing \$10,000 in the registry of the court, and giving bond, with approved security, in the penal sum of \$250,000, conditioned to that effect. Thompson and Payne having, through their counsel, signified their willingness to comply with the terms proposed, the secretary of the Camden Consolidated Oil Company obtained from Mr. William N. Chancellor, of Parkersburg, a promise that he would sign the bond as surety. This being satisfactory to the parties, the counsel in the cause set about preparing

the form of an entry of the order to be made on the minutes. In doing this, some difference of opinion was found to exist as to what would be required of Thompson and Payne under their offer; those acting for Thompson and Payne claiming that it would be enough if they bid the amount offered the next time the property was put up for sale under the decree, while it was insisted on behalf of the creditors that they should be required to repeat their bid every time the property was offered, until a sale should be made and confirmed by the court. On application to the court for further instructions in this behalf, it was decided that the order should be of the character asked by the creditors. Thereupon the order was drawn up and assented to by the parties, and approved by the court, in the following form:

"This cause came on to be heard on the eighteenth and nineteenth days of the present month, upon the motion to confirm the sale made by J. B. Jackson and W. S. Cole, special commissioners under the decree passed and entered in this cause on the seventeenth day of November, 1883, and upon a petition filed herein by Heman Loomis, to set aside the sale of the property of the defendant company, made on the first day of May, 1884, and upon exceptions taken by the said Loomis to the report of said sale returned to the court by said special commissioners, and upon an application made by Wm. P. Thompson and Oliver H. Payne to have the sale set aside, and offering to bid at a resale of the property the sum of \$173,000, and was argued by counsel. Upon consideration whereof, it was, on the nineteenth day of June, (instant,) adjudged that all the objections and grounds of exceptions assigned by Heman Loomis against the confirmation of the said sale made by said special commissioners to Charles H. Shattuck, on May 1st, be overruled, except the first, and that the said first ground of exception would be sustained, provided that the said Wm. P. Thompson and Oliver H. Payne should, within ten days, enter into a bond, with approved security, in the penalty of \$250,000, payable to Lyman B. Dellicker, the clerk of this court, conditioned that at any future sale of said property that may be made by decree in this cause, the said Thompson and Payne, or some one for them, will bid the sum of \$173,000, and that they will comply with the terms of said decree of sale in case they shall become the purchasers of said property at the said sum of \$173,000; and provided further, that the said Thompson and Payne shall deposit in the registry of this court, within said ten days, the sum of \$10,000 in cash, as additional security for their compliance with the offer made by them, and that the said Loomis shall, within said ten days, refund the sum of \$143.65 paid by Lavinia H. Austin for advertising, and pay to the purchaser at said sale the sum of \$407.50, the same being the interest accruing upon the amount of the purchase money actually paid, from the day of sale to the date of this decree."

The form of the entry having been agreed upon, no further proceedings were had until June 30th, when there was presented to the court a bond in the penal sum of \$250,000, executed by Thompson and Payne as principals, and Chancellor as their surety, conditioned according to the order of the court, and a certified check of the Camden Consolidated Oil Company on the First National Bank of Parkersburg for \$10,000. At the same time the costs and interest specified in the order as agreed on were paid by the same company for Loomis. Thereupon, the order, which had been approved June 19th, was entered on the journal of the court, and the first sale was set aside and a resale ordered.

Before the bond was signed by Chancellor, the secretary of the Camden Consolidated Oil Company procured for him, from Thompson and Payne, their individual bond of indemnity to him against any liability he might incur thereby. The check for \$10,000 was at first deposited, by order of the court, in the Citizens' National Bank in Parkersburg, but afterwards it was withdrawn from that bank and deposited in the First National Bank, on interest, at the rate of four per centum per annum. At what precise time this change was made, or on whose application, does not appear. When all this was

done Camden was in Europe. He returned before September 30th, and on that day Loomis, through Mr. Ambler, his attorney, served on him (Camden) a notice to buy the property under the contract at the sale to take place the next day, and that unless he did buy, or run the property up to the required amount, he would hold him responsible therefor. It now appears, from a statement made by Camden to the court at the present hearing, that before this time an arrangement had been made between him and Loomis for a joint ownership of the property after the other creditors were paid. At what time this new arrangement was made was not stated, and the other creditors were not in any manner affected by it. The effect of it was to change the contract, as between Camden and Loomis, so that when the other creditors were paid out of the rents and profits, the property would be owned, two-thirds by Loomis and one-third by Camden.

The property was again offered for sale on the first of October, and Camden came to the place where the sale was to be made before the bidding began. After his arrival, he went to the auctioneer, who had been employed to cry the sale, and told him he would bid \$173,000 for the property as the agent of Thompson and Payne. The sale was then opened by the auctioneer, and this bid was cried for some little time. Camden then bid \$173,050. This bid was also cried, and, no one offering more, the property was struck off to Camden at that price. When he made the bid he did not state that he was acting for any one but himself, or that he was bidding under the contract, or that he expected to pay for the property otherwise than in money. After the sale was closed, the commissioners went with him to his office to get the money. On their arrival there, Camden produced the contract, and asked that it be accepted in lieu of money. This the commissioners declined to do, as their instructions were to sell for cash only. At this interview Camden did not intimate that, if the court declined to give effect to the contract, he would not pay the money; but, on the contrary, told the commissioners that, if required to do so, he would complete the payment in that way. He was, however, anxious to have the return of the commissioners show his offer of the contract in lieu of money, and not his offer of money, so that he might, if possible, secure a purchase under the contract. To this the commissioners did not object; and accordingly, in their return, after setting forth the sale, they state that "Camden did not and has not paid to your commissioners the sum of money so bid and offered by him for said property as aforesaid, or any part thereof; but when your commissioners required the cash from said Camden, pursuant to the terms of said sale, he tendered to us a paper purporting to be a copy of a contract," (here follows a general description of the contract before referred to.) "Said copy of the contract, with a paper thereto attached, signed by Heman Loomis, by B. M. Ambler, his attorney, bearing date September 30, 1884, is herewith filed. * * * Your commissioners declined to receive the said contract in payment, in whole or in part, of the purchase money so bid by said Camden for said property, or to accept anything in payment thereof except lawful money of the United States, and this the said Camden has not as yet paid."

Mr. J. B. Jackson, one of the commissioners, went to Wheeling after the sale was closed, and the next day, October 2d, Camden telegraphed him at that place, as follows:

"PARKERSBURG, October 2, 1884.

"To Gov. J. B. Jackson: Please see that my bid is reported as based solely on the contract presented in payment, without any qualification or conditions that would affect me personally on my bid.

J. N. CAMDEN."

Mr. Cole, the other commissioner, and who was one of the counsel for the other creditors, resided at Parkersburg, where Camden was, but no such communication was made to him.

The report of the sale was filed with the clerk on the fourth of October, and on the sixth of the same month Camden filed in court a petition setting up the contract, and the demand which had been made on him before the sale, and praying "that, the premises being considered, he may be allowed to apply the claims and debts adjudged by said decree in discharge of his liability for the purchase money; that his compliance with the terms of said contract may be considered and decreed a compliance with the terms of said sale; that the said contract may be received in discharge of his bid; that the sale be confirmed, and that a decree be made to your petitioner for the said property; and that the court will make such further order and decree, and grant such other general and further relief in the premises, as your honors may deem right, as in equity may be proper, and as in duty bound, etc., he will ever pray," etc.

This petition is signed by Mr. Caleb Boggiss, one of the attorneys of this court, as counsel for Camden. In the petition it is stated that Camden is "largely interested to have the contract performed and executed, and that he desires that it may be done." The manner in which he is interested does not appear, except in the contract, and no mention is made of any new arrangement with Loomis. To this petition answers have been filed by all the creditors, except Loomis, objecting to the relief asked by Camden.

On the fourteenth of October, Carrington, Worth, Beach, Blair, the Toledo National Bank, and Valentine filed exceptions to the report of the commissioners on the ground that the purchase money had not been paid, and "prayed that said report be recommitted to said commissioners, with directions that unless the said Camden do at once comply with the terms of sale by paying to said commissioners the sum of \$173,050, that said real estate and property may be resold at the risk and costs of the said Camden." Upon the filing of this petition the following order was made by the court: "And it appearing to the court that at the sale of said property on the first of October, 1884, held pursuant to said decree, J. N. Camden became the purchaser of said real estate and property for the sum of \$173,050, and that he has failed to comply with the terms of sale by paying said sum of money, or any part thereof, to said commissioners, or into the registry of this court, thereupon, on motion of the said defendants, Carrington, Beach, Worth, Blair, Toledo National Bank, and Valentine, a rule is awarded against the said J. N. Camden, returnable on the third day of November, 1884, to show cause, if any he can, why he should not pay to said commissioners, or into the registry of the court, the said sum of \$173,050, so bid by him for said property as aforesaid, or why said sale should not be set aside, and said real estate and property resold by said commissioners at the risk and costs of said Camden."

On the third of November the parties all appeared, either in person or by counsel, and, the court not being able to take up the matter at that time, the further hearing was postponed until December 2d. At that time Camden was represented by his counsel, Mr. Boggiss. The order postponing the hearing was made in the forenoon of that day. During the afternoon of the same day, Mr. Boggiss, who had been employed by the secretary of the Camden Consolidated Oil Company to act as attorney for Thompson and Payne, appeared in court and moved for a cancellation of their bond, and a return of their deposit of \$10,000, with the interest which had accrued thereon. Neither at that time nor at any time before had it been intimated to the court that if the prayer of the petition of Camden was not granted, he would not promptly pay the full amount of his bid in money. On the contrary, the recollection of the judge holding the court at the time is distinct that it was expressly stated, either in the forenoon or the afternoon, or both, that the bid of Camden was *bona fide*, and would be paid in money if required. Under these circumstances, as Camden was known to be able financially to pay the money, if an order to that effect was made, the following entry was directed by the court:

"This day came Wm. P. Thompson and Oliver H. Payne, and moved the court to release their surety, W. N. Chancellor, from the obligation of their bond in the penalty of \$250,000, dated the twenty-first of June, 1884, conditioned to bid at a future sale of the property, directed by a decree in this cause to be sold, the sum of \$173,000, and filed in this court in this cause on the twenty-third day of June, 1884, pursuant to a decree rendered therein on the nineteenth day of June, 1884, and also moved the court to make an order directing that the sum of \$10,000 deposited by them in court in this cause on the twenty-third day of June, 1884, pursuant to the last above-named decree, together with the accrued interest, be refunded to them. And it appearing to the court from the report of J. B. Jackson and W. L. Cole, filed in this cause on the fourth day of October, 1884, that said Thompson and Payne did in all respects comply with the conditions of said bond, and that at said sale a higher bid than they undertook to make was made by J. N. Camden, which has been reported and accepted by said commissioners, it is therefore ordered that the said bond be canceled, and the parties thereto released therefrom. And it is further ordered that the said sum of \$10,000 so deposited by them, together with the interest that has since accrued thereon, be refunded to the said Thompson and Payne out of the registry of the court. It is further ordered that L. B. Dellicker is entitled to receive a commission of one per cent. on the amount so received and refunded, to be taxed in the bill of costs; and the receiver is ordered to pay the same out of any funds in his hands."

When this order was made, none of the creditors interested in the proceeds of the sale were present in person or by attorney, and they had no notice that any such application was to be made. The next day a check was made by the clerk, and properly countersigned by the judge, on the First National Bank, to the order of the Camden Consolidated Oil Company, for \$10,098 28-100, the amount of the deposit, and the accrued interest thereon, and delivered to the secretary of the Camden Consolidated Oil Company, who gave a receipt therefor as follows:

"Received, Parkersburg, November 4, 1884, from L. B. Dellicker, clerk U. S. district court, the sum of ten thousand and ninety-eight 89-100 dollars, money deposited by Payne and Thompson in case of *Mayhew et al. vs. W. Va. O. & O. L. Co.*

CAMDEN CONSOLIDATED OIL CO.,

"L. A. COLE, Sec'y."

The clerk, however, required a receipt from Thompson and Payne, and this the secretary agreed to get. Afterwards he obtained and delivered to the clerk such an instrument, a copy of which is as follows:

"Received of L. B. Dellicker, clerk of the circuit court of the United States for the district of West Virginia, ten thousand and ninety-eight 89-100 dollars, being in full for \$10,000, with accumulated interest, heretofore deposited by William P. Thompson and O. H. Payne, under an order of said court, in the case of *F. L. B. Mayhew & Co. v. The West Virginia Oil & Oil Land Company and others*, passed on the nineteenth day of June, 1884, and which is now, with its accumulated interest, directed to be returned to the said W. P. Thompson and O. H. Payne by an order of the said court in the same cause, passed on the third day of November, 1884.

"\$10,098.89.

[Signed]

W. P. THOMPSON.
"O. H. PAYNE."

As soon as the order for the cancellation of the bond was entered, the secretary of the Camden Consolidated Oil Company took a copy and presented it to Chancellor, who thereupon surrendered to him the indemnity bond of Thompson and Payne. This bond the secretary afterwards returned to Thompson and Payne. In all these transactions Thompson and Payne were represented by the secretary of the Camden Consolidated Oil Company, and they never at any time appeared in person.

On the twenty-first of November, Carrington, Worth, the Toledo National Bank, Valentine, and Blair, having heard of the order canceling the bond and surrendering the deposit, filed a petition to have that order set aside, and on the second of December the court made an order in reference thereto, as follows: "This day came James H. Carrington, A. C. Worth, William H. Beach, the Toledo National Bank, Benjamin B. Valentine, and Robert S. Blair, by W. C. Cole, their attorney, and moved the court to set aside the order made in this cause on the third day of November, 1884, returning to Oliver H. Payne and William P. Thompson the ten thousand dollars heretofore deposited by them in the registry of this court, and canceling their bond in the penalty of \$250,000, with Wm. N. Chancellor as security, according to the prayer of their petition filed in this cause; and it appearing that notice of this motion and of the filing of said petition has been given to the said Oliver H. Payne, William P. Thompson, and William N. Chancellor, it is ordered that this motion be placed on the docket, and the consideration thereof is continued until a future day of this court." This petition was filed and the entry thereon made during the term in which the order of cancellation was granted, but the matter was not disposed of before the adjournment. It therefore went over to the next term, which is the present term, as unfinished business.

On the twenty-second day of January, 1885, and during the present term, the motions connected with the sale of October 1, 1884, all came on for hearing, and the decision in reference thereto appears in the following order which was then made: "This cause came on to be heard at the present term upon the report of J. B. Jackson and W. L. Cole, commissioners, heretofore appointed to make sale of the property mentioned in this cause, filed on the fourth day of October, 1884, whereby it appears that J. N. Camden bid the sum of \$173,050 for said property, when it was offered for sale by said commissioners at public auction, on the first day of October, 1884, pursuant to a former decree of this court passed in this cause, and the said commissioners accepted the bid of said Camden, but that he has not complied with the terms of sale by paying to said commissioners the amount of said bid, or any part thereof. Upon consideration of the said report, and the exceptions filed thereto by several parties to this suit, and the rule heretofore awarded against said Camden to show cause why said property should not be resold at his cost and risk, and the petition of said Camden treated and considered as his answer to said rule, and the answers to said petition filed by the exceptors to said report, and the arguments of counsel for said Camden and said exceptors, and the said Camden still failing to comply with the terms of said sale by paying the amount of his said bid in cash, it is this twenty-second day of January, 1885, considered and ordered by the court that said petition and answer of said Camden is not a defense to said rule. It is further ordered that the exceptions to said report be and the same are hereby sustained, and the said sale is set aside, and the said commissioners will proceed at once to advertise and resell said property in accordance with the terms and provisions of said former decree passed in this cause on the seventeenth day of November, 1883, for cash, which sale will be made at the costs of said Camden. And if the said property should be sold for a less sum than \$173,050, the said bid of the said Camden, the court reserves, for future determination in this cause, the question whether the said Camden will be required to pay the deficiency."

Under this order the property was again offered for sale on the seventeenth of March, and sold to Charles H. Shattuck for \$119,100, he being the highest and best bidder. The purchase money was paid at the time of the sale, and is now in court. After this sale was reported to the court, the Toledo National Bank, Valentine, and Blair filed their petition asking that, before the sale should be confirmed, the court would, if necessary, modify its order of January 22d, so as to hold Camden on his bid, or for the deficiency between his bid and that of Shattuck, and to require Camden to take the property at his bid,

and, if he failed to do so, to confirm the sale to Shattuck, unless Thompson, Payne, and Chancellor elected to take and pay for the property at their bid of \$173,000. The same parties also filed exceptions to the report, the object of which was to secure the same action which was asked for in the petition. Camden filed: (1) A motion to strike this petition from the files; and (2) an answer without prejudice to this motion. Loomis has also filed a petition to the same general effect, and with substantially the same prayer. In this petition the following averment is made: "11. The commissioners offered said property again on the seventeenth day of March, 1885, at which time some arrangement had been made by which the interests of the Standard Oil Company and the parties represented by Receiver Shattuck had been settled upon a basis not known to your petitioner, under which the property was to be bought at the lowest figure at which it could be got. And Mr. Robert Garrett, whom Mr. Shattuck formerly, as now, represented, in part at least, and who had been the real party on the first bid of \$163,000, had some tacit or express, direct or indirect, understanding with Mr. Camden and his friends, whereby the property should be bought for a low figure, and without competition between them. And the said Camden now desires this sale to be confirmed at \$119,100, and pretends that he is not liable on his bid of \$173,050."

To this Camden answered as follows: "Respondent denies that any such arrangements were entered into as set out in charge 11 of said petition, but refers to his answer hereinbefore referred to, and relies upon the same as his answers to this charge, in so far as said answer is responsive thereto." The answer "hereinbefore referred to" is that filed to the petition of the other creditors, and the part of it which is responsive to the allegation of Loomis is as follows: "Respondent admits that the property being large and valuable, and the probable amount for which it would sell being large, that the sale being for cash would be more than any one individual would be willing to raise and invest in that character of property; and that certain persons, some of whom are named in the petition, did agree to join in the purchase of said property; and, if the property was so purchased by them, that they would form a corporation to own and work said property. Respondent denies that there was any combination or intention on his part to beat down the price of said property, or to procure the same for less than its fair cash value. On the contrary thereof, said arrangement was entered into *bona fide* to compete for the purchase of the said property, and to bid for the same to the fair value thereof; and respondent states, as his opinion and belief, that without such an arrangement the property would not have brought as much as it did at that sale. Respondent avers that none of parties were interested in any of the liens upon said property except the Thompson debt, represented by himself; that many of the other lien creditors were present at said sale, as he is informed, and that others were present by counsel; that the sale was fair and open, and ample opportunity afforded to all interested to bid for the same; and to the best of his information, from the present condition and character of the property, the same was sold for all it would bring, and more than it would now probably bring upon another resale."

Since the first day of May, 1884, there has been paid to Camden by the receiver the following sums, to apply on his claim as assignee of Thompson:

January 3, 1885,	-	-	-	-	-	-	\$2,000 00
January 30, 1885,	-	-	-	-	-	-	7,000 00
February 27, 1885,	-	-	-	-	-	-	1,500 00
March 16, 1885,	-	-	-	-	-	-	809 07

About these facts there is little if any dispute, and I have no hesitation in holding that Camden, by his purchase at the sale of October 1, 1884, became personally bound for the payment of the price

in money or its equivalent. The bid of Thompson and Payne must be taken to have been *bona fide*, for they were under bonds to make it. When Camden bid over them he gave no notice that he expected to pay otherwise than in money. He does not pretend that he had then or now any assignment of the claims payable out of the purchase money except that of Thompson, and perhaps that of Loomis, unless the alleged contract was sufficient of itself for that purpose. This contract was not signed by all the parties named in it, and there is nothing to indicate that any were to be bound until the execution by all was complete.

When the property was first put up for sale Camden was as much bound by the contract as he ever has been, but he then designedly refrained from bidding, and allowed a purchaser to buy at a price far below what, if the contract was in force, he should have offered. This made it necessary for the other creditors to resort to other means for the protection of their interests. And some of them did so. In this way a sale was secured for an amount in cash sufficient to pay all in full except Loomis. Camden afterwards saw fit to resist the confirmation of this sale; and for that purpose he joined with Loomis. All of the other creditors were in favor of the confirmation. In the exceptions, which were filed in the name of Loomis, no mention was made of the contract, and it was not intimated at the hearing, in any way, that the purpose of the contestants was to give Camden another opportunity to buy under the contract. All parties, so far as appearances were concerned, treated the contract as no longer an element in the case. The sale was finally set aside because of inadequacy of price, which was shown by an advance cash bid from other responsible parties. Camden now claims, in his answers to the petitions filed against him, that the decree of November 17, 1883, was entered up by consent of parties in a different form from what it would have been were it not for the contract; but there is no proof of that fact, and he himself does not state what these changes were. So far as appears from the face of the decree, the only consents were those of Thompson (Camden) and Loomis, that Storrs should be paid first from the money in the hands of the receiver, instead of *pro rata* with them; and that of Loomis, that Thompson (Camden) should be next paid in full before anything was distributed to him. But by the terms of the contract Thompson (Camden) was to be paid in full from the earnings of the property before Loomis was entitled to anything. I am unable to see how Camden has lost anything by his consent to the decree.

In his answer Camden states as his excuse for not bidding at the first sale that some uncertainty then existed as to his right to use the Loomis debt as money to pay for the purchase; but the same difficulty existed when he bid in October. No change had been made as to that part of the case between the first sale and the second to relieve Camden from embarrassment in this particular. All he says on that

subject in his answer is that "the proceedings attacking the debt or Loomis were dismissed or so modified by the opinion or action of the court in entering decrees ordering a resale under said former decree, that respondent was advised and believed that the obstacles to his bidding under said contract were substantially removed." He fails entirely to state what the modifications were, and I can discover nothing in the order to which such an effect can be given. Under the circumstances, it is clear to my mind that Camden could not use the alleged contract in lieu of money to pay his bid. The claims of the different creditors had not been assigned to him, and he was in no condition to call on a court of equity to require the creditors to make such assignments. As the contract was not available to him for the purposes of payment, it was incumbent upon him to pay in money.

The liability of Camden originally for the payment of his bid in money on the confirmation of the sale having thus been established, the next inquiry is whether, in the proceedings since his bid, anything has been done to release him from that liability. In his answers he states his claim as to this part of the case in these words:

"Respondent is advised by counsel that the court having refused to confirm said sale at the bid so made by the respondent, and in entering a decree ordering a resale of said property, that all liability on the part of respondent for such deficiency was determined, and respondent discharged therefrom; that respondent was not liable as purchaser at sale until the court had accepted the bid of respondent and confirmed the sale absolutely."

And in another place:

"Respondent, however, submits that by said decree of resale he was discharged from further liability upon his bid of \$178,050; there being no acceptance of said bid by the court, and a confirmation of said sale, which, respondent is advised, were necessary to charge him under said bid."

It is true, as was contended in argument, that in chancery a bidder at a sale by a master, under a decree of court, is not considered a purchaser until the report of sale is confirmed; and that he cannot be compelled to complete his purchase until the confirmation of the report; that is, until his bid has been in some form accepted by the court, as the court stands in the place of a vendor, using the master to receive and report the bids. *Sugd. Vend. & Pur.* (3d Lond. Ed.) 38, 39; (1st Amer. Ed. 33.) Under the old English practice an order *nisi* was first entered as of course, and this was afterwards made absolute, also of course, unless cause was shown to the contrary. The purpose of the whole proceeding was to show that the court accepted the bid and made the sale. *Sugd. Vend. & Pur.* 39, *supra*.

In the present case the commissioners reported the sale in due form, and Camden asked the court to take his alleged contract in lieu of money and confirm the report. The creditors in interest adverse to his petition asked that he be required to pay in money, and for a confirmation on that basis. No one else appeared to resist. There was no dispute about the regularity of the proceedings at the sale,

or the sufficiency of the price, or the title to the property. The difficulty was not as to the sale, but as to how it should be paid for. Camden did not ask to be released from his purchase because of a misunderstanding as to his rights, but only that he might be allowed to pay the price in a particular way. The creditors did not ask to have the sale set aside if the money was paid, and to get the money they obtained a rule on Camden. The defense of Camden to this rule was, not that he could not be required to pay because the sale had not been confirmed, but in effect that as, by the terms of a contract he claimed to have with the creditors, he would be entitled to the money when paid in, the contract should be taken in lieu of the money, to avoid unnecessary circuitry of action.

When, therefore, under the circumstances, the court decided that Camden must pay in money, it in effect confirmed the report of sale, and required him to act accordingly. The order which was entered at the time may not have been expressed with precise technical accuracy, but its meaning is clear; the sale was confirmed on the basis of a bid for cash, no other having been made, and as the money had not been paid, a resale was ordered at the costs of Camden, leaving the question open whether it should be at his risk. It is true that in the order this language occurs: "It is further ordered that the exceptions to said report and the same are hereby sustained, and the sale set aside, and the said commissioners will proceed at once to advertise and resell," etc. But this, when taken in connection with the rest of the order, was clearly intended only as a provision to relieve the subsequent sale from embarrassment by reason of the former one to Camden, and not to discharge him from liability for a deficiency between his own bid and any that might be made and accepted by the court under the resale which was ordered. Camden had full notice that the purpose of the court was to charge him for a deficiency, if upon further inquiry it should be found he was liable. No room whatever was left for a misunderstanding on that subject, and the order of January 22d was made during the present term, and is still under the control of the court, except so far as the rights of third persons have intervened. The answers of Camden satisfy me that he is interested directly or indirectly in the present purchase by Shattuck. For this reason I am not inclined to consider Shattuck as having an interest which will interfere with the right of the court to make such modification of that order as may now seem to be just. I am also satisfied that the order of November 3, 1884, canceling the bond of Thompson, Payne, and Chancellor, was made under a misapprehension of the facts, and ought to be vacated. It is therefore ordered that Camden elect here and now whether he will take the property at his bid of \$173,050 and pay for it in money. If he will, and he makes his payment within a reasonable time, to be fixed if required, the sale to Shattuck will be set aside, and that to him on the first of October, 1884, carried into effect by proper order. If Camden does

not elect to take the property, it will be ordered that he now, as the agent who made the bid for Thompson and Payne on the first October, elect for them whether they will take the property at \$173,000, and pay for it. If he does so elect, a reasonable time will be given them to make the payment, and the proper orders made to perfect a transfer of the property to them under their bid of October 1, 1884. Should neither Camden nor Thompson and Payne elect to take the property under these orders, the sale to Shattuck will be confirmed, and a personal decree rendered against Camden for the deficiency. The order of November 3, 1884, canceling the bond of Thompson, Payne and Chancellor, will also be vacated.

BOND, J., concurs.

*In re WABASH R. Co.*¹

(Circuit Court, W. D. Missouri. June, 1885.)

RECEIVER—INTERFERENCE OF STRIKERS—CONTEMPT—PUNISHMENT.

A writer, signing himself chairman, sent the following notice to the various foremen of the shops of the Wabash Railway Company during a strike organized to resist a reduction of wages, the railroad being at that time in the hands of a receiver appointed by the United States circuit court:

"OFFICE OF LOCAL COMMITTEE, June 17, 1885.

"——, Foreman: You are requested to stay away from the shop until the present difficulty is settled. Your compliance with this will command the protection of the Wabash employes. But in no case are you to consider this an intimidation."

Held, that this was an unlawful interference with the management of the road by the receiver, and a contempt of court, for which the writer should be punished.

Beebe & Randolph, for the railroad company.

Hall & Rogers, for defendants.

KREKEL, J. C. M. Berry and Thomas Selby, employes of the Wabash Railroad, are before me charged with contempt of court in interfering with the management and operation of the road. The special charge is that on the seventeenth day of June, 1885, they took possession of the round-house at Moberly, within this district, and by threats and intimidation caused employes of the company to quit work, and afterwards prevented them from working for the company, thus interfering with the operation of the road. In their return the defendants state that, on the morning of the seventeenth of June, they, with other employes of the road, at the usual hour of the day, went

¹ Reported by Robertson Howard, Esq., of the St. Paul bar.

to work, but found a notice posted on the shop doors which reads as follows:

"MOBERLY, Mo., June 16, 1885.

"To Employes: By authority of the general manager, A. A. Talmadge, I am instructed to close the shops at Moberly indefinitely. I expect further instructions in the matter to-morrow.
W. J. BROKAN, Div. M. M."

That the defendants thereupon went into the round-house to notify the men there employed of a meeting to be held by the employes that morning at 8 o'clock, and that such of the men as they did not see Mr. Arthur, in charge of the round-house, promised to notify; that they came to and went from the round-house in an orderly manner, and without any threat or intimidation.

The testimony before the court shows that, early in the spring of 1885, a strike was inaugurated in Moberly by the employes of the Wabash Railroad, resisting by force and intimidation a reduction of wages attempted to be made by the managers, in which the strikers accomplished their object, namely, to be reinstated at their former wages. On this occasion the managers of the road, in a circular addressed to Shaw, Coughlin, and Berry, as a committee of the employes, among other things, said:

"That in case it becomes necessary to make further reduction we will give the chairman of your committee three days' notice; and the committee shall decide whether there shall be a reduction of force or of hours worked, or an entire suspension of everything, excepting running repairs and inspection."

It appears that afterwards a correspondence regarding reduction of time or wages (it does not appear which) was had between Manager Talmadge and Berry, as chairman of the Moberly committee, in the course of which Berry suggested the reduction of wages of the officers rather than of the employes. Thus matters stood on the sixteenth day of June, when a suspension of the shop-work (not of repairs) was ordered by the managers, and the former strikers, among them these defendants, inaugurated the combination or strike hereinafter spoken of. Three written notices were issued on June 17, 1885, by C. M. Berry, as chairman of the employes, of which the following are copies:

"OFFICE OF LOCAL COMMITTEE, June 17, 1885.

"S. M. Nugent, For. of Lathes: You are requested to stay away from the shop until the present difficulty is settled. Your compliance with this will command the protection of the Wabash employes. But in no case are you to consider this an intimidation.

[Signed]

"C. M. BERRY, Chairman."

"MOBERLY, Mo., June.

"OFFICE OF LOCAL COM.

"To W. P. Sie: You are requested to stay away from the shops until this matter is settled. By your compliance with this request your action will be sustained by the Wabash employes to the utmost of their power. But in no case are you to consider this an intimidation. Having sent a similar notice to other foremen, the committee consider it wise to give you an opportunity to establish yourself for or against us.
C. M. BERRY, Chairman."

"OFFICE OF LOCAL COMMITTEE, June 17, 1885.

"*Mr. Arthur, Foreman R. H.*—DEAR SIR: All other foremen have been informed that it is our wish that they should remain away from the shops until the present difficulty is settled, but in your case you are justified in remaining while passenger trains are running; but we request you to confine your work to passenger engines only. But in no case are you to consider this an intimidation.
C. M. BERRY, Chairman."

The testimony further shows that the men engaged in the round-house on repairs quit work and went to the meeting called by Berry, chairman; and that of the 35 men employed in the round-house, the number who returned to their work at no time exceeded 15,—a number insufficient to carry on the necessary work of repairs. A number of the men who have gone to work swear that they have not been molested or interfered with. One of the locomotive engineers, however, testifies that a notice was given him to quit work, which he refused to obey; that, thereupon, three partially masked men approached him on his engine, and used violent and threatening language. Selby, one of the defendants, testifies that he went to the round-house, at the suggestion of Berry, to notify the men of the meeting. Witnesses differ as to the language used by Berry and Selby, while talking to Arthur in the round-house, about the men attending the meeting, but sufficient can be gathered from it to show that, while they undertook to avoid the law, yet they intended to leave the impression that the round-house employes had better attend the meeting. Upon this (a general outline of the facts) the question arises, ought the defendants to be punished for contempt? It will be recollected that the property of the Wabash Railroad is in the hands of the court, and that receivers have been appointed by it for its management. The owners have been deprived of possession and control, and with it the ability to protect it. The court, through its officers, has undertaken to do the ordinary business of the company, the running of regular, speedy, and safe trains for the conveyance of mails, passengers, and merchandise; and, moreover, the management of the property so as to make it valuable to those who have claims against it. All these great public and private interests demand that no unnecessary interferences with the property and its management should take place. If any one has grievances, be they employes or others, they can have easy and ready redress for their actual or supposed wrongs by bringing them to the attention of the court. Both receivers and managers are subject to its control. The court will not permit its officers to wrong any one, and is always ready to redress grievances. Such a thing as taking the law into their own hands, be they employes of the company or officers of the court, will not be tolerated. Stress has been laid, in the argument for defendants, upon the promise made in the circular issued by the managers during the early strike, that notice should be given to the chairman of the committee of the employes of any intended reduction, and that the committee should be consulted

about any reduction or suspension. These promises, heretofore more fully set out, though not applicable here, were well calculated to mislead, and no doubt had their influence in the proceedings afterwards had by the committee and strikers. The wholesome law of the state of Missouri, requiring companies to give 30 days' notice to employes before reducing their wages, which went into effect on the twenty-third day of June, has no application, because not in force when these occurrences took place. The provisions of this law no doubt emanated from the same sense of justice which induced the promise of the managers to give notice of any reduction, in the circular spoken of. It moreover indicates the true source where the remedy for grievances of the kind under consideration is to be sought. Differences between employers and employes, if not settled by compromise, must be settled by law and the courts. The community at large cannot afford to tolerate conflicts, from which outside and innocent parties must suffer. Courts do not interfere between employer and employes, except to declare what the rights of the parties are, and to keep order. Men may work or cease working as they choose, provided they violate no contract. They may combine and peaceably seek to forward their interest in any manner, provided they do no violence to others' rights, or commit no violation of law.

Did these defendants, by what they did, interfere with the rights of others? The court (in this case) had a right to operate the railroad without molestation of anybody. Indeed, as shown, was bound in law and justice to do so. The defendants, and specially Berry, the recognized leader of the strikers, did interfere in the management of the road. To make this plain, it is only necessary to refer to his notices. What would we say of one signing himself "Chairman" who, in the ordinary transactions of life, would give notice to a foreman in a shop to remain away from his work, and assure him that a compliance with the request would command the protection of a set of men who had combined to resist being discharged from work? What would we say of a man signing himself "Chairman" of an organized body who would write to an employe of a shop to stay away from his work, and that by compliance he would be sustained to the utmost by the body which he represented; that the committee considered it wise to give him an opportunity to establish himself for or against the combination? What would be thought of a man who signs himself "Chairman" of an organized body writing to an employe in a shop that he might remain in it to do a particular kind of work, but to confine himself to work designated by the writer? Such things occurring in ordinary life transactions, no one of common sense would doubt that such acts were an interference. The implied threats contained in the notices would justify the placing of the perpetrators under peace-bonds, and if consequences followed, such as in this case, the perpetrator becomes further amenable to the law. The statement in all of these notices that they are not to be taken as intimidations go to show beyond a

doubt that the writer knew he was violating the law, and by this subterfuge sought to escape its penalties. The defendant Selby is shown by the testimony to be an anxious and active helper, who knew very well what he was doing. He kept nearer within the bounds of the law than his co-defendant Berry. In view of the fact that the promises made in the circular of the managers, heretofore spoken of, may have induced the strikers to again try improper and illegal means, the sentence of the court is that Berry be confined for two, and Selby for one, month in the county jail of Jackson county, reserving the right to add to this sentence, if deemed necessary, peace-bonds in the sum of \$500 each, to run for one year.

FIRST NAT. BANK OF WORCESTER, MASSACHUSETTS, v. LOCK-STITCH FENCE Co. and others.

CENTRAL NAT. BANK OF MASSACHUSETTS v. SAME.

(Circuit Court, N. D. Illinois. May, 1885.)

1. PROMISSORY NOTES—LIABILITY OF INDORSER AT TIME OF EXECUTION AND BEFORE DELIVERY—NOTE AS EVIDENCE—RULE IN UNITED STATES COURTS—ILLINOIS STATUTE.

A third party who places his name upon the back of a negotiable promissory note at the time of its execution by the maker, and before its delivery to the payee, will be liable as a joint maker, and the note itself, with the indorsement thereon, is *prima facie* evidence of such liability. *Good v. Martin*, 95 U. S. 90, followed.

2. SAME—EFFECT OF DECISIONS OF STATE COURT.

The question of the liability of such a party is one of general commercial law, and the decisions of the courts of the state in which the note is executed and made payable are not necessarily controlling in the decision thereof by a United States court.

3. SAME—EVIDENCE.

The evidence in this case held not to overcome or change the *prima facie* case made by the introduction of the note, and judgment entered for plaintiff against all of the defendants as jointly liable upon the notes in suit.

These were two suits upon promissory notes, one for \$2,121, and the other for \$1,123.59, both dated January 1, 1884, due 12 months after date, and payable to the order of Washburn & Moen Manufacturing Company, at the First National Bank of Joliet, Illinois. The plaintiff in each case is a banking corporation, organized under the laws of the United States, and located in Massachusetts. The defendants are citizens of Illinois, the defendant Lock-Stitch Fence Company being a corporation, having its principal office and place of business at Joliet. The declaration in each case contained a single count, in which the defendants were charged as joint makers of the note set out in the declaration, and as such jointly liable to the plain-

tiffs thereon. To each declaration there was originally a plea of the general issue. Amended pleas were subsequently filed, in which it was averred that the defendants were not and never were jointly liable in respect to the several supposed causes of action in the declaration mentioned, or any or either of them, which pleas were duly verified.

It is provided by section 36 of the practice act of Illinois (chapter 110, Cothran's Annotated Ed. 1883, Rev. St. Ill.) that "in actions upon contracts, express or implied, against two or more defendants as partners or joint obligors or payors, whether so alleged or not, proof of the joint liability or partnership of the defendants * * * shall not, in the first instance, be required to entitle the plaintiff to judgment, unless such proof shall be rendered necessary by pleading in abatement, or unless the defendant shall file a plea in bar denying the partnership or joint liability, or the execution of the instrument sued upon, verified by affidavit." The notes in suit were executed and were payable in Illinois. On the face of each note appeared the signature of the defendant Lock-Stich Fence Company, by L. E. Dillman, treasurer, as the maker thereof; and on the back of each were the following indorsements in the following order: L. E. Dillman, A. H. Shreffler, A. N. Kleinfelter, A. Dillman, Washburn & Moen Manufacturing Co., P. L. Moen, Treasurer.

These cases came on for trial together, before the court and jury, and the plaintiff in each case, in the first instance, offered in evidence the notes sued on, with the indorsements thereon in the order stated. Objection was made to the introduction of the notes in evidence unless they should be supplemented by affirmative proof that the defendants were joint makers, it being contended by counsel for the defendants that the notes themselves were not to any extent evidence of joint makership. The court admitted the notes in evidence, but without then passing upon the question of their sufficiency as proof of the defendants' alleged joint liability. The plaintiff then called as a witness the defendant Andrew Dillman, by whom it was shown that on January 1, 1884, all the defendant indorsers were stockholders of the Lock-Stich Fence Company; that the witness was president, that L. E. Dillman was treasurer, that A. H. Shreffler was vice-president, and that A. N. Kleinfelter was secretary, of the company. The witness also testified that these parties held all the stock of the company, and constituted its officers at the time of the execution of the notes. This testimony was all objected to, and taken subject to the objection.

On cross-examination of the witness, it was shown that the debt for which the notes were given was one owing by the Lock-Stich Fence Company to the payee of the notes. Upon the conclusion of the examination of this witness, the plaintiffs rested, and the defendants then moved the court that the jury be instructed to render a verdict in their favor, on the ground that the defendants were not

shown to have been joint makers of the notes. The court reserved its ruling on this motion for the time being; and it appearing that the cases really involved no controverted issues of fact, but that their determination turned upon the view which the court should take of the legal principles invoked upon the question of liability, it was stipulated by the parties that the trial should proceed before the court, without the intervention of a jury, with the understanding that the defendants should have the same benefit of the motion for a peremptory instruction to the jury in their favor that they would have if a jury were still present. Certain of the defendants were thereupon called as witnesses, and testified that at the time these notes were given the Lock-Stitch Fence Company was solvent; that the notes were given in part settlement of an indebtedness then owing by the company to the Washburn & Moen Manufacturing Company, and not for or on account of the individual debt of the defendant indorsers, or any of them; that the president of the company negotiated the transaction, and he testified, to use his own language, that "Mr. Washburn said after we had settled the differences and got through, before we executed the papers, that he didn't know much about the corporation, and as we owned all the stock, he required as a favor that we should—that I should—become personally responsible; I should guaranty the debt; he wanted I should guaranty it. He said it was all right if I would guaranty that debt, and I said I agreed to that." The same witness testified that he requested the other defendants L. E. Dillman, Shreffler, and Kleinfelter to indorse the notes, and it was admitted that both notes were indorsed by the defendants, except the Lock-Stitch Fence Company, after the company had executed the notes and before their delivery to the payee.

Hawley & Hanchett and Geo. C. Christian, for plaintiffs.

Geo. S. House and Geo. C. Fry, for defendant.

DYER, J. Upon the argument it was contended in behalf of the defendants that the burden of proof to show that the defendant indorsers were co-promisors with the Lock-Stitch Fence Company upon the notes, and therefore jointly liable as makers, was upon the plaintiff; that the notes themselves were not evidence of such joint liability; that the liability of the defendant indorsers, if any, was that of guarantors, and that therefore they could not be sued with the maker of the notes as jointly liable thereon; that for these reasons the court should have instructed the jury, when requested so to do at the close of the plaintiff's case, to return a verdict for the defendants, except the Lock-Stitch Fence Company; and that in any event upon all the facts shown, considered in connection with the principles of law which it was claimed must control the disposition of the case, there should be a judgment in favor of the defendants L. E. Dillman, Shreffler, Kleinfelter, and A. Dillman.

Stating the grounds of the defendants' contention more in detail, it was urged that the effect of the plea of non-joinder, verified by affi-

davit under the statute which has been quoted, was to cast upon the plaintiff the burden of proving joint liability; and that under the decisions of the supreme court of Illinois, where a third party, not the payee, writes his name on the back of a note in blank, it is presumed in law—*First*, that the party wrote his name at or prior to the delivery of the note, and as a part of the transaction, to give the note credit with the payee; *second*, that such party thereby assumed the liability of a guarantor; that this presumption, however, may be overcome by parol evidence showing the actual contract of the parties as they intended it should be, so long as such contract is not inconsistent with that created by law. And it was then further insisted that the rule for determining the liability of the indorsers on the notes in suit must be that established by the law of Illinois where the notes were executed and were made payable. All this was controverted by counsel for the plaintiffs, who contended that the relation of the defendant indorsers to the note was such as to make them liable thereon as co-makers with the Lock-Stitch Fence Company; that the notes themselves were evidence of such liability; and that upon all the facts elicited, judgment should go in favor of the plaintiff against all the defendants.

Shortly stated, the controversy between the parties involves this question: What liability is assumed by a third party who places his name upon the back of a negotiable promissory note at the time of its execution by the maker, and before its delivery to the payee; and must liability in such case be determined in this court according to the course of judicial decision in the state where the obligation was incurred? Whether, in the case stated, the liability is that of original promisor, indorser, or guarantor, has been a question upon which great diversity of opinion has existed in many of the courts of the states. But the growing current of authority, even before *Good v. Martin*, 95 U. S. 90, seemed to tend towards the view that the liability assumed by a third party who thus indorsed a note in blank was that of original promisor, although a different rule was, and is yet, adhered to in some of the states. In New York it has been held, in a long line of cases, of which *Haviland v. Haviland*, 14 Hun, 627, *Phelps v. Vischer*, 50 N. Y. 69, and *Coulter v. Richmond*, 59 N. Y. 478, are examples, that presumptively such a party stands to the paper in the relation of indorser, but that this presumption may be rebutted by parol proof that the indorsement was made to give the maker credit with the payee. The same rule of liability prevails in Wisconsin. *Cady v. Shepard*, 12 Wis. 713. In Massachusetts it is held in a series of cases too extended for citation that if a third person place his name in blank on the back of a note before its delivery to the payee, he is an original promisor, and the presumption is, in the absence of anything to the contrary, that the names on the back and on the face of the note were written at the same time. To the same effect are 1 Pars. Cont. (6th Ed.) 243; *Irish v. Cutter*, 31 Me.

536; *Schneider v. Schiffman*, 20 Mo. 571; *Orrick v. Colston*, 7 Grat., 189; *Riggs v. Waldo*, 2 Cal. 485; *Sylvester v. Downer*, 20 Vt. 355; *Lewis v. Harvey*, 18 Mo. 74.

In this state it appears to be the established rule that a blank indorsement by a third party, made under the circumstances heretofore stated, is *prima facie* evidence of a liability in the capacity of a guarantor. In most of the cases wherein it has been so held, the holder sought to enforce against such third party the liability of guarantor, and the contention of the latter was that he could only be made liable as indorser. *Camden v. McKoy*, 3 Scam. 437; *Cushman v. Dement*, 3 Scam. 497; *Carroll v. Weld*, 13 Ill. 683; *Klein v. Currier*, 14 Ill. 237; *Webster v. Cobb*, 17 Ill. 459; *Heintz v. Cahn*, 29 Ill. 308; *Glickauf v. Kaufmann*, 73 Ill. 378; *Boynton v. Pierce*, 79 Ill. 145; *Stowell v. Raymond*, 83 Ill. 120; *Wallace v. Goold*, 91 Ill. 15.

But *Good v. Martin*, *supra*, must be regarded, I think, as settling the law upon this vexed question in the federal courts. In that case Good indorsed a note in blank after it was signed by the makers and before its delivery to the payee, and it was sought to hold him as a joint maker. In the opinion of the court, the authorities are reviewed, and it is distinctly held: (1) that if a third person put his name in blank on the back of a note at the time it was made, and before it was indorsed by the payee, to give the maker credit with the payee, or if he participated in the consideration of the note, he must be considered as a joint maker; (2) but if his indorsement was subsequent to the making of the note, and to the delivery of the same to take effect, and he put his name there at the request of the maker pursuant to a contract of the maker with the payee for further indulgence or forbearance, he can only be held as guarantor; (3) if the note was intended for discount, and he put his name on the back of it with the understanding of all the parties that his indorsement would be inoperative until the instrument was indorsed by the payee, he would then be liable only as a second indorser, in the commercial sense. Says Mr. Justice CLIFFORD, speaking for the court:

"Where the indorsement is in blank, if made before the payee, the liability must be either as an original promisor or guarantor; and parol proof is admissible to show whether the indorsement was made before the indorsement of the payee, and before the instrument was delivered to take effect, or after the payee had become the holder of the same; and, if before, then the party so indorsing the note may be charged as an original promisor, but if after the payee became the holder, then such a party can only be held as guarantor, unless the terms of the indorsement show that he intended to be liable only as second indorser, in which event he is entitled to the privileges accorded to such an indorser by the commercial law."

Applying to the cases at bar the principles thus laid down, it cannot be doubted that *prima facie* the liability of the defendant indorsers on the notes in suit is that of original promisors; nor can it be successfully questioned, in the light of this adjudication, that the notes themselves, with the indorsements thereon, are evidence of such lia-

bility; for if the indorsements were made at the inception of the note, they are presumed to have been made for the same consideration and a part of the original contracts expressed by the notes. *Good v. Martin, supra*. Whether the liability of these parties on the notes is shown by the parol proof of the facts and circumstances which took place at the time of the transaction to be other than as above stated, will be considered in a subsequent part of this opinion.

But it was contended by counsel for the defendants that, as the notes in suit were executed and were made payable in this state, the law of the state, as established by the course of judicial decision here, must prevail in determining the character of the liability assumed by the defendant indorsers. This proposition was urged with much plausibility and force. That the question here involved is one of general commercial law must be admitted. The decisions in Illinois which have been cited are not founded upon any local statute, nor, in my opinion, upon any such local usage as is alluded to in *Swift v. Tyson*, 16 Pet. 1. Nor does the determination of liability in the cases at bar rest upon an interpretation of any statute or consideration of any local usage. It involves simply the legal relation which certain parties bear to instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence. The case of *Swift v. Tyson, supra*, is so familiar that extended reference to it is unnecessary. It had been held for a series of years in New York, by the supreme court of that state, that a pre-existing debt was not a sufficient consideration to shut out the equities of the original parties in favor of the holders. But in *Swift v. Tyson*, which came up from New York, the supreme court of the United States held a contrary doctrine to that announced by the courts of the state upon the question of the right of a *bona fide* holder of a bill of exchange, who had taken it before maturity, in payment of a pre-existing debt, without notice of any equities between the original parties, to recover without regard to such equities.

In *Oates v. National Bank*, 100 U. S. 239, a commercial transaction was under consideration, which arose in Alabama. It was an action by a national bank, located in that state, against a citizen of the state, upon a promissory note there executed, and there made payable and negotiated. It was contended that the decision of the supreme court of Alabama should be accepted as the law governing the rights of the parties. But in reply to that contention, the supreme court of the United States said:

"While the federal courts must regard the laws of the several states, and their construction by the state courts, (except when the constitution, treaties, or statutes of the United States otherwise provide,) as rules of decision in trials at common law in the courts of the United States, in cases where applicable, they are not bound by the decisions of those courts upon questions of general commercial law. Such is the established doctrine of this court, so frequently announced that we need only refer to a few of the leading cases

bearing upon the subject. *Swift v. Tyson*, 16 Pet. 1; *Carpenter v. Providence Ins. Co.* Id. 495; *Watson v. Tarpley*, 18 How. 517."

Again, in *Railroad Co. v. National Bank*, 102 U. S. 14, the question was whether the holder of negotiable paper transferred *merely* as collateral security for an antecedent debt—nothing more—is not a holder for value, within the rules of commercial law which protect such paper against the equities of prior parties. Mr. Justice HARLAN, speaking for the court, in a very able opinion, admitted that if the principles announced in the highest court of the state of New York were to be applied to the case, a different conclusion would be reached than that announced in the opinion. The note in suit was executed and made payable in the state of New York, but the court reaffirmed the doctrine of *Swift v. Tyson* and *Oates v. National Bank*, and refused to follow the decisions of the state court. Upon the authority of these cases I must hold that, as the question in judgment is one of general commercial law, the decisions of the courts of the state upon it, though commanding, as they should, our attention and high respect, are not necessarily controlling here. Especially is this so if *Good v. Martin*, *supra*, is to be considered, as I think it must be, an exposition of the law upon the question of the character of the liability presumptively assumed by the defendant indorsers when they placed their names on the back of the notes in suit. This act of the parties occurred at the inception of the notes and before their delivery to the payee. Their indorsements, therefore, must be presumed to have been made for the same consideration as that expressed in the notes and as part of the original contracts.

As we have seen, an affirmative admission was entered on the record, before the plaintiffs rested their case, that the defendant indorsers indorsed the notes prior to their delivery to the payee. But without such admission, the notes themselves, with the indorsements thereon in the order in which they appear, in connection with the presumption arising therefrom, afforded *prima facie* evidence of liability as original promisors within the doctrine of *Good v. Martin*. This was proof that satisfied the requirement of section 36 of the practice act before quoted, wherein it imposed upon the plaintiffs—as in such cases undoubtedly it does, when a verified plea denying joint liability is filed—the burden of showing the joint liability of the defendants.

It remains only to consider whether the extrinsic oral testimony tending to show the circumstances under which the defendant indorsers placed their names on the notes over comes or changes the *prima facie* case made by the plaintiffs. In *Good v. Martin* it was held that the interpretation of the contract in such case ought to be such as carries into effect the true intention of the parties, which may be made out by parol proof of the facts and circumstances which took place at the time of the transaction. The language of the opinion makes it somewhat doubtful whether the court meant to go further than to hold that parol proof is admissible to show whether the

indorsement of the third party was made before the indorsement of the payee, and before the instrument was delivered to take effect, or after the payee had become the holder of the same. Little doubt, however, arises of the meaning and effect of the transaction between the parties in the cases in hand, even if the testimony, orally given, is all admissible. The defendant indorsers represented all the stockholders and officers of the company which executed the notes. The notes were given on account of a debt owing from the company to the payee. They were duly executed by the maker, and then, before delivery, indorsed by the other defendants. Credit was thereby given the maker with the payee, and such was the intention of the parties. The relations of the indorsers to the company made them, in a certain sense, participants in the consideration of the notes. The president of the company testified that Mr. Washburn said when the note was executed that, as he did not know much about the corporation, and as the parties who afterwards indorsed the notes owned all the stock, he desired them to become *personally responsible* on the notes. All this clearly adds to the *prima facie* case made by the notes themselves, cumulative and convincing proof of such a relation of the defendant indorsers to the notes as establishes their liability as co-promisors, within even a restricted view of *Good v. Martin*. But it is contended that an intention is evinced to create only the liability of guarantors by the further testimony of the president of the company that in the conversation with Washburn the word "guarantee" was used; that after he said that he required the defendant indorsers to become "personally responsible," he used the expression that the defendants "should guarantee the debt." The real relation of the parties in the transaction to the notes they indorsed, cannot be modified or changed by a form of technical expression that may have been used at the time, so as to affect the character of their liability. They indorsed the notes in blank. No words of express guaranty were employed to qualify the indorsements. It is apparent that the only object of the indorsements was to create an additional personal responsibility and secure credit to the maker with the payee, and the defendants must be held charged with the legal liability fairly flowing from their acts.

Judgment will be entered against all the defendants as jointly liable upon the notes in suit.

THE CITY OF MERIDA.¹

(District Court, S. D. New York. June 5, 1885.)

1. COLLISION—OVERTAKING VESSEL—EXHIBITION OF TORCH—REV. ST. § 4234.

Section 4234, Rev. St., requiring the exhibition of a lighted torch, is designed to furnish an additional safeguard against collision, not to dispense with any of the previous obligations of diligence on the part of an overtaking vessel to keep out of the way of a vessel ahead. Though the latter fail to exhibit a torch, as required, the burden is still upon the former to show that she used all reasonable diligence to avoid the vessel ahead, as required by rule 22, § 4233.

2. SAME—BURDEN OF PROOF—NEGLIGENT LOOKOUT—APPORTIONMENT.

About 1 o'clock on the morning of the eleventh of April, 1883, the night being overcast and dark, but without fog, the steamer City of M., bound to New York, was some 60 miles north-east of Cape Hatteras, and going about 10 knots an hour, on a course N. by E. At the same time, the schooner M. J. R. was sailing by the wind on a course varying from N. N. E. to N. E. by N., and making about 4 knots an hour. The lookout of the schooner testified that he saw only the steamer's green and mast-head lights about a point off the schooner's starboard quarter. No torch was exhibited by the schooner; her master supposing, as he said, that the steamer would pass astern of him. The schooner was not seen by those on the steamer till the vessels were a short distance apart, when the wheel of the steamer was ported and her engine stopped, notwithstanding which her stem struck the schooner aft on the starboard side, causing injuries which rendered the schooner a total loss, and compelled the steamer to put in towards Norfolk, where she was beached to prevent sinking. This action was brought against the steamer by the owners of the schooner. The testimony as to the navigation of the two vessels was in irreconcilable conflict. *Held*, that faults on the part of both vessels caused the collision; that if, as alleged by the schooner, the green light of the steamer was visible for some nine minutes prior to the collision, bearing continually *in the same direction*, the schooner's men should have known from that fact that the steamer was circling round and overtaking them, instead of crossing astern, and should have exhibited a torch; that the steamer was also in fault, as the fact that no torch was shown her did not lessen her obligation, as a following vessel, to use all reasonable diligence to keep out of the way of the vessel overtaken, and fault on the part of the schooner did not relieve her from the obligation of proving that she was not in fault, or that the case was one of unavoidable accident; that this burden she had not sustained, if the schooner was seen as far distant as was alleged, because her porting was, in that case, error, since a starboarding of her wheel would easily have carried her under the schooner's stern; nor was the error one *in extremis*; considering the distance between the two vessels, and the moderate speed at which the steamer was gaining upon the schooner. Moreover, on the whole evidence, it was most probable that the real error of the steamer was neglect in the lookout in not seeing the schooner until the vessels were much nearer than they admitted, and so near to each other that there was no time to avoid the schooner, and that there was negligence in not observing her in time. The damages were therefore divided.

In Admiralty.

Owen & Gray, for libellant.

A. O. Salter and R. D. Benedict, for claimants.

BROWN, J. This libel was filed by the owners of the schooner Mary J. Russell, to recover the sum of \$21,600, their alleged damages through the loss of the schooner and her cargo, arising out of a collision with the steam-ship City of Merida, at about 1 o'clock A. M.

¹ Reported by R. D. & Edward G. Benedict, Esqs., of the New York bar.

on the morning of April 11, 1883, about 60 miles north-east of Cape Hatteras. Both vessels were going in nearly the same direction; the schooner, with a cargo of lumber, being bound from Jacksonville, Florida, to Leesburg, New Jersey; and the City of Merida being bound on one of her regular trips to New York. The night was overcast and dark, but without fog; the wind strong from the north-west. The schooner was sailing by the wind on her port tack, varying from N. N. E. to N. E. by N., and making about 4 knots per hour. The steamer was about 250 feet long, having a general cargo, and 60 passengers. She was making about 10 knots per hour, on a course N. by E., and was coming up on the starboard side of the schooner. Her lights were first seen from the schooner about a point off the latter's starboard quarter. The schooner was not seen on the steamer until within a few lengths of her, when the steamer's wheel was ported, and signals were given to stop her engines; but neither were in time to avoid the collision. The stem of the steamer struck the schooner near her mizzen-chains on her starboard side, and raked her thence forward, carrying away her mizzen-rigging, main-rigging, and fore-rigging, and got tangled in her head-gear, from which she was at length cut away. The schooner was so damaged that she was abandoned not long afterwards; and, with her cargo, was totally lost. The stem of the steamer was knocked away to starboard, and a hole stove in below the water-line, so that she leaked badly, and was obliged to put in towards Norfolk, where she was beached in order to keep her from sinking in deep water.

On the part of the steamer it is claimed that the collision was wholly the fault of the schooner, in not exhibiting a flash-light to the steamer as the latter came up astern. For the schooner, it is insisted that no flash-light was required, for the reason that when the steamer was first seen, several minutes before the collision, and thenceforward, up to perhaps half a minute before the collision, the steamer's green light, and not her red light, was visible, indicating that she was passing across the schooner's stern; and also because, when the steamer's red light first became visible, there was not time to get and exhibit a torch-light; and further, because, if a torch-light had been exhibited at that time, it would have been of no use, since the schooner was then in clear view of the steamer.

The testimony upon these points is irreconcilable. There is no doubt that the steamer's lights were visible a mile distant. The lookout of the schooner estimated her distance at a mile when he first saw and reported her lights. He testifies that he then saw her mast-head light and her green light only about a point off her starboard quarter; that he reported these to the master, who was on deck; and the master testified that he saw them on the same bearing, and considered himself in no danger, as the green light showed that the vessel was going astern of him. If the steamer was a mile distant when her lights were first seen, as her speed was only six knots in excess of the speed

of the schooner, these lights must have been seen 10 minutes before the collision. The first officer, who was in charge of the steamer, testifies that her course was N. by E., or, possibly, a little further to the eastward; and that no change of her helm was made until the sails of the schooner were seen, about two or three lengths of the steamer ahead; and that the schooner was then from a quarter to half a point upon his port bow. The lookout says that she was a point on his port bow.

If during this interval of some nine minutes the steamer was a point on the schooner's starboard quarter, and making a course N. by E., her green light could not have been visible at all; but her red light and mast-head light only would have been seen; while the schooner, when she first came in view, if the steamer's green light only had been in view, must have been upon the steamer's starboard bow, instead of on her port bow. Again, had the steamer, some ten minutes before the collision, being from one to two points off the schooner's starboard quarter, been upon a course which would exhibit her green light, and not her red light, her green light would have been constantly hauling astern of the schooner, and, in a little more than half the time that elapsed before the collision, her green light would have borne off the port quarter of the schooner; whereas the testimony of the captain is that her green light continued bearing in about the same direction, namely, one point off his starboard quarter, up to the time when the change of lights was seen, which was only about a minute or a minute and a half before the collision.

Various hypotheses have been suggested concerning the previous navigation of the vessels, so as to account for their coming into collision in the way that they certainly struck. One controlling fact in the case, about which there can be no dispute, is that the blow of collision was struck, not by the side or bow merely of the steamer, but by her stem. Her stem was knocked to starboard by the shock. The difference in the courses of the two vessels at the moment of collision, therefore, could not have been less than *two* points. But the difference in the previous general courses of the vessels, as testified to, even without the change made by the steamer's porting in consequence of the approaching collision, was but *one* point,—the schooner's course being N. N. E., and the steamer's N. by E.; and even supposing that the schooner was at that time falling off to the furthest limit of her variation, namely, one point, so as to be going N. E. by N., there would still be but two points of difference, with no room for any such change as alleged, under the steamer's port wheel.

On the part of the steamer the first officer testifies that, when the schooner was first seen, his wheel was put hard a-port, and that the steamer swung somewhat to starboard. But his testimony is very indefinite in this respect, as he did not look at the compass; and he is unwilling to testify that she swung as much as two points. She swung some, he says; but, as he thinks, less than two points. But

if she swung any to starboard, her stem certainly could not have struck the schooner, unless the schooner had fallen off more than a point, or else unless the steamer's previous course had been more to the northward than N. by E. If the latter was the fact, then she was going negligently out of her intended course. If at any time during the 10 minutes preceding the collision she headed three-fourths of a point to the northward of her proper course, a diagram of the general courses of the vessels will show that both colored lights would have been exhibited to the schooner; a little further heading to the northward would have shut in the red and exhibited the green light only. But the hypothesis that the steamer was heading so much to the northward of her course during some nine minutes, presupposes a very improbable degree, and a long continuance, of negligence in the wheelsman. He was not examined, for reasons which, perhaps, are satisfactory. That hypothesis is, moreover, inconsistent with the fact that the colored light seen by the schooner did not draw astern of the schooner, as it would have done if such a northerly course had been continued by the steamer for any length of time; and the contention of the schooner is that the green light only was exhibited until a minute or so before the collision.

There is no hypothesis concerning the previous navigation of the two vessels that has been suggested, or that I have been able to imagine, that will account for this collision, without contradicting the most material portions of the testimony on one side or on both sides. From what has been said, it is apparent that there are very strong improbabilities in the story told by each. The simplest and most natural explanation would be to suppose that the lights of the steamer were not seen at all, until just before the time when the red light was noticed,—that is, when she was some 700 or 800 feet distant, about a point or two off the starboard quarter; that at that time the two lights were actually visible, but only the green light at first noticed, the red being possibly obscured to the view of the lookout at the moment. This supposition, doubtless, does great violence to parts of the schooner's testimony. It is unnecessary, however, to make definite findings in these respects, there being sufficient in the story of each as it stands, combined with the circumstances of the case, to show that each is in fault.

1. Assuming that the captain of the schooner saw the steamer's green light when the lookout first reported her, namely, about a mile distant, and that, as he says, this light continued bearing about a point on his starboard quarter until the hull of the steamer came in view, and that she then ported, so as to bring her red light in view for the first time, the fact that the light during this long interval did not haul astern should have been clear proof to him that the steamer was following him up, instead of crossing the schooner's stern, and that he ought to show a flash-light, or give some signal of warning, before she had come so near. If the light seen had been the red

light, instead of the green light, and both vessels kept upon their proper courses, the red light would have continued to be seen by the captain of the schooner on the same bearing, or nearly the same bearing, during the whole interval; changing only with the changes of the schooner in following the wind.

The master must have known that the green light could not possibly remain on the same bearing unless the steamer were constantly going to starboard under a port wheel; and this was sufficient notice to require him to exhibit some signal to a vessel so nearly astern. Such a change on the part of a steamer at sea, continued during nearly 10 minutes, would, indeed, be very remarkable. I do not credit it; but if actually observed, as the captain and the lookout seem to testify, they could not fail to know its meaning; and ordinary prudence, if not the letter of the statute, would have required them, under such circumstances, to show a timely signal of warning to a vessel coming up astern in this peculiar manner. *The Oder*, 13 Fed. Rep. 272, 283; *Leonard v. Whitwill*, 10 Ben. 638. It is more probable, however, that the steamer's lights were not seen at all until very much nearer the time of collision than is estimated by the schooner's witnesses; and that if the steamer's lights had been seasonably noticed, the red light would have been seen first. It is improbable in the highest degree that the steamer was for any length of time heading so much off from her proper course of N. by E. as to obscure her red light. The captain of the steamer testifies that his lights were visible that night two miles. I have no doubt that had a reasonable lookout been kept for vessels coming up astern, the steamer's red light, and that only, except her mast-head light, would have been seen from 10 to 15 minutes, at least, before the collision. Seeing the red light, and seeing it continue, as it undoubtedly did continue, on about the same bearing, and only a point or two off his starboard quarter, the captain of the schooner would have known that a torch-light should be exhibited; and if it had been exhibited, that would, without doubt, have averted the collision. The schooner must therefore be held in fault.

2. Notwithstanding the fact that no light or other signal was exhibited to her, the City of Merida must also be held in fault, either for bad and inexcusable navigation in porting when the schooner was seen far enough off to be easily avoided by starboarding, or else for negligence in not seeing the schooner in time to have passed easily astern of her.

The act of 1871, now section 4234 of the Revised Statutes, requiring the exhibition of a lighted torch, was designed to furnish additional safeguards against collision; not to dispense with any of the previous obligations of diligence on the part of an overtaking vessel to avoid one ahead of her. In such cases it was previously the well-established rule, and it is the rule still, that a vessel astern must keep out of the way of a vessel ahead; and upon failure to do so, the vessel astern is presumptively in fault, whether she be a steamer or a sail-

ing vessel. *Whittridge v. Dill*, 23 How. 448; *The Grace Girdler*, 7 Wall. 196, 202; *The Governor*, Abb. Adm. 108; *Simpson v. Spreckels*, 13 FED. REP. 98.

The omission of obligatory signals by the leading vessel does, indeed, charge her with fault; but it does not relieve the following vessel from the burden of proving that she kept a proper lookout, and that proper and timely efforts on her part to avoid the vessel ahead were thwarted by the latter, or that the weather was such that the vessel ahead could not be seen in time to avoid her; and that the accident was therefore unavoidable. *The Grace Girdler*, *supra*; *The Morning Light*, 2 Wall. 550.

In the case of *The Grace Girdler*, though the weather was clear, a majority of the court held the collision to have been the result of unavoidable accident, *i. e.*, not avoidable by reasonable or ordinary care and skill, under the complications of the navigation of three boats. In the case of *The Morning Light*, the vessel astern was acquitted on the same ground of unavoidable accident, in consequence of the great darkness, and of thick fog. In the present case, although the night was dark, there was no fog. Vessels ahead, even without lights, could be seen at some considerable distance. This plainly is not a case of unavoidable accident. As respects faults in the steamer, where there is prior fault on the part of the sailing vessel, the considerations so forcibly stated by Woodruff, J., in the case of *The Ariadne*, 7 Blatchf. 211, are not to be overlooked; that "vessels have a right to assume that other vessels in their neighborhood are acting in obedience to statute regulations; and when the negligence of the sailing vessel, and her failure to comply with the statutes requiring her to bear a light which can be seen at a distance of two miles, have led the steamer into danger of collision, it is not for the sailing vessel to insist that by *more than usual negligence she might have been discovered at a few yards greater distance, and to claim contribution on that ground.*" Page 213.

Giving the steamer in this case the full benefit of this rule, the question here is whether the City of Merida does show "usual vigilance" on her part; and whether the facts warrant the inference that she did use reasonable and ordinary care and diligence, both in seeing the schooner when she first came in view, and in trying to avoid her afterwards. On these points, in my judgment, the steamer has not acquitted herself of blame. The evidence necessitates the inference either of negligence in the lookout, or of unskillful and bad navigation.

The testimony of the lookout is that he saw and reported the schooner when she was two or three lengths distant, *i. e.*, from 500 to 750 feet, and about a point on his port bow. The first mate, who heard and answered the lookout's report, says that he saw the schooner at that time, and that she was then between one-quarter and one-half of a point—not outside of one-half point—on his port-bow. He then knew the schooner was upon her port tack; and when he first saw her,

he saw the edge of her sails plainly. He does not give any estimate of her distance, but he estimates the time at half a minute before the collision. The engines, he says, were at once ordered to be stopped; but the speed of the steamer was not essentially checked. If the time was but half a minute, the steamer would have gone some 500 feet in the interval, and the schooner 200 feet; so that the distance between them would have been but 300 feet when the mate first saw her. If the interval was a minute, their distance apart would have been 600 feet, which is not far from the lookout's estimate of two or three lengths; that is, from 500 to 750 feet. Various witnesses on the part of the libellant, whose estimates were rightly received, *ex necessitate*, judged that a vessel's hull or sails could be seen, as the weather was that night, a quarter of a mile or upwards. The master of the steamer says that after the collision he could see the schooner some 400 or 500 feet off,—the distance from the schooner at which he lay to.

From the testimony I cannot doubt that the schooner was easily discernible some 600 feet distant, and ought to have been seen and reported by the lookout at that distance. The position of the first officer near the wheel-house makes his estimate of the schooner's bearing more likely to be correct than the estimate of the lookout; and the first officer's estimate is from a quarter to a half a point only on his port bow. He testifies that the City of Merida answered her wheel readily, and in going 600 feet with her wheel hard a-starboard, the City of Merida, not a large steamer, would certainly have changed two points, and she would thereby have gone astern of the schooner, even had the latter remained stationary. But as the schooner was all the time going to starboard, though nearly in line with the steamer, and as the mate of the steamer knew this fact, it would have been from the first obvious to him that there was abundant room to pass astern, under a starboard wheel, had the schooner been seen at the distance of 600 feet. In fact, as the steamer would have had 1,000 feet to pass over before the collision, had she changed under a starboard wheel no more rapidly than much larger steamers change, (*The Lepanto*, 21 Fed. Rep. 651, 654,) she would have gone, upon starboarding, several hundred feet astern of the schooner, as a drawing of the courses will clearly show.

In behalf of the steamer it is urged that, though her porting may have been an error, it was an error of judgment only, *in extremis*, when brought into a dangerous situation by the fault of the other vessel. *The Elizabeth Jones*, 112 U. S. 514; S. C. 5 Sup. Ct. Rep. 468. But at a distance of 600 feet astern, with the schooner not exceeding half a point on the steamer's port bow, and with the course of the schooner known, and with so moderate a difference of speed, I cannot possibly regard the situation of the steamer as *in extremis*. The bearing of the schooner, only a quarter or half a point on the port bow of the steamer, and going in nearly the same direction, was very favorable

for easily avoiding her at that distance, or even at a considerable less distance. The means of doing so by starboarding were so obvious, that porting at the distance of some 600 feet, in that situation, was inexcusable.

Various circumstances, however, satisfy me that the error of the City of Merida was not of that kind, but in neglect to observe the schooner until she was very much less than 600 feet distant, probably less even than 300 feet; and that her very close proximity was the reason why, in the language of the mate, he judged that "porting was his only salvation."

The evidence is that he gave the order to port instantly, and went into the wheel-house to assist in putting the wheel hard over as soon as possible. At the same time he gave orders to stop the engine. He also says that when the engine was stopped, the vessels were very close to each other; showing that the time must have been very short between the order to port and the collision. It is noticeable, also, that he would give no estimate of the amount that the steamer swung under her port wheel, saying only that it was less than two points; while the considerations that I have pointed out above indicate that if the steamer was upon a course of N. by E. previously, as the mate also testifies, she could not have swung much, if any, to starboard, and have had her stem strike the schooner as it did. It would take a short time—perhaps one-quarter or one-third of a minute—to get the wheel over so that the steamer would begin to feel its effect perceptibly; while, after that, she would swing rapidly to starboard, at the rate undoubtedly of a point in every 300 feet. If her previous course was N. by E., as her witnesses say, or even N. $\frac{1}{2}$ E., a half a point more to the northward, still, it is certain that she could not have swung even a point under her port wheel. Taking all these circumstances together, and the unsatisfactory and insufficient narrative of the steamer's witnesses, I am satisfied that the schooner was not noticed at all until the steamer was close upon her; and that there was negligence in not observing her in time to have avoided her easily, and without alarm, by starboarding. But if the other alternative be adopted, that the schooner was seen and reported at a distance of, say, 500 or 600 feet, and only one-quarter to one-half of a point on her port bow, then there was abundant time to have gone astern of her, by the exercise of ordinary nautical judgment and skill. The fact that the two vessels were pursuing almost the same course, and with but a moderate difference of speed, makes this case wholly different from the cases of meeting or crossing vessels, as in the cases of *The Ariadne*, 2 Ben. 472; S. C. 7 Blatchf. 211; *The Narragansett*, 3 Fed. Rep. 251; S. C. 11 Fed. Rep. 918; *The Algiers*, 21 Fed. Rep. 345,—to which my attention has been called, and in which the court found there was no lack of vigilance in the steamer.

On either alternative the steamer must be held in fault, and the damages must therefore be divided.

MOORE and another v. OCEANIC STEAM NAV. Co. and others.

(District Court, S. D. New York. June 8, 1885.)

1. WHARF—LESSEE TO REPAIR.

A lessor who has let a wharf and slip, and delivered exclusive possession to a lessee who covenants to repair, is not liable for damages that happen through obstructions that arise subsequently, of which the lessor has no notice.

2. SUNK—DAMAGE TO BARGE.

A barge loaded with coal having been sunk by a concealed pile near the shore end of the slip, *held*, upon the proofs, which were insufficient to show with certainty how the pile came there, that it was probably a water-soaked log which had become imbedded in the mud, and was not there when the city, 10 years before, leased the premises to the defendant company, and that the city was not, therefore, liable. *Held, further*, on the same grounds, that the defendant company was not liable, because that part of the premises where the barge was sunk had been underlet several years previously, and exclusive possession given to another company not sued, that had covenanted to keep the premises in repair; and it not being proved and not being probable that the obstruction was there when the under-lessees took possession, and the under-lessors, defendants, having no notice of the obstruction prior to the accident.

In Admiralty.

Carpenter & Mosher, for libelants.

Hawkins & Gedney, for steam-ship company.

E. Henry Lacombe, for the mayor, etc.

BROWN J. The measurements in regard to the position of the libelants' boat when sunk, and the place of the hole in the bottom, when compared with the drawings of the position of the old pier, show pretty conclusively that the pile which caused the damage was within the interior lines of the northerly projection from the former pier. That projection was a crib-dock. There is evidence that piles were driven as fenders along its exterior sides; but the pile in question was, as I have said, in the interior of those lines, and must have been several feet distant from any of them. This shows that the pile that caused this injury is different from any one of those shown in the drawings submitted, and different from any one known to exist. There are only two hypotheses to account for it: one, that it may have been a pile driven in the inside of the crib-dock for the purpose of fastening it when first brought there, or while in course of construction; the other, that the pile was a water-soaked drift log, which had become casually imbedded in the bottom, so as to form an obstruction. Either of these hypotheses is possible. There is no proof as to which is the fact. So far as the evidence shows, there was no pile used in building the crib-dock; yet it is possible that such a pile may have been driven down. But there are strong circumstances against the probability of this explanation.

The location of this pile is shown to be from one to three feet westward of the front line of the present platform of the Oceanic Company, extended, and some 20 feet to the southward of its south-west-erly corner. This spot is certainly within the limits that the testi-

mony shows were repeatedly dredged and dragged for the purpose of removing such piles in 1874, and since; and it is scarcely possible that this pile could have been left, at that time, sticking at least two feet above the mud bottom, without being noticed and drawn out. With the lapse of time, moreover, the mud in slips is not lessened, so as to uncover piles which were previously even with the bottom, but is increased so as to fill up the slip and cover such obstructions. Again, it seems very improbable that a pile projecting two feet above the mud bottom should have remained, during this long period, outside of the line of the platform of the wharf, and no boat or vessel touch it. On the other hand, it is in proof that it is not uncommon for old logs or piles to be water-soaked, and, being unequally heavy at the different ends, to sink more at one end, and thus become gradually imbedded in the mud, while the other end projects above the bottom, and becomes an obstruction. On the whole, I think this is the most probable explanation. Upon dredging, after this accident, two such piles were found not far from this location, besides others driven deep through the riprap.

Treating the damage as done through some drift pile, thus accidentally imbedded in the mud, no sufficient ground appears for holding either defendant liable, considering the careful dredging that is proved to have been done. The city, in 1874, leased the slip to the Oceanic Company, granting, not the mere right of wharfage, but exclusive use and possession of the pier and slip. The pile cannot, I think, have been there at that time. It must have come there since. The Oceanic Company agreed to do all repairs, and to keep the slip clear. They, or their under-lessees, have been in exclusive possession ever since. No notice of any such subsequent obstruction ever came to the knowledge of the officers of the corporation, and no negligence is, therefore, chargeable upon it.

The Oceanic Company, several years ago, underlet that portion of the premises upon which this accident happened to the Citizens' Company. The latter company, by this sublease, undertook to perform all the obligations of the Oceanic Company in its lease from the city. Full and exclusive possession was taken and has been continued by the sublessees. They have not been sued. It does not appear that the pile that did the injury was there at the time when the Oceanic Company made its sublease; and it is not probable that it was there then; and if it came there since, inasmuch as the Oceanic Company had no notice of its existence, that company must be held exempt on the same ground that the city is exempt, viz.: That the slip not being in bad order at the time of the lease, the lessor, when exclusive possession is transferred to the lessee, who covenants to keep in repair, is not liable for a subsequent obstruction of which he has no notice. Per WOODRUFF, J., in *Taylor v. Mayor*, 4 E. D. Smith, 559, 261; *Swords v. Edgar*, 59 N. Y. 28.

I must find, therefore, that the libelants have not shown any neg-

ligence or any breach of legal obligation on the part of either of the defendants sued in this action. Without referring, therefore, to the other questions presented, I am constrained to dismiss the libel; but without costs.

BEHAN v. MAYOR, ETC., OF THE CITY OF NEW YORK.

(District Court, S. D. New York. June 8, 1885.)

WHARVES—DAMAGE FROM SEWER—OBVIOUS DANGER.

Where a canal-boat moored at a wharf belonging to the corporation, directly along-side and beneath the opening of a large main sewer, and during the following night was submerged and sunk from the great outpouring of water consequent upon a summer shower, *held*, that there was no negligence in the corporation, either in the construction, repair, or maintenance of the sewer, and that it was no nuisance to navigation. That liability to sudden danger of a discharge of water being visible and sufficiently obvious to a man of ordinary intelligence, *held*, that the owner could not recover of the city for the loss.

In Admiralty.

Wilcox, Adams & Macklin, for libelant.

E. Henry Lacombe, for the corporation.

BROWN, J. On the sixth of July, 1884, at about 1 o'clock A. M., the libelant's barge, loaded with coal, while lying along the end of the pier at the foot of Seventy-ninth street, on the East river, was flooded by a sudden rush of water through the main sewer, partly beneath which the boat then lay. The dock was a short crib-dock; the main sewer was a very large one, draining about 50 blocks; and at the place of discharge it was about five feet high, and about four feet broad upon its flat bottom, which was from one to two feet above low water.

The libelant's boat was consigned to Seventy-ninth street. It had arrived there on the thirtieth of June, and lay along the end of the wharf, outside of other boats, waiting for a chance to discharge, until the fifth of July, when it reached a position immediately against the end of the wharf, and under the sewer. During the 5th there were occasional light rains, and more or less of a continual discharge from the sewer, which the libelant observed. It was not sufficient to do any harm, and it did not occur to him that he was in danger from a sudden shower. This danger, however, was known to other boatmen. They were accustomed to take precautions against it, through the use of boards to keep off the water, or in fending off from the wharf. The libelant had never been there before, and it does not appear that any one told him of his danger.

At about 11 P. M. of July 5th there were indications of a heavy thunder shower. The thunder and lightning became sharp and heavy, and the libelant, to avoid seeing it, went down into his cabin. A heavy shower followed, and the libelant was startled by hearing the noise of water and by the trembling of his boat. As he started to

go up the cabin he met the water pouring down the companion way. In about four minutes, as he says, his boat was filled and sank.

It is impossible to hold, as it seems to me, that the sewer was not rightly and lawfully constructed, so as to empty at the end of this short dock. The sewerage had to be discharged somewhere, and this sewer was constructed by the city on its own property. It was not a nuisance. It was not an unlawful obstruction. The use of that dock for boats was subject to its use for the sewerage, as it visibly existed. The dock was not a pile-dock, so that the sewer could have been capped at the end, and the discharge of water effected at the bottom. Nothing was out of repair. The city collected wharfage for the use of this wharf from vessels that moored there; but there was no person in attendance to give notice of liability to a great discharge of water from the sewer in case of a sudden shower. Persons came and went as they chose, being liable only to a demand for such use of the wharf as they made. I do not think the city was bound to keep a person in attendance at the wharf to notify boatmen coming there that they must look out for the water that might be discharged from the sewer. The liability to this danger was sufficiently obvious from the great size of the sewer, which was itself an indication that at times large masses of water were expected to run through it. The sewer opening rose some four feet above the deck of the libellant's boat at low water. The visible approach of a heavy summer shower was itself a further indication of the impending liability to a sudden great outpouring of water. I think, therefore, the accident must be attributed to the want of proper caution by the libellant in respect to a danger which was visible and sufficiently obvious to a man of ordinary intelligence; that the libellant, in mooring there, did so subject to these obvious risks; and that no negligence is legally attributable to the corporation.

The libel is therefore dismissed; but without costs.

LONG, Receiver, v. BUFORD and others.

(Circuit Court, W. D. North Carolina. April Term, 1885.)

REMOVAL OF CAUSE—SEPARATE CONTROVERSY.

The pleadings and record in this case, as they stood at the time of removal, show that it involves but one indivisible controversy, and the cause is remanded to the state court.

Motion to Remand.

W. M. Robbins and G. N. Folk, for plaintiff.

D. Schenck and Charles Price, contra.

DICK, J. In determining the motion of the plaintiff to remand this suit to the state court, I deem it unnecessary, in this opinion, to state the allegations and the matters of defense with the fullness and particularity with which they are set forth in the pleadings. The general merits of the controversy will be considered and decided upon the pleadings and the evidence when the suit is set for hearing.

This is a civil action instituted under the code practice of this state in which legal and equitable rights and interests may be adjusted and administered in our form of action, by applying the appropriate remedies. The relief demanded in the complaint is wholly of an equitable nature, and the case in this court must be considered as a proceeding in equity, as the courts of the United States administer the principles of law and equity by separate and distinct modes of procedure.

The object of a court of common law is to reduce the litigation to separate and distinct issues of law, or issues of fact; and the pleadings must be framed with accuracy and precision so as to produce such results. The object aimed at in a court of equity is to make a complete decree on the general merits, and adjust and determine the rights of all persons legally or beneficially interested in the subject-matter of such decree. The rules of pleading, therefore, in equity are less stringent than at law; and the general scope of a bill may be considered, and such relief afforded as is warranted by the merits disclosed, although not alleged with the technical accuracy and precision required in proceedings at law. As a general rule in equity pleading, the plaintiff must state his case in direct terms and with reasonable certainty. General certainty is usually sufficient. When matters are alleged to be known to the defendant, or must, from the nature of the circumstances, be within his knowledge,—and are the subject of the discovery sought in the bill,—precise allegations thereof are not required. Story, Eq. Pl. 213.

I have briefly referred to these general rules of equity pleading for the purpose of showing the liberal spirit which governs courts of equity in reaching the merits of a case, when they adjust and determine the rights of parties in accordance with the enlightened prin-

ciples of justice and equity. These liberal and flexible rules of pleading are fully recognized and adopted in the system of code practice which prevails in this state in cases in which equitable rights are involved. *Hoover v. Berryhill*, 84 N. C. 132; *Usry v. Suit*, 91 N. C. 406.

In this complaint the plaintiff in substance alleges that he is the duly-appointed receiver of a defunct corporation, chartered as the Western Division of the Western North Carolina Railroad Company, and generally known as the Western Division Company, and that he was empowered to institute this action by the proper legal authority; that in August, 1848, the legislature of North Carolina passed an act authorizing the organization of the said corporation, which he now represents, to be vested with the usual powers and rights of other similar corporations. The said corporation was duly organized, and under a provision in the charter the state of North Carolina became a stockholder to a large amount, and issued its bonds in payment of its stock, and directed taxes to be levied to satisfy the same. The corporation entered upon the work for which it was organized, and constructed a road-bed and a large quantity of masonry and other work, to the amount in value of \$300,000. In the progress of said work the corporation became largely indebted to various individuals for goods sold and delivered, materials furnished, money loaned, and work done, to the amount of about \$50,000. Said debts have been reduced to judgment against said corporation, are still due and unpaid, and constitute a lien upon the real estate and franchises of said corporation.

The complaint further alleges, in substance, that by reason of an act of the legislature of this state, passed in March, 1870, the Western Division Company was deprived of the bonds and promised assistance of the state; and having no other means to carry on its work, it became insolvent by virtue of such unexpected embarrassment; that it had no property to pay its large indebtedness, except its franchises, road-bed, bridges, masonry, and other parts and fixtures of the uncompleted railway, and some interests which it had acquired in certain Florida railroads.

The complaint further alleges, in substance, that in March, 1879, the legislature of this state passed an act repealing the charter of said Western Division Company, and further declaring that the legal title of all the property and effects of said corporation should, by the force and effect of said act, be transferred to and vested in the Western North Carolina Railroad Company, a then existing corporation, to be held, nevertheless, by said last-named company in trust for the use and benefit of the creditors of the said Western Division Company. That said expressly declared trust was accepted by the said Western North Carolina Railroad Company, and it was authorized by said act to take possession of said trust property and effects, and for that purpose to prosecute such actions at law and suits in equity

as might be necessary. That after the Western Division Company was thus merged in the Western North Carolina Railroad Company, James W. Wilson, its president, received \$25,000 for the interest of the Western Division Company in certain Florida railroads, and applied the same to the purchase of iron, which was used in laying the track of the Western North Carolina railroad, and constitutes a part of the property now in the possession of and used by said company, and is worth the sum of \$25,000.

It is further alleged, in substance, in the complaint that some time after the reorganization of the Western North Carolina Railroad Company under the amended charter of March, 1879, the state of North Carolina sold and transferred all of its interests in said railroad to W. I. Best and others, who subsequently assigned and transferred all the interests thus purchased to the defendants A. S. Buford, T. M. Logan, and W. P. Clyde, who took possession of the franchises, property, and effects of every kind belonging to the said Western North Carolina Railroad Company, and procured all the interests of the private stockholders. The complaint then makes the following allegations, which are regarded by counsel as very material in determining this motion to remand:

"That the legislature of North Carolina, on the ——— day of ———, authorized the purchasers of the Western North Carolina Railroad Company to create a new corporation out of the company thus sold, conveyed, and transferred to them by the state; and, in accordance with the provisions of said act of the general assembly of the state of North Carolina, and the purchasers thereof, in accordance with the provisions thereof, organized a new corporation, and known as the Western North Carolina Railroad Company, and *they* have taken possession of all the property, franchises, and effects of every kind belonging to the Western North Carolina Railroad Company, including all the property, franchises, and effects of every kind belonging, or formerly belonging, to the Western Division of the Western North Carolina Railroad Company; and the said A. S. Buford, T. M. Logan, and William P. Clyde, as well as W. I. Best and others, purchasing from the state, took the said property, franchises, and effects of every kind coupled with the trust attached thereto."

The counsel of defendants insists that the personal pronoun *they* (which I have italicized in the above quotation) refers only to Buford, Logan, and Clyde, and does not represent the *new* corporation formed by said purchasers. I do not concur in this construction of this sentence. The word *they* refers to persons who have taken possession of the property mentioned. There are two kinds of persons referred to in the preceding clause of the sentence: Some natural persons, and an artificial person, both capable of taking possession and holding property, and the artificial person is the nearest antecedent. The rule of syntax that personal pronouns agree with the antecedent nouns which they represent in gender, number, and person, does not strictly apply to *they*, as that pronoun has the same form for the several genders, and often refers to two or more antecedents in the singular number. When there are two or more antecedents conjoined

in the structure of a sentence, their representative pronoun must be in the plural number. If the two antecedents in this sentence were separate and distinct corporations the word *they* would certainly apply to both. In the construction of facts stated in pleading, it is a general rule at common law that everything shall be taken most strongly against the party pleading, but the language is to have a reasonable intendment and construction. And where an expression is *capable* of different meanings, that shall be taken which will support the averment, and not the other which would defeat it. 1 Saund. Pl. 416.

We have already observed that courts of equity, in construing the pleadings in a suit, exercise a more liberal discretion than courts at common law, and will regard the whole scope of a bill, and the object sought, in ascertaining the intendment of the plaintiff in the language used in his allegations. In endeavoring to ascertain the intention of the person who drew this complaint, I think I am fully authorized in applying the personal pronoun *they*, in the sentence we are construing, to both antecedent nouns, and not to the second antecedent in exclusion of the first. It is insisted by counsel of plaintiff that the object and purpose of the purchasers, in organizing the *new* corporation, was to place the property and franchises purchased in the possession and under the control of the corporation defendant, to be used to their mutual advantage and profit. The construction, as to the intention of the pleader, which I have placed upon the above allegation is sustained by the twelfth paragraph of the complaint, in which it is distinctly alleged that a demand was made on the defendant Western North Carolina Railroad Company in 1882, to pay over money, and carry out the trust imposed in favor of the creditors of the Western Division Company. The pleadings show that at the commencement of this action there was but one Western North Carolina Railroad Company, the present defendant, exercising the franchises of a corporation.

If I am correct in my construction of the language of the complaint, it appears from the allegations that certain property formerly belonging to the Western Division Company, liable to the claim of creditors, who have docketed judgments, and who are represented in this action by the plaintiff, passed into the hands of the defendants, incumbered with a trust in favor of such creditors, expressly imposed by an act of the legislature of this state; that the legal title to said property was transferred to the defendants Buford, Logan, and Clyde, and was placed by them under the possession and control of the defendant corporation to be used and employed in its ordinary business operations. It does not appear when, or how far, title to said property was transferred to said corporation. These allegations are controverted by the answers of the defendants, and form issues to be decided upon the evidence at the final hearing.

If the allegations of the complaint are averred with sufficient cer-

tainty, and are fully sustained by the proofs, the remedy afforded by the law seems to be clear and complete. The doctrines upon this subject are fully discussed in *National Bank v. Insurance Co.* 104 U. S. 54. It is there announced as an undoubted principle of equity "that, as between *cestui que trust* and trustee, and all parties claiming under the trustee, otherwise than by purchase for valuable consideration without notice, all property belonging to a trust, however much it may be changed or altered in its nature or character, and all the fruit of such property, whether in its original or its altered state, continues to be subject to or affected by the trust." In this respect there is no distinction between express, implied, or constructive trusts.

I am inclined to the opinion that if the complainant can sustain his allegations by satisfactory evidence at the hearing, the defendants may be declared constructive trustees of the property mentioned in the pleadings. In the case of *Johnson v. Prairie*, 91 N. C. 159, the supreme court of this state said: "It is a well-settled rule in this court that where a purchaser, in the necessary deduction of his title, must use a deed which leads to a fact showing an equitable title in another, he will be affected with notice of that fact."

As a general rule of law as to the title and transfer of real property a subsequent purchaser is chargeable with constructive notice when he has information necessarily incident to such matter sufficient to put him on inquiry, and the means of investigation are easily accessible. The law presumes that purchasers of real property will inquire into the right of the vendor to sell, and will examine the source and chain of title.

The principal subject of the argument of counsel on this motion to remand was the manifest confusion and incompleteness of the allegations of the complaint as to the defendant corporation. It appears from the complaint that two corporations, known as the Western North Carolina Railroad Company, were created and organized under acts of the legislature of this state. The first was organized under the act of the fifteenth day of February, 1855, and, under the provisions of the act of the thirteenth day of March, 1879, was invested with all the property and franchises of the Western Division Company to be held in trust for the creditors of said company.

The second corporation was formed by the defendants Buford, Logan, and Clyde, the purchasers of the property and franchises of the first corporation, and this second corporation is now in possession of said property and franchises using the same. The defendants in their answers allege that there was another corporation styled the Western North Carolina Railroad Company, created and organized under an act of the thirteenth of March, 1875, and was really the *second* corporation, and the immediate predecessor of the present defendant corporation.

In the complaint allegations are made against the Western North Carolina Railroad Company in rather a loose and indefinite manner,

and without discriminating clearly the organization referred to by such name. The confused, indefinite, and inartificial allegations are justly subject to the criticisms of the counsel of defendants, but the objections made are not fatal on this motion to remand. The objection to a defective statement of a cause of action ought to have been made by demurrer, so that the plaintiff might have had an opportunity to amend and make his allegations of a good cause of action more precise and definite. The plaintiff may also insist that the answers of the defendants have waived the objections to the sufficiency of the allegations of the complaint, as they have not in their answers reserved the right to make such objections as upon demurrer. It is insisted by the counsel of defendants that "the right of removal, if claimed in the mode prescribed by the statute, depends upon the case disclosed by the pleadings as they stand when the petition for removal is filed." *Barney v. Latham*, 103 U. S. 205. We will endeavor to apply this established rule of law to the case now before us.

This case was removed under the second clause of the second section of the act of March 3, 1875. The purpose and meaning of this section have been fully defined by numerous decisions of the federal courts, and the only difficulties that can now be presented for determination will arise from the peculiar facts and circumstances that appear in the pleadings and record of a case. The pleadings and record in this case, as they stood at the time of removal, show that the plaintiff is a citizen of this state; that the defendant petitioners are citizens of other states; and that the corporation defendant is a citizen of this state. The only other question for consideration is whether there are two or more causes of action involved in this suit which can be separated, and whether there is one matter of controversy wholly between the plaintiff and petitioning defendants, which can be fully determined between them without directly affecting the rights and interests of the defendant corporation.

In the complaint the defendant corporation is made a party defendant, and relief is asked against it, and it has been duly served with process, and has filed an answer. It is charged in the complaint as having in possession the property involved in the controversy, and has long been using the same and deriving profits therefrom. It appears to be an indispensable party, as its rights and interests must be seriously involved in any decree made against the other parties defendant. It is a general rule in equity that all persons legally or beneficially interested in a subject-matter of controversy before the court are entitled to be heard, and must be made parties. This general rule has been so modified by statute, and rules of the supreme court in equity, (Rev. St. § 737, rules 22, 47,) as to authorize courts of equity to dispense with proper and even necessary parties to a suit under circumstances mentioned in said statute and rules. But on this motion to remand a case removed to this court from the state

court, under the second clause of the second section of the act of March 3, 1875, the corporation defendant being an actual party before the court, it occupies the position of an indispensable party, as its interests and rights must be settled and bound by any decree that may be made.

The pleadings, in my opinion, disclose but one cause of action. The sole object of the suit is to establish the right of the complainant as receiver to enforce a trust in behalf of creditors, which was expressly imposed upon certain property which he alleges formerly belonged to the Western Division Company, and is now in the hands of and under the control of the defendants. The authority of the plaintiff to institute this suit, the rights claimed, the grievances complained of, the terms of the express trust, the nature and value of the property, the persons who hold the same, and the redress sought, are distinctly alleged in the complaint, and constitute but one definite equity as a ground of relief. In *Hyde v. Ruble*, 104 U. S. 407, Chief Justice WARRE, speaking for the court, says: "The issues made by the pleadings do not create separate controversies, but only show the questions which are in dispute between the parties as to their *one* controversy."

The counsel of defendants in their brief present a "second ground" to sustain their right of removal in the following terms:

"That the petitioners, Buford, Logan, and Clyde, *controvert* the allegation that they have the property, effects, and franchises of the Western Division, that being the matter with which they are *specifically* and *solely* charged in the complaint," and "that the Western North Carolina Railroad Company *controverts* the allegation that it or somebody else has the books and evidences of indebtedness of the Western Division." The material matters referred to in the above statements have been considered and commented upon in the preceding part of this opinion. I regard paragraph 8 of the complaint, containing charges made on information and belief, as simply a usual method of pleading intended to procure discovery as to matters incidental to the one main indivisible controversy involved in the suit, and present no separate cause of action. The fact that the defendants, in their joint answer, separately controvert some of the allegations of the complaint does not create separate controversies. *Ayres v. Wiswall*, 112 U. S. 187; S. C. 5 Sup. Ct. Rep. 90.

The elaborate briefs and forcible arguments of the counsel of the parties have caused me to examine the authorities cited, and consider this motion with unusual care. I have a clear and positive opinion in regard to the case, but still I may be in error. It was insisted in the argument that it is obligatory upon the plaintiff who made the motion to remand this case, where the court had accepted jurisdiction to show clearly from the pleadings and records, as they were at the time the petition for removal was filed, that the case does not come within the provisions of the statute. It is a general rule of evidence

that upon issues of fact formed by the pleadings, the burden of proof is upon the party who affirms the truth of the controverted matter, and not upon the party that denies. This rule also generally applies to motions in a pending cause founded upon alleged facts. The moving party must affirmatively show the truth of his averments.

Upon jurisdictional questions the rules of pleading and procedure in common-law courts of general jurisdiction do not in many respects apply to federal courts of limited jurisdiction. In these courts jurisdiction is never presumed, and cannot be admitted, waived, or conferred by consent of parties. The court must look carefully into the pleadings and record to see whether its jurisdiction clearly appears. In cases removed from the state courts the record must be filed by the petitioners, and includes the proceedings by which the transfer was effected, and they must show, affirmatively, the facts necessary to give the court the jurisdiction thus obtained and accepted. *Railway v. Ramsey*, 22 Wall. 322. Where the circuit court has any doubt as to the right of removal, the safer practice is to remand the case to the state court, which clearly has jurisdiction; for if the court, in so doing, commits an error, it is speedily remediable in the supreme court of the United States. The dissatisfied party can take a writ of error and have the record filed in the supreme court, and on his motion the case will be advanced and speedily determined, and the question will not embarrass the further progress of the suit. *Wilson v. St. Louis & S. F. Ry. Co.* 22 FED. REP. 5. If this course is not adopted, the question remains open during the pendency of the case in the circuit court.

In the case of *Ayres v. Wiswall*, 112 U. S. 190; S. C. 5 Sup. Ct. Rep. 90, Chief Justice WAITE says:

"The fifth section of the act of March 3, 1875, makes it the duty of the circuit court of the United States to remand a cause which has been removed from a state court when it shall appear to the satisfaction of the court, at any time after the suit has been removed, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of the court." *Ayers v. Chicago*, 101 U. S. 187; *Barney v. Latham*, *supra*.

If this case is allowed to remain in this court the pleadings in the action of law must be reformed so as to conform to pleadings in equity, and the objections made by the defendants might be obviated by amendments which are usually allowed for the purpose of administering substantial justice when a new and different case is not made by such amendments. Suppositions of this character should not influence the court to grant a motion to remand a cause to the state court, in which there *clearly* appears, from the pleadings and record before it, that there is a *distinct and separable controversy* as contemplated by the statute, but such considerations may properly induce a court not to retain upon its docket a cause in which the *jurisdiction is doubtful*.

When a cause is properly removed from a state court under the

second clause of the second section of the statute, the removal carries into the United States circuit court *all the controversies* involved, and they may be fully determined *if the jurisdiction of the court continues to the hearing*. But if, at any time, during the pendency of the suit, the case should be so changed by amendments, or by reforming the pleadings, under the direction of the court, as to present only one *really indivisible controversy* between the parties, the jurisdiction of the court would cease. In this respect the fifth section of the act of March 3, 1875, modifies the general rule that where a court has rightfully obtained jurisdiction of the parties and subject-matter of an action or suit, it can decide every question involved and afford complete relief.

After a careful examination of the authorities cited, and a full consideration of the arguments of counsel, I am of the opinion that the pleadings and record of this suit, as they stood at the time of removal, show that it involves but one indivisible controversy between the plaintiff and defendants. It is therefore ordered that this suit be remanded to the state court from whence it was removed, upon the petition of the non-resident defendants.

LOUD GOLD MIN. CO. v. BLAKE.

(Circuit Court, N. D. Georgia. July, 1885.)

RIPARIAN RIGHTS—DIVERSION OF WATER—INJUNCTION.

On examination of the evidence, *held*, the complainant has not established its exclusive right to the water alleged to have been diverted from its mine and land by defendant, and that an injunction restraining defendant should not be granted.

In Equity.

Price & Bolton, for complainant.

H. H. Pavy and Harry Jackson, for respondent.

BOARMAN, J. The complainant's bill shows that the Loud Gold Mining Company organized under a charter which authorized the company to acquire, but not exclusively, the use of the water in certain non-navigable streams by compulsory purchase from riparian proprietors. This company, in addition to its tracts of mining lands, purchased in 1880 certain farming lands through which Town creek runs; among these lots are Nos. 67, 71, and others lying below 67; that the company at great expense dug a ditch parallel with the flow of the creek, for the purpose of flowing the waters of Town creek to the mining lands. This ditch diverts and withdraws a portion of the water from the west side of the creek, some miles above the mining lands, at a point in the south half of lot 67, which flows through a continuous ditch to the mining lands. Complainant shows also that

the company purchased from a number of the owners of lands through which the creek runs the privilege of using the water; that is, of flowing it out into and through the ditch to the lands below.

It will be observed that the property claimed in this case by the complainant consists (1) of the mining lands, purchased at an expense of \$20,000, and of the farming lands lying on the creek, purchased in 1880, to which last-mentioned lands certain riparian rights belong; (2) of the license or privilege purchased in 1880 from a number of the owners of the lands through which the creek runs, to divert and withdraw the water running through their lands for the company's use. Complainant alleges that the company's interests and rights in and to the mining and farming lands, and the company's rights to the license and privilege to divert and use the water running through the lots of other riparian owners, are invaded and injured by defendant, and that, in consequence of this wrongful invasion and injury, the mining interests of the company are and will remain valueless, unless relief is obtained against the wrongful and illegal acts of the defendant, against which the company complains and seeks this injunction.

The company complains that defendant illegally diverts and draws off the water from the east side of said creek at a point in the north half of lot 67, and causes it to flow through his ditch in such quantities as to leave, at certain periods of the year, no water, or not sufficient water, for complainant's lawful use; that this diversion and withdrawal of the water in such quantities, by the defendant, irreparably injures his property, and is in violation of the law which protects the company in the premises; because defendant, after withdrawing the water into his ditch, and using the same in his mills, which it is not denied he has a right to do, does not cause the flow to be returned to the stream, so that complainant can, under the rights and privileges claimed by the company, have the use of the water, as he is entitled to; but that defendant, after diverting and using the water in such quantities, allows it to be lost and wasted, so that, as a matter of fact, the water used by him finds its way back to the stream at a point not only below the mouth of the company's ditch in south half of lot 67, but at a place miles below the company's farming lands, and below the lands on the creek, from whose owners complainant bought said privileges and licenses, and the company, by defendant's diversion and waste of the water, is injured in being deprived of its lawful right as a riparian owner of the farming lands to have the water returned, and to flow into its natural channel through these lands, in such a way as the quantity will not be diminished, to the company's injury.

The pleadings and proof present two questions for solution: (1) Has the defendant wrongfully invaded and impaired the company's privileges so as to *irreparably* injure the mining interests of the company, and, if so, is the complainant (the right to the privileges and

licenses so purchased being considered as clearly established) competent to maintain this action against defendant? (2) Has the company, who owns in fee-simple the farming lands in lot 71 and other lands lying below 67, had such injury done to its riparian rights as will entitle it to the writ of injunction? That is, has the defendant, in withdrawing the water into his ditch, at a point in lot 67, and allowing the same to remain out of the creek until it reaches a point below the farming lands, caused such a diminution in the quantity of water that flows through the natural bed of the stream in lot 71 and others as to cause sufficient injury to the company to warrant a writ of injunction to restrain the defendant from diverting the water in lot 67?

The defendant does not deny that he withdraws a certain quantity of water from the creek at the point in lot 67 above complainant's ditch, but claims that the lands through which the water at that point is diverted belongs to him, and that as a riparian owner he has a lawful right to withdraw and use the said water. He contends further that if the water is wasted, and does not find its way into the creek until it gets below the complainant's ditch in lot 67, or below his farming lands in the lower lots, he is not, in this action, in any way accountable to complainant: (1) Because the possession of the licenses and privileges which complainant claims to have bought from the several riparian owners does not invest the company with such rights as will enable it to maintain this action. (2) Because the proof does not show that the water flowing through the creek at any season of the year in lot 71 is diminished, in consequence of the withdrawal of the water at a point in lot 67, *sufficiently to irreparably injure* the company; and if the water passing through lot 71 is materially lessened, because of defendant's withdrawal of the water, he, the defendant, secured the right to divert the water from lot 71 before complainant purchased the said farming lands, and his right was not affected by complainant's said purchase. These denials are, for the purposes of this suit, sufficiently sustained by the law and facts.

On the first question presented for solution it is not, in the view I shall take of this case, necessary to express an opinion as to whether the undisputed possession and ownership of such licenses or privileges as the company purchased from the riparian owners would enable the complainant to maintain this suit; for I shall hold that the defendant, as the proof shows, had dug his ditch through his own lands and had appropriated from the creek, at a point in his own land, the same quantity of water he now uses two years before the company owned any lands along the stream, or had become possessed of the privileges or licenses now claimed; that whether defendant now has any claim or right to the use of the water now flowing through his ditch or not which he can maintain at law against complainant, the facts show that, when the complainant reached the point in lot 67 from which he withdraws water into his ditch, the defendant had

publicly, and without any concealment or design to mislead complainant, dug and completed his ditch; and was and had been in the enjoyment and use of the water for two years; and the writ of injunction, after the completion of this valuable and costly work by defendant, should not now be made to operate in favor of the complainant, who knew for two years that the public work was going on for the purpose of withdrawing the water from a point in the north half of lot 67. The complainant, under its charter rights, has no cause, in an equity proceeding, to complain that the water is diverted and withdrawn in such quantities by defendant as to deprive the complainant of sufficient water for the company's mining purposes: (1) Because the proof administered by the complainant does not make it sufficiently clear to the court that the land sold by Logan to the company in 1880 was free from the right, which the defendant claims he had obtained previously from Logan, to divert and withdraw the water at the point in lot 67, and under the privilege obtained by defendant from Logan he was, and had been for two years before this suit was begun, in the enjoyment of the same quantity of water which is now appropriated by defendant. (2) Because the complainant's right, as the riparian proprietor of lot 71, and lots below, does not entitle the complainant to the writ of injunction; for the reason that the proof does not make it clear that his right to have the water flow through his lands in its natural channel *is injured by any material diminution of the flow* of the creek through his farming lands.

Reserving to complainant all the rights that he may have in an action at law, the relief and injunction asked for in this proceeding are refused and denied.

NASH v. EL DORADO Co.

(Circuit Court, D. California. July 6, 1885.)

1. COUNTY BONDS—SUIT AGAINST COUNTY—POLITICAL CODE CAL. §§ 4000, 4002, 4003.

A county in California is a corporation, and liable to suit.

2. SAME—STATUTE OF LIMITATIONS—RESIGNATION OF COUNTY SUPERVISORS.

That the supervisors of a county all resigned for the purpose of evading service of summons in a suit against the county, will not prevent the statute of limitations from running.

3. SAME—SUIT, HOW COMMENCED.

Suit may be commenced in such sense as to stop the running of the statute of limitations by the filing of the complaint.

4. SAME—COUPONS—STATUTE RUNS FROM WHAT PERIOD.

The statute of limitations runs upon coupons from the date of their maturity.

5. SAME—INTEREST ON BONDS—CIVIL CODE CAL. § 1917.

Where no provision is made for interest, both bonds and coupons bear interest after maturity at the legal rate, whether the coupons are detached or not.

6. SAME—CONSTITUTIONALITY OF SPECIAL STATUTES OF LIMITATIONS.

It is competent for a state legislature to pass special statutes of limitations applicable to a particular county indebtedness.

7. SAME—ACTION, WHEN BARRED.

If an action on the bonds would be barred in a certain number of years after their maturity, an action on the coupons will be barred in the same number of years after their maturity.

At Law.

B. S. Brooks, for plaintiff.

A. L. Rhodes, for defendant.

SAWYER, C. J., (orally.) This is an action brought upon bonds of El Dorado county, issued by the county in pursuance of the statute, for the purpose of aiding in the construction of the Sacramento Valley Railroad. The action is brought upon the bonds and the coupons for interest upon the bonds. The bonds, in this instance, have 12 years to run, the bonds and coupons calling for the payment of interest semi-annually. The bonds provide for the payment of interest at 10 per cent. per annum, at specified times, semi-annually, "on surrender of the coupons for interest." Coupons were attached for interest running over the entire period till the maturity of the bonds. The action is, in form, upon the bonds, and for interest, with no separate counts upon the coupons. The main question relied upon is as to what, and for how long a period, interest can be recovered in view of the statute of limitations. The demurrer goes to the amount of the recovery, rather than the general sufficiency of the complaint. The object seems to be to get the ruling of the court as to what rate of interest the bonds and the coupons bear after maturity,—the interest called for in the bond being ten per cent. per annum,—and as to the effect of the statute of limitations on the coupons. That being the object, and these points having been argued, notwithstanding the difficulty of reaching the point by demurrer, I have no objection to expressing my views upon the subject now. It is claimed that the county is not liable to be sued at all. But the act of 1854, Statutes 1854, p. 45, authorizes counties to be sued. That act was in force until the adoption of the Code. Section 4000, Pol. Code, constitutes counties corporations, and sections 4002 and 4003 authorize them to be sued. Under that statute, and under the present Codes, then, the county, since 1854, has been, and it now is, subject to be sued on its bonds. It is alleged, for the purpose of avoiding the statute of limitations, that, for a certain period during the running of the statute on these bonds, there was no board of supervisors for El Dorado county, the members having all resigned for the express purpose of evading service of summons in a suit, so that no valid service could be made upon anybody. But, under the statute of limitations, no service is necessary to constitute the commencement of a suit. Code Civil Proc. § 350.

The suit is commenced within the meaning of the statute by the filing of the complaint; so there is no time that suit could not have

been commenced, within the meaning of the statute, against El Dorado county. Suit could have been commenced at any time in such sense as to stop the running of the statute of limitations. Coupons do not bear interest until they become due. I have no doubt that they bear interest from the date of their maturity at the *legal* rate. It has been repeatedly so held by the supreme court of the United States. All of the cases decided in the supreme court of the United States hold that the statute of limitations runs upon coupons from the date of their maturity. Though incidental to the principal agreement, they are independent obligations intended to be cut off from the bonds, and passed from hand to hand; and, it is held, whether cut off or not, that the right of action accrues upon them as soon as they fall due. But it is claimed by the complainant here that he has counted upon his bonds alone, claiming interest not on an independent contract, but only as an incident to and a part of the bond itself. The bonds provided that interest should be paid at specified times semi-annually, as designated in the coupons attached. The money fell due at specified times, the bond not being yet due, and the right of action accrued, and the holder could commence an action upon the maturity of those coupons. They could be cut off and transferred separately as independent negotiable paper. If I were to execute a mortgage to secure, say \$6,000 borrowed money, giving three notes for \$2,000 each, payable, respectively, one of \$2,000 in one year, one in two years, and one in three years, there can be no doubt that an action would accrue on each as it matured. So, also, if instead of notes I should give a bond for \$6,000, payable \$2,000 in one year, \$2,000 in two, and \$2,000 in three years, it would be the same as in the case of the notes. Each installment matures at a particular time, and at that time the payee is entitled to his money; the right of action accrues, and an action may be commenced, at any time within the time prescribed by the statute of limitations after the right of action accrues. I have no doubt, therefore, that the right of action upon the coupons accrues upon the maturity of the coupons, and do not think the statute will be evaded in consequence of the coupons being for interest, and attached to the bonds. As to those coupons, then, against which the statute has run more than four years since their maturity before the commencement of the action, the action is barred under the statute of limitations. But, in this particular case, another point arises. A special act was passed in 1876 (St. 1875-76, p. 686, § 6) which suspended the running of the statute upon these particular bonds and coupons until the meeting of the next legislature; and in 1878 (St. 1877-78, p. 76, § 5) the same provision was again enacted, which suspended the running of the statute of limitations until the meeting of the following legislature,—the two periods in the aggregate amounting to over three years. On each occasion the running of the statute is expressly suspended by these special statutes. It is claimed that it is incompetent for the legis-

lature to pass a special law applicable to these cases alone. I think otherwise. I do not see any reason why the legislature might not pass a law suspending the running of the statute in these special cases as well as in any other general class of cases. The running of the statute was suspended during these periods, and that period must be added to the time prescribed by the general statutes. Adding this time, I believe all the coupons, except the last two on each class of bonds, are barred.

Another point requires notice. The claim is that these coupons do not mature until the maturity of the bonds. That is not the point decided in the cases relied on, cited from the United States supreme court. The point in *City v. Lamson*, 9 Wall. 477, and in *Lexington v. Butler*, 14 Wall. 282, was that a coupon would be regarded as a part of the bond, and the same term would apply to the coupon that would apply to the bonds. That is to say, if the bond is not barred until 20 years after its maturity, the coupons will not be barred till 20 years after they become due; the same limitations being applied to the coupons that is applied to the bonds. See *Clark v. Iowa City*, 20 Wall. 587. The question did not arise in these cases as to the time when the statutes began to run. It was only decided that after the statute began to run on the coupons it had the same time to run that the bond had after its maturity. It is very clear that no other question was passed upon. But it is equally clear that in the subsequent decisions in *Amy v. Dubuque*, 98 U. S. 474, and in *Koshkonong v. Burton*, 104 U. S. 668, the statute begins to run at the maturity of the coupons, whether the coupons are detached or not, and on the bonds from the maturity of the bonds. The time on the coupons is the same as the time on the bonds. If an action on the bond is barred in four years after the maturity of the bond, an action on the coupons is barred in four years after their maturity.

There is another question as to interest after maturity, and as to the rate. The bond is payable in 12 years; interest payable semi-annually, according to the coupons annexed. The interest on the bond, specified in the instrument, during the time is 10 per cent. There is no provisions as to interest after maturity. It is claimed that the bond, after its maturity, bears interest at ten per cent., or the rate prescribed in the bond. I do not think so. There is no contract in writing to pay interest at that rate after the maturity of the bond. The contract specifies a specific time for payment, and there is no provision for paying interest until actually paid. It is payable at a specified time, and at such rate as prescribed. The contract assumes that the money will be paid when it falls due, and makes no provision for any other contingency. There is no contract in writing as to the rate of interest to be paid after the bond becomes due. Until the time it becomes due the rate of 10 per cent. per annum prevails. There is no contract to pay interest on the bonds, or on the coupons, after they become due, and the interest is recoverable only

at the legal rate, in accordance with the express provision of the Code. Section 1917 of the Civil Code provides that: "Unless there is an express contract in writing fixing a different rate, interest is payable on all moneys at the *legal rate of seven per cent. per annum after they become due on any instrument of writing,*" etc. These bonds and coupons are instruments in writing, and they are governed by this provision of the Code. There is no contract in writing as to the rate of interest which the bonds or coupons shall bear after they become due. They must therefore bear the legal rate of 7 per cent. Section 1919 provides in what cases *interest shall bear interest according to the rate agreed upon as to principal*; and this case does not come within the provision.

The court granted a reargument upon the question of interest on application of defendant's counsel, upon which the following oral decision was rendered: Upon the reargument I do not see any grounds for changing the views before expressed. In my judgment the cases now cited by counsel for defendant from the California reports, arising upon statutes of the state, do not decide the precise points presented in this case. *Beals v. Amador Co.* 28 Cal. 449, is not like this. In that case there was only an equitable demand growing out of a division of the county, which the statute imposed upon the new county an obligation to pay. The sum fixed by the legislature was specific, and the obligation extended no further than the law expressly required. Besides, it was only to be paid from time to time, when the fund raised should be sufficient, and not, absolutely, on a specific day. *Soher v. Calaveras Co.* 39 Cal. 134, was similar to *Beals v. Amador Co.* in principle. So, as to interest on coupons after maturity, the case of *Savings & Loan Soc. v. Horton*, 63 Cal. 105, is different. In that case interest was charged upon interest after it became payable, due generally, and not upon coupons as separate contracts at the *contract rate paid on the principal*, which was different from and larger than the legal rate. The court held this to be erroneous under section 1919, Civil Code, before cited. I do not think it applies to this case.

The several points upon which an opinion is expressed are scarcely reached by the demurrer. But I understand that new bonds are expected to be issued in pursuance of a recent statute as soon as the amount of the liability of the county is judicially ascertained. Perhaps the views expressed will answer the purposes of the parties without further action. As no point is made as to the validity of the bonds, the complaint, at least, states a good cause of action for the amount shown to be due, not barred; and that, upon the views expressed, seems to be but a matter of calculation. So that the demurrer must be overruled, and it is so ordered, with leave to answer on or before the rule-day in August.

HALL v. EL DORADO Co.

(Circuit Court, D. California. July 6, 1885.)

This case is similar to *Nash v. El Dorado Co.*, ante, 252, and must be decided in the same way. Let a similar order be entered.

BUMBERGER and others v. GERSON.

(Circuit Court, W. D. Louisiana. April, 1885.)

1. ATTACHMENT—FRAUDULENTLY DISPOSING OF PROPERTY—INTENT MUST EXIST AT TIME OF MAKING AFFIDAVIT.

The fraudulent act of a debtor, made the ground of an attachment, must have accrued before or exist at the time the affidavit for the attachment is made by the creditor.

2. SAME—INSUFFICIENCY OF BOND—ALLOWING ADDITIONAL SECURITY TO BE GIVEN.

The insufficiency of a surety on the bond at the time the attachment was issued will not render it void, and entitle defendant to have it dissolved, but additional security may be required and taken by the court.

At Law.

Millsaps & Sholars, A. Goldthwaite, and M. C. Elstner, for plaintiffs.

Boatner & Boatner, for defendant.

BOARMAN, J. Defendant's motion to dissolve the attachment in these cases presents three different grounds, which alike apply to all of these cases. A stipulation waiving the jury is in the record. The reasons urged by defendant's counsel, except the questions of the sufficiency of the surety on the bond, have been considered and passed upon as being insufficient to dissolve the attachment. In none of the grounds for dissolving the attachment do the defendants deny the fraudulent acts charged against them. The allegation as to the insufficiency of the bond presents an interesting matter of fact and law. The bond in this case is for \$1,500; and the same surety, Allen, appears as the sole surety on a number of bonds where the writs were issued against the several defendants affected by this motion to dissolve the several bonds, were signed on the same day, and amount aggregately to over \$20,000. The proof shows that Allen's property, liable to seizure, is worth about \$15,000.

The plaintiff alleges his right to the attachment under act of 1868. He says, substantially, that at the date of the attachment Gerson had converted, or was about to convert, his property into money, or evidences of debt, with intent to place it beyond the reach of his creditors. For the purposes of this cause, during these motions, the

debt sued on, under the pleadings, must be treated as justly due by the defendants, and we must also consider that Gerson, in the motive of his acts in the premises, had the intent to defraud his creditors, the plaintiffs in these suits.

The Louisiana courts have repeatedly laid down the following rules in relation to attachments, and to the causes for their dissolution:

1. That an attachment must stand or fall, according to the state of facts at the date when it issues, and it cannot be cured by a subsequent event.

2. That the surety on the bond must be good; that is, he must be competent to enter into and bind himself by contract; he must be solvent and able to pay his debts and liabilities, including the amount of the bond; he must have property in value beyond the amount of the bond; the property upon the value of which the bondsman's sufficiency is to be tested must be liable to seizure.

In making this test I think the surety's property should be of such a kind as the law will allow to be seized and sold to satisfy the obligations of the bond, and that the court should not, with the view of testing the sufficiency of the surety, take into consideration the extent of the facility or difficulty which might attend the marshal in effecting the seizure of the property.

3. Attachment is a harsh and severe remedy, and strict proof should be required on a motion to dissolve.

The defendants rely on the inflexibility of the first rule, and say that the fact of the sufficiency of the surety must exist among the state of facts at the time the attachment issues.

In applying the first rule suggested, let us see what the courts mean and intend to imply in saying that the attachment must stand or fall on the state of facts at the date when it issues. What things or facts must be true, under the reason of that rule, at the time the attachment issues? Does the reason of the rule suggest that the facts relied on for the issuance of the attachment writs should exist at the time the plaintiff signs the affidavit setting up the causes for his attachment; or does the rule require that the allegations setting up the fraudulent purpose of the debtor should be true at the time of the issuance by the clerk of the writs?

It is conceded that the untruth of the allegations charging the fraudulent acts on the part of the debtor at the date of the affidavit must be fatal to the validity of the attachment, whatever may be the solvency of the surety. In this case it must be true that at the time plaintiff made his affidavit Gerson was fraudulently disposing of his property, or was about to dispose of it. If his fraudulent intent and acts occurred after the time plaintiff made the affidavit, the attachment, at whatever time the writs may have been issued by the clerk, must fail. The insufficiency of these facts stated in the petition and affidavit cannot be cured by a subsequent event; for the plaintiff will not be allowed to show any fraudulent acts of the defendant which occurred after the date of the affidavit, except in so far as such sub-

sequent acts of the plaintiff might be admissible to illustrate the defendant's fraudulent motive and purposes, even though the writs were not ordered by the judge, or, in fact, issued by the clerk for a day or more after the filing in the court of the petition and affidavit.

Recurring a moment to the practice, in the matter of application for and in the issuance of the attachment writs, we will find that the particular time at which the rule would require the alleged facts must be true, refers to the time at which the affidavit is made by the defendant, rather than to the time at which the writs issue; for it may be, as it often is, that the plaintiff makes the affidavit a day or several days before the judge has an opportunity to grant the order for the issuance of the writs; the judge's order is granted only after the petition and affidavit are presented to him. Having obtained the order to let the writ issue, on the plaintiff's giving bond according to law, the plaintiff in good faith presents his surety, whom he believes to be solvent. The clerk, to whom the law confides the *quasi* judicial duty of passing on the sufficiency of the surety, may approve or reject the surety; if he approves the surety, the plaintiff has done all that he can do in the matter; if he rejects the surety, the plaintiff may tender another surety.

When the clerk takes the surety offered by the plaintiff, who is without collusion with his surety, or knowledge of his insufficiency, the result is to show to all parties, as far as it is practicable, that the bondsman is sufficient in law. Anterior to the act of 1868 an attachment would not lie for the reasons or on the grounds provided for in that act; then an attachment issued when the debtor resides out of the state, or has left the state permanently; when he is about to leave the state without there being a possibility, in the ordinary course of judicial proceedings, of obtaining or executing a judgment against him previous to his departure. The enlargement of the grounds for an attachment so that it is for the first time, under the act of 1868, made a remedy against the fraudulent acts of a debtor, suggests that the first rule, which was laid down, as it appears, before the remedy by attachment was so extended, should not now, in its literal significance, apply.

We must assume that all the fraudulent acts of the debtor in this case existed at the time the affidavit was made. These facts are not denied, but the debtor says, notwithstanding his fraudulent acts, the attachment should fall; that now, plaintiff's only remedy to prevent injury from his fraudulent acts should be denied to him; that plaintiff's only remedy now, to make effectual in his favor, against defendant's fraudulent acts, the common pledge which he, as a creditor, had on his debtor's property, must be denied and taken from him because the clerk approved a bondsman who was not then sufficient. The plaintiff swears that the fraudulent acts upon which he relies for attachment had occurred before, or they existed at, the time of the affidavit; he does not swear to the sufficiency of the surety at any time.

Considering the facts, which we assume to be true, it does not appear to me that the courts in Louisiana, in laying down the first of the rules herein suggested, meant to treat and consider the matter of the sufficiency of the surety as one of the facts which must necessarily enter into the state of facts existing when the writ issues.

If the surety was not then sufficient, why cannot the court now, looking to the interest and rights of both plaintiff and defendant, correct the mistake that the plaintiff made in believing that Allen was a sufficient surety, or the bad judgment of the clerk who justified and approved the bondsman presented in good faith by the plaintiff? As the rule would apply in this case, it cannot be said that it is founded in equity; the conservatory writ in this case, if this rule is inflexible, avails the plaintiff nothing against the debtor who admits his fraudulent purpose to avoid payment. It is not denied that the court should allow the plaintiff, at any time, to give additional security, as the penalty of having his attachment set aside, if the surety, whom the clerk approved as sufficient when he issued the writs, should become afterwards insufficient, and that such a bond will take effect from the date of the original bond.

Without deducing from these generalizations the conclusion that the plaintiff in all attachment suits should be allowed to make sufficient a bond that was insufficient, at the time the clerk took and approved the bond, we, in consequence of the facts established in this case, do not feel constrained to regard the rule which we have been discussing as so inflexible as to forbid the plaintiff to now give additional security rather than to dissolve the attachment. The proof shows that Allen is worth about \$15,000 in such property as the law seems to require; the several bonds which were signed on the same day by him amount to over \$20,000. It is not denied that in suit No. 67 Allen is a sufficient surety. In the absence of proof as to the time of the day at which this or that bond was signed, how can the court say at what time, or upon what particular one of these several bonds, Allen's sufficiency as a surety became expended? Can it be said, in the face of these facts, that the rule which seems to require that an attachment should stand or fall upon the state of facts existing at the time it issues forbids the court now to allow the plaintiff to give, if he chooses, additional security? Shall the plaintiff in suit No. 67 be considered as having given sufficient security, and the plaintiff in the some one or more of the other suits, later in number, be told that the bond in his case was signed by Allen at a time when his sufficiency was expended and the conservatory writ must prove useless against his fraudulent debtor?

The difficulties presented by the facts in this case, in the mind of the court, can be met satisfactorily only by allowing the plaintiff to supplement his original bond by giving additional security in each of the several cases. In a case where we must presume, as we do in this case, that the debtor justly owes the debt, and that he is by his

fraudulent acts, which he does not deny, rendering nugatory and ineffectual all of the ordinary remedies which the creditor might adopt, it cannot be said that the remedy by attachment is a severe or harsh one. The facts in this case, as it now stands before the court, do not show that a severe remedy was adopted by the attaching creditor to enforce the payment of the debt justly due to him. *Erstein v. Rothschild*, 22 FED. REP. 65.

The clerk is ordered to take additional security in each of the several cases.

MANN v. ARKANSAS VALLEY LAND & CATTLE Co., (Limited.)

(Circuit Court, D. Colorado. June 5, 1885.)

1. CONVERSION OF CATTLE—BONA FIDE PURCHASER—NOTICE.

One who purchases for value and without notice, from a stranger, cattle that have strayed from their range and been taken possession of by such stranger, will be liable for conversion if he refuses to deliver them to their owner on demand made by him.

2. SAME—MEASURE OF DAMAGES.

The measure of damages for such a conversion will be the value of the cattle with their increase to the time of demand, with legal interest thereon from the date of the demand.

3. WITNESS—CREDIBILITY—FALSE TESTIMONY.

The jury may disregard altogether the testimony of a witness who has willfully and knowingly sworn falsely in respect to any material matter in the case.

At Law.

R. E. Foote and vrels, Macon & McNeal, for plaintiff.

Hugh Butler, for defendant.

HALLETT, J., (*charging jury*.) There is a great mass of testimony in this case directed to one proposition only: whether the cattle belonging to the plaintiff came into the defendant's possession and were retained by it. It is true that several questions are involved and embraced in this proposition; as (1) the title of the plaintiff to the herd which he claims to have purchased from Schlager & Jordan in the fall of 1880, and which was branded, as he says, with a bar brand. This is contested by defendant upon the ground that he did not then obtain an absolute title to the property; though it is conceded that he subsequently acquired such title. That is a matter which will not require very much attention. The bill of sale which was given by Schlager & Jordan to the plaintiff at that time, after providing the terms of payment, and the way in which the value of the cattle should be estimated, did provide that the sellers should have and retain possession, or the right of possession, until the cattle should be paid for. This was obviously a security for a deferred payment. Some cattle—about 600—were to be taken to Omaha or Council Bluffs, and there sold for a sum not less than the price specified in the contract, and

Schlagel & Jordan were to receive the proceeds of the sale. This transaction was to be carried on by the plaintiff according to the terms of the contract, in the name of Schlagel & Jordan. So far as disclosed on the trial this was done.

In Omaha some dealings were had with Sheedy & Clark, of which it is not necessary to say very much. Schlagel & Jordan, in that transaction, assumed to be the owners of the property,—Mr. Mann, the plaintiff here, joining them; but it would seem that the money obtained in that transaction was for Mr. Mann's benefit, and while Schlagel & Jordan were still insisting upon their lien on the cattle at that time. I believe they agreed to relinquish it to Sheedy & Clark, and take other security for the money that was due them, and they were still recognizing the sale that had been made to Mr. Mann, and what they were doing was to protect their security. It is not necessary to consider what the rights of Schlagel & Jordan were under these transactions, and what position Mr. Mann assumed towards them. For the purposes of this controversy it may be said, in all that took place between the parties, and the several contracts that were made, that Mr. Mann became the owner of this herd in the month of October, 1880, as he claims to have done.

Then there is a great volume of testimony as to the possibility as to whether this herd in fact did come into this state from Sheep Creek basin, where they were turned loose, and the possibility of their doing so, and so on; whether the Black Hills mountains formed a barrier which at that season of the year they could or could not pass; whether they were seen at the junction of the Laramie and Platte rivers; whether they came south by way of Horse creek, crossed the railroad near Egbert station, and passed on into this state. All that evidence was given for the purpose of proving whether the cattle came to this state. The evidence offered by the plaintiff on that subject was for the purpose of showing that the cattle came into this state, and for the purpose of identifying them as the animals which were turned out at Sheep Creek basin. It was necessary to establish the proposition that they came into this state, so as to make it plausible and reasonable that they came afterwards into the possession of Mr. Bloomfield and of the defendant. Now that evidence has no other importance than to establish the fact or disprove the fact—the truth of the proposition—that the cattle did come into this state during that winter—the winter of 1880–81.

I have an instruction from the defendant's counsel to the effect that if, in your opinion, any portion of that testimony is false or untrue, that defeats the whole case. That is not true, unless it appears to you the cattle never did in fact come here. As I have already stated, the object and purpose of all that testimony is to show whether the cattle did or did not come into this state; and, notwithstanding the failure of any part of that evidence to establish the fact to which it is directed, if you should be of the opinion, nevertheless, that

the cattle came into this state, or, if only a part of them, then some part, the failure of such testimony would not affect the result. But, of course, if the failure of such testimony would have the effect in your minds to satisfy you that the cattle never reached this state, or came here, then of course they could not come into the hands of Mr. Bloomfield, or of this company, the defendant.

It is not necessary or proper that I should comment upon that testimony. It is directed, first, to prove that the cattle must have died in or near the country in which they were turned out,—the cattle of both herds, the Gillespie herd, and the others, the Schlagel & Jordan herd, also; and next to prove that the state of those mountains—the Black Hills range—was such that they could not possibly or probably pass them; that they never did come on this side of those mountains at all; that all the witnesses who testified to seeing them in Wyoming or this state afterwards were mistaken, or swore falsely in respect to those matters. Of course, all that testimony has been discussed before you by counsel at great length, and if you are of the opinion, on full consideration of it, that the cattle, or some part of them, came into this state, were in this state in the spring of 1881, and subsequently, then the question arises, what became of them here?—whether they came into the hands of Mr. Bloomfield. Up to the fall of 1882 Mr. Bloomfield was doing business for himself,—during the years 1880, 1881, and 1882, until the autumn of the latter year,—when it seems he sold his herd to the defendant in this case, the Arkansas Valley Land & Cattle Company, and he became the manager of the company.

If the cattle passed to the company in any way, they must first have been in the hands of Mr. Bloomfield during the year 1881 and the greater part of the year 1882, until the time when he turned over his herd—sold his herd and turned it over to the defendant. Upon that subject the plaintiff has offered some testimony of witnesses who state that Mr. Bloomfield asserted a claim to some of these cattle, and took possession of some of them; that many of them were seen in the neighborhood of his ranch and upon his range, and that he actually asserted a claim to them. That is met by the testimony of many persons who state that they were engaged, similarly to those who testify for plaintiff, in gathering cattle during the years 1881 and 1882,—gathering the cattle that Mr. Bloomfield laid claim to,—and they saw nothing of these particular cattle.

You will perceive a great conflict of testimony that has arisen upon this subject, and it must be conceded by every one who has heard the testimony that it is very striking and very strong. It is hardly to be explained on the theory that these witnesses may be mistaken on one side or the other, and their statements harmonized so as to make them stand with each other. There must have been some false testimony on one side or the other; and the question is for your determination where the truth lies. Those witnesses, as far as I can

see, had equal means of observation; they were with the cattle,—“handling” them, as they express it; that is the word they use, though, I suppose, none of them actually put hands on them; but they were with them, and, so far as I can see, they had equal means of observation. I think this circumstance may be adverted to: that when men gather cattle for a particular person, if they find some with the brand of that person on them, perhaps they do not pay strict attention to other brands that may be found on the same cattle.

It is rather natural that they should rely upon the brand on which the cattle are held. That some of the witnesses did not observe the brands on the cattle very closely, may be accounted for upon that theory; but that does not go all the way towards harmonizing the statements of these witnesses, because some of them testify with considerable particularity as to what they could see on the animals, and they saw nothing more than they described. Some of them admit that they are unable to remember all the brands that they saw on the cattle. Perhaps it may be said of them, they are unable to describe what they cannot remember.

With this conflicting testimony you are called upon to decide, and it becomes your duty to decide, upon this occasion between these parties. If you arrive at the conclusion that Mr. Bloomfield did take possession of the cattle of the plaintiff; that they were in this state, and he did take possession of them in 1881 and 1882,—then how many were turned over by him to the defendant company? How many, if any? Some of the witnesses on the part of the plaintiff testified that certain of these cattle were turned over by Bloomfield and driven over to the range of the Arkansas Valley Land & Cattle Company, on the Arkansas river. Others deny this—others who were with those herds. There, again, is the same conflict of testimony which exists with respect to the other matter,—whether Bloomfield had possession of them. The same occurs here; a conflict which is for you to decide.

The defendant company is liable to plaintiff for any of these cattle which came to its possession and were retained by it, although it may have been an innocent purchaser of them, without notice of the plaintiff's right, because no one can be divested of his property by the mere act of another purchasing it. If one lose a thing, and it come to the hands of another wrongfully, who takes possession of it, and sells it to a third person in good faith,—that is, the purchaser acting in good faith,—he acquires no title as against the true owner by his purchase. But in order to put the purchaser in the wrong in respect to it; to make it appear that he has appropriated the property to his own use, and made a conversion of it, as we use the phrase in the law, which means only that he has appropriated it to his own use,—there must be something like a demand for it, or some use of it by the person who has possession.

In this instance, the plaintiff relies upon a demand made on Mr. Bloomfield, the defendant's agent, some time in the early part of last

year. As to that matter, if the plaintiff demanded the cattle from the defendant, or the agent of the defendant, bearing certain brands,—the brands under which he claimed them, or the two herds,—and the defendant then had possession of the cattle having such brands, I think the demand was sufficient. The position of the defendant's agent, at all events, was that there were no such cattle in his possession; and if the fact was that he had such cattle at that time, the demand was sufficient, and the failure to comply with it would authorize you to determine that there was a wrongful conversion of the cattle.

These are the general propositions which it is incumbent on the plaintiff to maintain by a preponderance of testimony, in order to recover in this action; that is to say, it must appear to you that the cattle having been turned out in Wyoming, as stated by witnesses on behalf of the plaintiff, came into this state and were appropriated and taken possession of by Mr. Bloomfield, and afterwards turned over to the defendant company by him, and that there was a demand by the plaintiff upon Mr. Bloomfield, as the agent of the defendant company, for the cattle before this suit was brought. As to the number of cattle, of course the defendant cannot be responsible—especially not, as being a purchaser of the property in good faith—for any more than were actually received. I believe some of the witnesses fixed the number. If you find for the plaintiff, you must find for a certain number, as well as the value.

Counsel have submitted a great number of propositions, some of which may require to be noticed in addition to what I have said to you. There are not any of them, I believe, that are quite satisfactory to me in the language that has been used, although they express the law to some extent.

"That in considering the testimony of the witnesses the weight of the evidence is not to be determined by numbers." That proposition is true. You will find some witnesses who impress you as being more worthy of credence than others, and if you believe they state the truth you are at liberty to accept their testimony, although it may be opposed by the testimony of several other witnesses, who are witnesses of equal means of observation, and appear to have equal knowledge of the facts to which they testify. If there is no reason for discrediting the greater number on one side, of course there is weight in numbers. You have greater reason to believe two witnesses who testify to a fact in opposition to one who makes a different statement, when the two appear as worthy of belief as the one who stands opposed to them. These matters of the weight and value of testimony are said to be particularly within the judgment and discretion of a jury. They are to determine the effect of what they have heard, and when the testimony is conflicting they are the absolute judges of its truth.

"If you find the plaintiff owned the bar cattle, and afterwards bought the T cattle and took an assignment from Gillespie, Kelly, and

others of their right of action for them before instituting this suit, you will find for the plaintiff the value of such cattle of either herd which you may find the defendant has converted, without reference to what he paid for the one herd or the other." The point of that instruction appears to be that the amount paid by plaintiff for the animals is of no special importance in this action. That is true. If he is entitled to compensation, the amount paid by him is not a matter for consideration.

"If you find that defendant converted any of the cattle belonging to plaintiff, and that among those converted were cows which either had calves with them at the time of the conversion, or afterwards and before the commencement of this suit had calves, then you are instructed that the plaintiff is entitled to recover the value of such calves or increase, and you may consider as evidence of the number of such increase the average increase of cattle for the years between the time you may find the company took possession and the institution of this suit." That is true, substituting for "the institution of this suit" the time when the demand was made for the cattle. The plaintiff, if entitled to anything, is entitled to the value of the animals with their increase up to the time of the demand made; not the commencement of the suit, but the making of the demand, which was, I believe, in the early part, perhaps near the first, of January, 1884.

(*Mr. Macon* asked as to interest.) Yes. If you find for the plaintiff, he is entitled to interest on the amount from the date of the demand—interest according to the statute of this state—at 10 per cent. per annum.

"The jury is further instructed that the plaintiff's case must be fairly made out and sustained by a preponderance of testimony, and they are not authorized or warranted in finding a verdict against the defendant based upon mere doubt or suspicion. The circumstance that the plaintiff is alleged to be poor, and unable to defray the expense necessarily incurred in connection with the presentation of evidence, or the circumstance that the defendant is alleged to be rich and powerful, and to have superior ability for the presentation of evidence against the plaintiff's case and in support of its own, is not to be considered." That is given in the language which is used.

"The jury is further instructed that the issues in this case, made by the pleadings, present the question whether the plaintiff, Mann, was at any time the owner of the cattle claimed by him, and whether such cattle drifted to Colorado and afterwards came into the possession of the defendant. The answer denies each and all of the propositions stated, and the burden of proving these facts rests upon the plaintiff. The answer contains no admission of any kind which relieves the plaintiff from proving all or any of the facts necessary to show that he was the owner of the cattle mentioned, and that the same have since come into the possession of and been converted by the defendant." That is given.

"The court instructs the jury that negative testimony is entitled to consideration, when, from the nature of things, other testimony cannot be given. If the plaintiff's witnesses swear that cattle, claimed or owned by the plaintiff, were seen or found in certain localities, it is competent for the defendant to show by witnesses who had equal opportunities with the plaintiff's witnesses to testify to the contrary; and if the jury believe that the witnesses who testified that they saw no such cattle at the times and places mentioned, and that such witnesses had reasonable opportunity under the circumstances to know whether the cattle were in such localities as testified to by the plaintiff's witnesses, their testimony is entitled to as much consideration, if the jury believes that the witnesses were equally credible." That is given also. If they have the same opportunities for judging and determining the fact, and they are equally credible, they should receive the same consideration.

I do not recall any other proposition on which I have to say anything, except that if you find that any of these witnesses whose testimony has been contradicted, or seems to be inconsistent, the several parts with each other, has willfully sworn falsely in respect to any material matter, then you are at liberty to disregard the testimony of such witness altogether. That proposition is contained in some of these instructions submitted to me. That is the law in such matters,—that if a witness wilfully, purposely, knowingly testifies falsely, he may be discredited altogether. Of course, a witness is not to be discredited upon a mere mistake that he may make,—a slip of the memory, want of recollection, some infirmity of his mind; but if he deliberately and purposely misstates a fact thereby, he shows himself to be unworthy of belief.

There is nothing else, gentlemen, I believe, which I wish to say to you, unless the counsel think I have omitted something. I advise you to proceed with care. This is an important case to the parties, and you should take your own time. You will be comfortably entertained, under any circumstances; that is, we will give you plenty to eat, and make you as comfortable as we can.

CASTANOLA and others v. MISSOURI PAC. R. Co.

(District Court, W. D. Texas. 1885.)

SALE—STOPPAGE IN TRANSITU—TRANSFER OF "DUPLICATE" BILL OF LADING—NOTICE—INSOLVENCY OF VENDEE.

On February 6, 1884, D. sold to T. 25 hogsheads of tobacco, and shipped them by rail to him, taking two bills of lading, one marked "original," and the other "duplicate." The "duplicate" bill of lading and invoice were transmitted to T., and the "original" was attached to a 60-days draft drawn by D. on T., and sent through a bank for acceptance. T. on receipt of the "duplicate" transferred it by indorsement to C., with whom he had contracted to sell the

tobacco, and received payment therefor; and on presentation of the "original" and draft the next day, refused to accept the draft, and it was returned to D. On February 24, 1884, T. failed, and D. ordered the goods, then in transit, to be stopped. On February 27 and 29, 1884, C. demanded the goods of the railroad company, and was informed that they had been stopped in transit by D. and shipped back to them; whereupon C. sued the company to recover the value of the goods, claiming to be an innocent purchaser for value. *Held*, (1) that the transfer of the "duplicate" bill of lading for value did not carry with it necessarily the title to the goods; and (2) that C. had notice before he paid for the goods, which should have put him on inquiry as to what disposition had been made of the "original" bill of lading, and therefore did not acquire a legal title to the goods that would defeat the right of the consignor to stop them in transit.

TURNER, J. In this case the plaintiffs sue defendant for the non-delivery of 25 boxes of tobacco. The facts developed by the evidence are substantially as follows:

About the last of January, 1884, (I think the 28th,) a member of the firm of Turnley Bros. & Co., grocers, residing and doing business at Galveston, Texas, came to this place, (San Antonio,) and contracted with this plaintiff for 25 boxes of "Drummond Horseshoe Tobacco." That about the sixth of February thereafter, Turnley Bros. & Co. gave to the agent of the Drummond Tobacco Company an order for tobacco; 25 boxes to be consigned to Turnley Bros. & Co. at San Antonio, Texas; also a number of boxes to be shipped to them at Galveston. On the eleventh day of February, the Drummond Company shipped the tobacco, as ordered by Turnley Bros. & Co., and taking from the railroad company (defendant) two bills of lading, one stamped "Original" and the other "Duplicate." The duplicate bill, together with the invoice, was transmitted to Turnley Bros. & Co., and the original bill of lading was attached to a 60-days draft, drawn by the consignors upon the consignees, and sent through a bank to Turnley Bros. & Co. for acceptance.

Turnley Bros. & Co., upon the receipt of the duplicate bill of lading, delivered the same to plaintiff, indorsed, without date, as follows: "Deliver to M. Castanola & Son." Signed. "TURNLEY BROS. & Co."—which duplicate bill of lading, together with an invoice of the tobacco, amounting to \$270.50, payable in 60 days, or 2 per cent. off for cash, reached Castanola & Son, February 20, 1884. On the next day, plaintiff remitted to Turnley Bros. & Co. the amount of the invoice, less 2 per cent. off. Turnley Bros. & Co. refused to accept the draft attached to the original bill of lading, and same was returned to the Drummond Tobacco Company, and on the twenty-fourth of February, 1884, Turnley Bros. & Co. failed, and on that day it became publicly known that they had failed, and the Drummond Tobacco Company ordered the goods stopped in transit. On the 27th plaintiff presented the duplicate bill of lading to defendant, and was told that they also had a letter from Turnley Bros. & Co., notifying it of the transfer of the tobacco to plaintiffs. On the twenty-ninth of the same month, plaintiffs again demanded the tobacco, and were told by the defendant's agent that the goods had been stopped in transit by the Drummond Tobacco Company, and the tobacco shipped back to St. Louis, and delivered to the Drummond Tobacco Company. It is evident that Turnley Bros. & Co. were in failing circumstances at the time they gave the order for the goods to the Drummond Tobacco Company.

The plaintiffs bring this suit, and seek to recover of defendant the value of the goods, claiming to be an innocent purchaser for value.

The question first presented, then, is, is the purchaser, in the eyes of the law, the owner of the goods, by virtue of his having the duplicate

bill of lading assigned to him, and having paid therefor? The position taken by the defendant is that the duplicate bill of lading does not represent the goods, but the original one does; and plaintiff purchased at his peril, and that no title to the goods passed to the plaintiff; and therefore the Drummond Tobacco Company rightfully exercised their right of stoppage *in transitu*. If this position be well taken, that ends the controversy. Bills of lading are often spoken of as negotiable. This is not, legally speaking, true. They are for specific articles, and not payable in money, and are not, strictly speaking, negotiable commercial paper. See Daniel, Neg. Inst. (2d Ed.) p. 660, § 1727. They are assignable, and the bill of lading represents the property; and if the consignor assigns *the* bill of lading to an innocent purchaser for valuable consideration, the title to the goods passes to the purchaser, and such a sale would defeat the right of stoppage *in transitu* of the consignor. The difficulty arises in determining which is *the* bill of lading that represents the goods, and the transfer of which carries with it the legal title. They are called original, duplicate original, and triplicate originals. This in one sense is true. They all contain a receipt for the goods by the transportation company, as well as a contract to transport the goods to the place of delivery, and to deliver to the person entitled thereto. See authority last cited, section 1728. It cannot be argued that each one of these bills, independent of the other, represents the goods. If this proposition be conceded, it follows as a logical sequence that either some one of them must represent the goods, or that the three or more, (as the case may be,) taken together, represent the goods.

In the cases to which my attention has been called the term used is, where *the* bill of lading has been transferred to an innocent purchaser for value, etc., using the singular number. As I have said, these bills of lading are not strictly negotiable, but were assignable, and in some respect likened in the commercial world to original and duplicate bills of exchange. It will hardly be contended, however, that a prudent man would purchase a duplicate bill of exchange without first having ascertained that the original had not been paid. The fact that the second bill of exchange is presented suggests and gives notice that there is an original, which, if paid, renders the duplicate of no value.

Ought this rule to be applied here, either in determining which is or what constitutes *the* bill of lading, or with reference to the *bona fides* of the purchaser. It is evident that the consignors did not intend to part with title to the goods unless Turnley Bros. & Co. accepted the draft drawn upon them,—see Daniel, Neg. Inst. (2d Ed.) § 1734; and if this controversy were between the consignors and the consignees there would be but little difficulty.

This case illustrates the facility with which a consignee who is disposed to defraud the consignor can effect his purpose, if it be held that the duplicate bill represents the goods, and that its transfer to a purchaser takes thereby the legal title to the goods. I am unable to

find any adjudicated case in point. I am constrained to believe, for the reasons above indicated, that a transfer of a duplicate bill of lading for value does not carry with it the legal title to the goods, and that the purchaser in this case was put upon notice before he paid for these goods, which should have put him upon inquiry as to what disposition had been made of the original bill of lading; and that therefore, under the facts of this case, the plaintiff did not acquire the legal title to the goods, such as would defeat the right of the consignor to stop the goods while in transit.

The judgment is therefore for the defendant, with costs.

Notwithstanding that Judge TURNER's decision strikes one as being right and reasonable, I have had considerable difficulty in agreeing with it, because there are in the books some *dicta*, if not, in fact, several decisions, that seemingly, at least, conflict with the views expressed by the learned judge. For example, Mr. Smith¹ says: "Several parts of a bill of lading signed by the master are generally delivered to the shipper; and in some instances the parts have been indorsed to different persons. In such cases, the first person to whom a part is regularly indorsed is entitled to the goods." And Mr. Benjamin,² basing his remark on the decision of the house of lords,³ says: "The person who first gets one bill of lading out of the set of three (the usual number) gets the property which it represents, and needs do nothing further to assure his title, which is complete, and to which any subsequent dealings with the other bills of the set are subordinate; and that though the shipowner or wharfinger, if ignorant of the transfer of one bill of the set, may be excused for delivery to the holder of another bill of the set acquired subsequently; that fact will not affect the legal ownership of the goods as between the holders of the two bills of lading."

Inquiries of leading bankers in Chicago, however, confirm Judge TURNER's conclusion that it is highly imprudent to buy or make advances upon a "duplicate" bill of lading without requiring production of the "original," or at least an account of the same, if it should be lost. At the First National Bank the officials say: "We deal in bills of lading to the extent of \$20,000,000 a year, and invariably require the original bill to be produced. Under no circumstances would we make advances upon a mere 'duplicate' bill of lading; it would be assuming a risk altogether unbusiness-like." Similar views were expressed at the Chicago National, the Commercial National, the Canadian Bank of Commerce, and the Corn Exchange National Bank. The manager of the branch of the Bank of Montreal was especially emphatic. "Why," said he, "the bill of lading is negotiable; we should certainly require the original to be produced before making advances,"—thus clearly implying that, in his opinion, the transferee of an original bill might acquire rights to the property to which the right of a bank making an advance upon a "duplicate" would be subordinate. In this apparent conflict of opinion between eminent text-writers and practical business men, I have examined the cases, including those upon which the conclusions of the text-writers are based, to ascertain (1) whether they warrant the broad, unqualified conclusion that the first *bona fide* indorsee for value of any of the parts of a bill of lading takes the goods; and (2) whether, if so, such cases are not distinguishable from that

¹ Mercantile Law, 302; citing Gurney v. Behrend, 3 El. & Bl. 622, and Gilbert v. Guignon, L. R. 8 Ch. App. Cas. 16.

² Benj. Sales, § 1224.

³ Barber v. Meyerstein, L. R. 4 Eng. & Ir. App. (H. L.) 37.

decided by Judge TURNER, so as to take the latter out of the rule deductible from the former.

1. Does the first transferee in good faith, without notice and for value, of any part of a bill of lading, take the goods, of which it is a symbol, against all subsequent transferees? Thompson was a planter in Jamaica, heavily indebted to Caldwell & Co., in Liverpool, who were secured by mortgage of his estate. He was also heavily indebted to France & Co., in Liverpool. Thompson's agent in Liverpool was one Fairbrother. In March, 1785, Thompson shipped in the *Tyger*, owned by France & Co., and commanded by Ball, a large consignment of sugar and rum. He took three bills of lading from Ball. The first of these bills covered the whole cargo, and ordered delivery to *Messrs. Thompson and Fairbrother, or their assigns*. While this bill was in Thompson's possession in Jamaica, the other two were drawn for different parts of the cargo, but together making up the whole cargo, and ordered delivery to the order of the shipper or his assigns, and were indorsed by Thompson as follows: "Deliver the within to Messrs. Thompson and Fairbrother, provided they engage to pay the net proceeds to Messrs. France and nephew, otherwise deliver them to the order of James France and nephew, on account of Coppell and Goldwin. The last-named persons were agents of France & Co. in Jamaica, and to them were delivered these two bills of lading, while Thompson still held possession of the first bill. Thompson then sent the first bill to Fairbrother, with a letter notifying him somewhat vaguely of having indorsed the other two bills to Coppell and Goldwin. Without communicating this notice to them, Fairbrother assigned the first bill to Caldwell & Co. In the mean time, Coppell and Goldwin forwarded their two bills to France & Co., and on arrival of the *Tyger* in Liverpool, both Caldwell & Co. and France & Co. demanded the goods of Ball, the master. He refused to deliver to Caldwell, who thereupon brought trover against Ball. It was held that both Caldwell & Co. and France & Co., being *bona fide* holders of the bills, for value and without notice, the goods were to be awarded to whoever had obtained first the legal title and possession, which was decided to be France & Co., the second and third bills having been given to their agents, Coppell and Goldwin, and the goods being in their vessel before the first bill was transferred to Caldwell.¹

In this case, it appears to have been the second and third parts, which, being first transferred, carried the title against a subsequent transferee of the first bill.

In *Meyerstein v. Barber*,² A. was indorsee of a bill of lading, drawn in a set of three, making cotton deliverable in London on payment of freight. The cotton had been lately landed, under an entry made by A. at a sufferance wharf in the port of London, with a stop thereon for freight. On the fourth of March, A. obtained from M. an advance of £2,500, on the deposit of two copies of the bill of lading, M. assuming the third to be in the hands of the master. On the sixth of March, the stop for freight being then removed, A., who had in February instructed B., a broker, to take samples of the cotton and to offer it for sale, obtained from B. an advance of £2,000, on the deposit of the third copy of the bill of lading, which A. had fraudulently retained. On the eleventh of March, B., being informed of the prior advance by M., sent his copy of the bill of lading to the wharf and procured the cotton to be transferred in his own name, and afterwards sold it and received the proceeds. Held, that the bill of lading, when deposited with M., retained its full force and effect; that there was therefore a valid pledge of the cotton to M., and he could maintain an action against B., either for the proceeds of the sale as money received to his use, or for wrongful conversion of the cotton.³

¹ Caldwell v. Ball, 1 Term R. 205.

² L. R. 2 C. P. 38.

³ Meyerstein v. Barber, L. R. 2 C. P. 38.

As intimated above, this case went on appeal to the house of lords, wherein the judgment below was affirmed, and the lord chancellor, Lord HATHERLY, said: "Now, if anything could be supposed to be settled in mercantile law, I apprehend it would be this, that when goods are at sea, the parting with the bill of lading, *be it one bill out of a set of three, or be it one bill alone, is parting with the ownership of the goods.*"¹ And Lord WESTBURY said: "It is unquestionable (as has been said here by one of the judges) that the handing over the bill of lading for any advance, under ordinary circumstances, as completely vests the property in the pledgee as if the goods had been put into his own warehouse. There can be no doubt, therefore, that the first person who, for value, gets the transfer of a bill of lading, *though it be only one of a set of three bills, acquires the property; and all subsequent dealings with the other two bills must, in law, be subordinate to that first one; and for this reason, because the property is in the person who first gets a transfer of a bill of lading.*"²

The form of the bill of lading does not appear in the *Caldwell Case*, *supra*, but in *Meyerstein's Case* it is shown that each part contained the usual clause, "one [part] of which being accomplished, the others to stand void." These cases certainly appear to sustain the position of the text writers quoted above, that the transfer of any part of a bill of lading passes the property covered thereby. And perhaps a good reason for giving to the parts of a bill of lading all the force of originals, is suggested by the supreme court of the United States in deciding that each part of a bill of exchange is an original.³

"On the other hand, great inconveniences might arise from compelling the plaintiff to produce the other parts of the set, or to account for their non-production, as he might not be able, satisfactorily, to prove that they had not been negotiated, or that they had been lost. In short, if the plaintiff, before he could recover, were required to produce or to account for all the parts of the set, he would be obliged, in every case where the bills had been transmitted by different conveyances abroad, to arm himself with proofs of every stage of their route and progress, until they should come back again into his hands, as preliminaries to his right to recover upon their being dishonored. Such a requirement would create most serious embarrassments in all commercial transactions of this sort; and instead of bills drawn in sets being a public convenience, they would be greatly obstructed in their negotiability, since the rights and the remedies of the holder might be materially impaired thereby." This argument seems to me to be just as forcible when applied to bills of lading drawn in sets as to sets of bills of exchange.

2. Is the case decided by Judge TURNER distinguishable from those above given, so as to take it out of the rule established by the latter? There are two kinds of bills of lading commonly issued by railway carriers: one kind, a document containing the names of consignee and destination, describing the goods, and formulating the contract of carriage and delivery, together with the conditions made a part of it. This is the ordinary "inland" or "domestic" bill of lading, and is given in all ordinary shipments where a bill of

¹ *Barber v. Meyerstein*, L. R. 4 Eng. & Ir. App. (H. L.) 325.

² *Barber v. Meyerstein*, L. R. 4 Eng. & Ir. App. (H. L.) 336. See, also, *Skilling v. Bollman*, 6 Mo. App. 76; *Michigan Cent. R. Co. v. Phillips*, 60 Ill. 191; *Railroad Co. v. Wagner*, 65 Ill. 198; *Vandover v. Wilmot*, 10 Ben. 223; *Zachrisson v. Ahman*, 2 Sandf. 68; *Gurney v. Rehrend*, 3 El. & Bl. 622.

³ *Downes v. Church*, 13 Pet. 205; and see *Bank of Pittsburgh v. Neal*, 22 How. 16. As to the bank upon which they are

drawn, each part of a bill of exchange is an original. The "second" or "third" will be paid without question upon presentation; the only inquiry by the bank being of its own book-keepers as to whether it has paid any other part besides that presented. This is not saying, however, that a person or bank, asked to discount a "second" or "third" bill drawn upon another person or bank, may safely discount the paper without inquiry as to its counterparts.

lading is required. The other kind of bill is known as the "export" bill; a similar document in substance, but of somewhat greater formality and minuteness of provision. These "export" bills are given in cases of foreign "through" shipments, and they contain a clause common to the genuine maritime bill of lading, but omitted in the "inland" railway bill just mentioned, namely: "In witness whereof, the agent signing for the said transportation and steam-ship companies hath affirmed to ——— [number of bills inserted here] ——— bill— of lading, of this tenor and date, one of which being accomplished, the others to stand void."

This is the provision upon which rests the whole theory that each part of such a bill of lading is an original. The bill of lading contained such a clause as this in *Meyerstein's Case*, above, and from the fact that the bills in *The Caldwell Case*, *supra*, were maritime bills, it may be fairly presumed that they contained a similar clause, although this does not appear in the report of the case. Now the word "duplicate," written on the ordinary "inland" railway bill of lading, can hardly be fairly held to so plainly import originality like the broad, explicit clause in the maritime or "export" railway bill. I know that some decisions and *dicta* impute the force of an original to a duplicate. Thus Burrill says of duplicate: "That which is doubled or twice made; an original instrument repeated. A document which is the same as another in all essential particulars. TINDAL, C. J., 7 Man. & G. 93; MAULE, J., *Id.* 94. Sometimes defined to be the copy of a thing; but, though generally a copy, a duplicate differs from a mere copy in having all the validity of an original."¹ So Abbott defines a duplicate as "a transcript of a writing equivalent to the original."²

But a well-established popular meaning of duplicate is, "that which exactly resembles or corresponds to something else; hence a copy, a transcript, a counterpart;"³ and it is in the sense of "copy" that it is, in my opinion, to be taken when written across an inland bill of lading. Whether it implies "originality" or merely a "copy," there are decisions which sanction Judge TURNER's view that prudence requires one buying or making advances on a "duplicate" bill to produce or account for the "original." Thus, upon application for probate of a "duplicate" will, both copies must, in England, be deposited with the registry of the court of probate.⁴

A case bearing upon the point is *Glyn, Mills, Currie & Co. v. East & West India Dock Co.*⁵ Goods having been shipped for London, consigned to C. & Co., the ship-master signed a set of three bills of lading, marked, "First," "Second," and "Third," respectively, making the goods deliverable "to C. & Co., or their assigns; freight payable in London; the one of the bills being accomplished, the remainder to stand void." During the voyage, C. & Co. indorsed the bill of lading marked "First," to the plaintiffs for a valuable consideration. Upon the arrival of the ship in London, C. & Co. entered the goods as consigned to them, and they were landed and placed in the custody of the defendants in their warehouses; the master lodging with the defendants notice, under the merchants shipping act, 1862, to detain the cargo until the freight should be paid. C. & Co. then produced to, and lodged with, the defendants the second part of the set of bills of lading. The defendants accordingly entered C. & Co. in their books as enterers, importers, and proprietors of the goods, and the stop for the freight being afterwards removed, they delivered the goods to various persons, upon delivery orders,

¹ Burrill, Law Dict. "Duplicate."

² Abb. Law Dict. "Duplicate;" citing Benton v. Martin, 40 N. Y. 345. See, also, Bouv. Law Dict. "Duplicate;" citing Onions v. Tyrer, 1 P. Wms. 346; Pemberton v. Pemberton, 13 Ves. 310; Roberts v.

Round, 3 Hagg. Ecc. 548. See Lewis v. Roberts, 103 E. C. L. 29.

³ Webst. Dict. "Duplicate," (4to Ed.) 420.

⁴ Rapalje & L. Law Dict. "Duplicate;" Rawson, Pocket Law Lex.

⁵ 5 Q. B. Div. 129.

signed by C. & Co. Held, by FIELD, J., that the defendants were liable in an action by the plaintiffs for the value of the goods; for, without deciding whether the master could have been exonerated by a delivery of the goods to the person first presenting a bill of lading, the defendants were not, by receiving the goods, subject to the stop for freight, placed in the same position as the master and entitled to his rights; and further, that in delivering the goods upon the order of C. & Co. they had acted in a character beyond that of mere warehousemen, and were guilty of conversion.

In deciding this case, Judge FIELD said: "If it is said to be a hardship on the defendants that they should be liable for delivery upon the production of the second part of the bill of lading, without any knowledge of a previous indorsement, it may be observed that they had the remedy in their own hands, as the part so produced was conspicuously marked 'Second,' and they had only to require the production of the 'First' part, which, as is well known, is usually sent to the consignee, and, in case of the non-production of it, to take an indemnity before delivery."

"Indeed, that is the course pursued by the defendants in their East India trade, in which the original bills of lading only are accepted, and in case of loss, the defendants require satisfactory proof of title and an indemnity; thus showing that, in that trade, at least, precautions are taken which, if taken by the defendants in the present case, would have protected them against loss. If the law were held to be different from the result at which I have arrived, the consignee who had sold or dealt with goods to arrive would only have to avail himself of his almost necessary earlier knowledge of the arrival of the goods, to anticipate, by production of his bill of lading, any production by the indorsee of the original, previously indorsed, and thus most seriously affect the transaction of any such dealings, which are effected solely in reliance upon the shipping documents."¹ This appears to be substantially the same line of reasoning adopted by Judge TURNER.

On the whole, I am constrained to believe that the principal case is well decided, because (1) if the bill of lading, as may be fairly presumed from the fact that the shipment was "inland," was an "inland" form, it is not within the rule applicable to maritime or "export" bills, the accomplishment of any part of which avoids all the others. (2) If the transfer of a mere duplicate bill of lading will pass the property, then the way is opened for the negotiation of every "duplicate" issued, and the perpetration of gross frauds thereby. (3) To require a seller or pledgeor of goods in inland transit to produce the "original" bill of lading or to account therefor, and show by other means a good title in himself to the goods, is not an onerous requirement, but one easily and quickly met. Ordinarily, the seller or pledgeor can quickly procure the original bill of lading; if he cannot, and has yet a good title, he can give a bond of indemnity. (4) The common practice of bankers and merchants requires the production of the "original," with which prudent custom Judge TURNER's decision is in wholesome accord. ADELBERT HAMILTON.

¹ Per FIELD, J., in *Glyn, Mills, C. & Co. v. East India Dock Co.* 5 Q. B. Div. 136.

CELLULOID MANUF'G Co. and others v. CHROLITHIAN COLLAR & CUFF Co. and others.

(Circuit Court, S. D. New York. July 6, 1885.)

PATENTS FOR INVENTIONS—EFFECT OF DECISION UPON INTERFERENCE—INFRINGEMENT—PRELIMINARY INJUNCTION—ANTICIPATION.

A decision upon an interference is not conclusive in suits upon the patent granted in pursuance of it. But it is a sufficient adjudication upon the patentability of the invention, and the right of the successful party to a patent for it, to lay the foundation for a preliminary injunction against the losing parties and privies to prevent infringement of the patent; and neither alleged anticipation of the invention by others, known to them while they were seeking to obtain a patent for it themselves, nor their own alleged invention, will avail them to prevent the injunction, without being made clearly to appear.

In Equity.

C. Wylls Betts and Frederic H. Betts, for orators.

John P Adams, for defendants.

WHEELER, J. The patent in question in this case, No. 288,955, dated November 20, 1883, for a collar or cuff of celluloid, was granted to Albert A. Sanborn, assignor, after an interference had been declared between him and Charles A. Kanouse, an applicant for a patent for the same invention for the benefit and at the expense of the defendants, had been decided in favor of Sanborn. The defendants had an opportunity to be and were heard upon the questions involved in the interference case, and were privies to the judgment upon it, and are bound by the judgment to the same extent as parties to the record. The decision upon an interference is not conclusive in suits upon the patent granted in pursuance of it. Rev. St. § 4914. But it is a sufficient adjudication upon the patentability of the invention, and the right of the successful party to a patent for it, to lay the foundation for a preliminary injunction against the losing parties and privies to prevent infringement of the patent; and neither alleged anticipation of the invention by others known to them while they were seeking to obtain a patent for it themselves, nor their own alleged prior invention, will avail them to prevent the injunction, without being made clearly to appear. *Smith v. Halkyard*, 16 FED. REP. 414; *Peck v. Lindsay*, 18 O. G. 63; 2 FED. REP. 688; *Holliday v. Pickhardt*, 12 FED. REP. 147. The defendant corporation was not formed so early as the time of the anticipations relied upon, and is said, therefore, not to have been within the reach of knowledge of them. But such corporations have the knowledge of their officers and agents, and no other; and the other defendant, and the agent of this one, is shown by his own affidavit to have had full knowledge of the paper collars with edges turned down relied upon long before and at the time of the interference. Aub's patent, No. 147,588, is the other principal thing set up. That may not have been known to the defendants, or their officers or agents. But whether it was or not, it does not appear to be

for the same invention as this patent. This was for a collar or cuff made of two layers of muslin, with the wearing edges folded to prevent unraveling and improve the appearance, and all cemented together by a mixture of starch, spermaceti, and indigo; this is for a collar or cuff made of a single thickness of celluloid, or other pyroxyline material, with the edges turned over on to itself, and cemented down, to form a hem. Neither are the paper collars, with their edges turned over, the same as the collars of the patent. Their edges are not cemented down to form a hem, and the material is not adapted to that treatment. There is no question but that the patent is infringed, if valid.

The motion for a preliminary injunction is granted.

ARNHEIM v. FINSTER and others.

(Circuit Court, S. D. New York. July 1, 1885.)

PATENTS FOR INVENTIONS—CAPS—REISSUES NOS. 7,807, 7,808—INFRINGEMENT—
INJUNCTION.

Preliminary injunction refused because of doubt as to the validity of the re-issued patent.

In Equity.

C. Wyllys Betts and *Frederic H. Betts*, for plaintiff.

Gilbert M. Plympton, for defendant.

WHEELER, J. *Marks v. Fox*, 18 Blatchf. 502, S. C. 6 FED. REP. 727, upon this same patent, reissue No. 7,807; division A, and No. 7,808, division B, granted to Marcus Marks, July 24, 1877, on surrender of original No. 166,395, dated August 3, 1875, for an improvement in caps, would be ample authority for granting this motion for a preliminary injunction, if that decision was to be followed now. It would, of course, be implicitly followed but for the decisions of the supreme court upon reissued patents made since. That such a case might have been decided differently in the light of those decisions, is recognized in *Coon v. Wilson*, 113 U. S. 268; S. C. 5. Sup. Ct. Rep. 537. This motion must be passed upon in view of these later cases. The original patent was for a head covering, as a whole, consisting of a crown, a forward band, and rearward neck-protector, moving up and down, at pleasure. The original application was for a patent for the combination of the neck-protector with the body of the cap, without including the forward band. The application was rejected on references to anticipating devices, with a suggestion that the forward band be included. Thereupon the claim was amended, according to the suggestion, by the solicitor of the applicant, and the patent was issued. The alleged infringement does not have the forward

band, which the patentee, under the direction of the patent-office, made material in the original patent, and would not infringe that. *Fay v. Cordesman*, 109 U. S. 408; S. C. 3 Sup. Ct. Rep. 236. If it infringes the reissue, the infringement must be of the combination without the forward band, which was applied for and rejected, and the rejection acquiesced in. What was so given up by the applicant was effectually disclaimed and surrendered to the public, (*Mahn v. Harwood*, 112 U. S. 354; S. C. 5 Sup. Ct. Rep. 174;) unless there is something to distinguish this case in this respect from that. The patentee appears to have been ignorant of the rejection and change of claim until shortly before the reissue. Had he known of the rejection he might, and probably would, have pursued a different course from what the solicitor took for him. It is argued that therein was a sufficient mistake to allow of a restoration of the original claim by a reissue as a correction. But there was no mistake in the presentation of the original claim. No part was left out or varied, by any misunderstanding between the inventor and the draughtsman of his application. He succeeded in applying for exactly what he wanted. The patent-office acted upon his application understandingly and in due course. The mistake, if any, lay between him and the solicitor in not prosecuting the application in the direction of an appeal. This does not appear to be such a mistake as would allow him to resume what the records of the patent-office would show he had for so long a time left surrendered. These considerations make the validity of the reissue in respect to this infringement too doubtful to warrant a preliminary injunction.

Motion denied, and provisional stay of proceedings vacated.

RICHARDS v. HAYS.

(Circuit Court, E. D. Pennsylvania. April 28, 1885.)

PATENTS FOR INVENTIONS—SQUIBS FOR BLASTING—NOVELTY—PRIOR USE.

The prior use of fuses embodying the essential features of the patents Nos. 8,361 and 134,128 being shown, *held*, that such patents are void for want of novelty.

In Equity.

Chas. Howson and E. G. Buller, for plaintiff.

Guy E. Farguhar, F. T. Chambers, and George Harding, contra.

PER CURIAM. This bill is founded upon two patents issued to Samuel H. Daddow, and to Esther H. Daddow, executrix of Samuel H. Daddow, Nos. 8,361 and 134,128, respectively. They are both for improvements in squibs for blasting, and it is alleged that the first claim of 8,361 and the second claim of 134,128 have been infringed

by the defendant. Numerous witnesses have been examined touching their prior knowledge and use of fuses embodying the essential features of those described in both patents. If this testimony is believed, it is decisive against the complainant. While it would serve no useful purpose to consider it in detail, it is sufficient to say that we are unable to discredit it, and hence the bill is dismissed, with costs.

DEPLANQUE *v.* RIPKA and others.

(Circuit Court, E. D. Pennsylvania. April 28, 1885.)

PATENTS FOR INVENTIONS—PLAQUES FOR PAINTING AND DECORATION—INFRINGEMENT.

The evidence failing to satisfy the court that the Deplanque Plaque is infringed by the plaque of Ripka, the bill is dismissed.

In Equity.

Jerome Carty, for plaintiff.

J. Cooke Longstreth, *contra*.

BUTLER, J. The parties may stand upon the presumptions arising out of the respective patents involved. The evidence touching the validity of the plaintiff's letters (aside from this presumption) is not conclusive. It seems probable that he got his ideas, and instruction how to carry them out, from Mr. Ripka. This question cannot be settled by the witnesses' recollections of dates, on which the plaintiff relies. If Ripka tells the truth, there can be little doubt that he communicated the information on which the plaintiff proceeded. If the plaintiff had made the discovery at the time Ripka refers to, the conversation could not, it would seem, have occurred. The plaintiff would not have listened to the suggestions without revealing his discovery, especially would not have replied as Mr. Ripka swears he did. This testimony must therefore be accepted, or discarded for want of integrity in the witness. He is, however, corroborated in part by Miss Brightenbaugh. But granting that the plaintiff did not thus get his information, it is extremely doubtful whether any invention or discovery is involved in what he did. The materials used, and the combination employed, are old. Panels for decoration were made of the same materials, combined in the same way, long before. The moulding of similar substances was common; and in most instances this seems to have been done as the plaintiff does it,—that is, by the use of some liquid, or the application of heat, to moisten the substance, and render it pliable. The only thing which clearly seems to be new is the application of the material to the formation of a plaque; and this was simply moulding it in a particular form; which certainly is not patentable of itself. Still, in the view we entertain of the case,

the validity of the plaintiff's patent need not be passed upon. The evidence does not satisfy us that the respondent's plaque is an infringement. We are not convinced that the materials used are the same as those employed by the plaintiff. The testimony relied upon by the plaintiff is inconclusive, and should not, therefore, be held to overcome the presumption arising from the contrary judgment pronounced by the patent-office.

The bills must be dismissed.

YOUNG v. UNION INS. CO.

(District Court, N. D. Illinois. June 15, 1885.)

1. MARINE INSURANCE—INSURABLE INTEREST—TRUST.

When the legal title to a vessel is wholly in a party as trustee, he may insure her for the use of his beneficiary.

2. SAME—RIGHT TO ABANDON—LOSS IN EXCESS OF HALF AMOUNT INSURED—STRANDED VESSEL—ADDING EXPENSE OF REPAIRS AND COST OF GETTING VESSEL AFLOAT.

When a vessel has stranded, the insured may add the cost of repairs to the cost of getting her off the beach, and getting her to a port of safety and repair, for the purpose of making such an amount as to equal or exceed half the amount insured.

3. SAME—DELAY OF INSURED IN GIVING NOTICE OF ABANDONMENT.

When the delay of the insured in giving notice of abandonment has not prejudiced the insurer, such delay will not impair or affect the rights of the insured.

4. SAME—"SUE AND LABOR" CLAUSE IN POLICY—UNDERWRITER TAKING POSSESSION—CONSTRUCTION—TOTAL LOSS.

Where the underwriter takes possession of insured property under the "sue and labor" clause in a policy, for the purpose of saving, and, if necessary, repairing the property, he must make reparation and return within a reasonable time, or he makes the property his own, and is liable for a total loss.

In Admiralty.

W. L. Mitchell and *G. D. Van Dyke*, for libelant.

Schuyler & Kremer, for respondent.

BLODGETT, J. In this case, libelant seeks to hold respondent for a constructive total loss upon a policy, by which respondent insured to libelant a half-interest in the schooner *H. D. Moore*, her tackle, apparel, and furniture, for the sum of \$2,500, against the perils of navigation upon the lakes, rivers, etc., from the first day of April, 1883, to the thirtieth day of November of that year; loss payable to libelant or to his order. The defenses set up are: (1) That libelant had no insurable interest in the schooner, but that he held the legal title as naked trustee for one James T. Young; (2) that, under the facts in the case, and the terms of the contract of insurance, the libelant was not entitled to abandon the schooner as for a constructive total loss; and respondent is not liable on said policy for such loss.

There is little, if any, conflict in the testimony as to the material facts of the case. It is undisputed that, in March, 1880, James T. Young and one James McMullen purchased the schooner in question from H. D. Moore, each paying one-half the price; that said James T. Young directed that his interest in the purchase should be conveyed to the libellant, and accordingly a bill of sale in due form was executed and delivered by Moore to libellant, and the said McMullen, conveying to each of them an undivided half of said schooner, with her boats, tackle, etc.; that the said James T. Young, from the time of said purchase up to the time of the loss now in question, resided in Chicago, and acted as the manager and ship's husband of said schooner, and had the benefit of the earnings of the half interest standing in the name of libellant; that, at the time the policy now in question was taken out, the agents of respondent were fully informed of the fact that the beneficial ownership was in the said James T. Young, and issued said policy with the knowledge and understanding that libellant was acting as trustee for said James T. Young, and insuring his interest.

It also appears that on November 13, 1883, and while the policy was in full force, the schooner was stranded in a gale of wind upon the east shore of Lake Michigan near Kilderhouse Pier; that the captain of schooner telegraphed to the said James T. Young the fact that the schooner was so stranded, and said Young promptly communicated his information to Messrs. Keith & Carr, the agents of respondent in Chicago, and also informed them that the services of a tug and steam-pump would be necessary to get her off. On receiving this information Keith & Carr requested Young to telegraph to Manistee and ascertain if a tug could be obtained there, and at what price. Young sent a telegram to Manistee as requested, and received answer that a tug and steam-pump could be had for \$185 per day. Keith & Carr then engaged the tug and pump, and sent Capt. Blackburn, their own wrecking-master, by rail to meet the tug, and take charge of the work of getting the schooner off. The schooner was got afloat by the aid of the tug and pump on the twenty-first of November, but, while at work upon the Moore, the wrecking-master received instructions from Keith & Carr, respondent's agents, to take the schooner to Northport, about 40 miles from the place where she had been stranded, and then to take the tug to the assistance of another schooner, the Watertown, that had been stranded near Northport.

The wrecking-master followed these instructions, and towed the Moore to Northport, which was not a port where she could be repaired, and then went to the relief of the Watertown. Having succeeded in getting the Watertown afloat and towing her also to Northport, Capt. Blackburn, on the seventh of November, attempted to tow the two disabled vessels to Chicago with the tug he had used in getting them afloat; but the weather became so tempestuous that he was obliged to return to Northport, where he laid the Moore up for the winter,

having employed her captain to remain on board of her as ship-keeper. The proof also shows that the captain of the Moore objected to being taken to Northport, and insisted that he should be towed to a port of repair, or be allowed to sail to Chicago, which he testifies he thinks he could have done with safety; but Blackburn, the wrecking-master, told the captain that his orders were to take the schooner to Northport; and he did so against the objections of the captain.

In the latter part of February, the libelant was informed that the charges for the services of the tug and steam-pump had not been paid, and that a libel of the schooner for such services was threatened, and was also informed that the schooner was in danger of being damaged by pounding against the pier or dock along which she was moored in Northport harbor, and on the seventh of March, 1884, notice of abandonment as for a total loss was duly served on the proper agents of respondent, and in apt time thereafter proofs of loss and bill of sale to respondent in due form of all libelant's interest in said schooner, with the consent and by direction of said James T. Young, were duly delivered, or tendered, to the proper agents of respondent, but respondents refused to accept said abandonment. It also appears that, in the latter part of April, the schooner was, by the direction of the agents of respondent, towed from Northport to the port of Chicago, where she arrived on April 30th. Soon after her arrival here, an *ex parte* survey was made at the instance of the respondent's agents as to the amount of repairs needed to restore the schooner to the condition she was in before the disaster. And after such survey the schooner was taken to a dry-dock here by orders of the agents of respondent, but, owing to some misunderstanding with the proprietors of the dock as to who was to pay for the needed repairs, she was run out of the dock and remained in the river until about May 24th, when she was again, by the direction of respondent's agents, taken into the dock and repaired in substantial accordance with the survey; and on the eleventh of June she was tendered to the libelant as fully restored to her condition prior to the disaster. The libelant refused to receive her for two reasons (1) Because he insisted upon his right of abandonment, and to be paid as for a total loss; and (2) because she was not so fully and completely repaired as to restore her to the same serviceable condition she was in before the disaster.

It further appears that respondent paid the captain for his services as ship-keeper from the time the schooner was laid up in Northport until she was put into dry-dock, and also paid the wages of seamen employed to assist in navigating the schooner from Northport to Chicago. It also appears that the expense incurred in getting the schooner off the beach and towing her to Northport, and from Northport to Chicago, and the wages of the ship-keeper until she went into dry-dock for repairs, and the wages of the seamen on the trip from Northport to Chicago amounted to \$2,463.93, and that the expenses for the repairs amounted to \$2,483.37. It is also conceded that at the

time of the issue of the policy in question, another policy was issued by the Insurance Company of the State of Pennsylvania for the same amount, on the half interest of McMullen, co-owner of the schooner with libellant, and that the whole value of the schooner was fixed by the terms of each policy at \$6,500, thus making the owners insurers for \$750 each. And also that the same agents, Keith & Carr, represented the insurers in both policies. The proof also shows that at the time the schooner was tendered to the libellant, on June 2d, there were no sails or running rigging upon her, and her anchor was a second-hand one and much lighter than her old anchor, which was lost at the time of the disaster, that her center-board would not work in the box, and that her yawl or small-boat had been lost in the disaster and had not been replaced. It further appears that on August 30, 1884, the schooner was again tendered to libellant by respondent, but that while another anchor of substantially the weight and usefulness of the one lost had been placed on board of her, she still had no running rigging, nor sails, nor yawl-boat.

The policy in question contains the following clauses, which it becomes material to consider in the light of the facts in the proof:

"It is agreed that the acts of the insured, or insurer, or its agent, in recovering, saving, and preserving property insured in case of disaster shall not be considered a waiver, or an acceptance of an abandonment, nor as affirming or denying any liability under this policy; but said act shall be considered as done for the benefit of all concerned, and without prejudice to the right of either party.

"Further, the insured shall not have a right to abandon the vessel in any case, unless the amount which the insurer would be liable to pay under an adjustment as of a partial loss shall exceed half the amount insured."

As to the first point made by the defense, I understood at the time of the argument that it was substantially abandoned, as the proof showed without dispute that the insurers were fully advised, at the time this policy was taken out, of the nature of the libellant's interest, and that he intended by such policy to insure the half interest standing in his name, for the benefit of his brother, James T. Young. Whether said point was abandoned or not, I am well satisfied that it is not well taken, as the authorities all seem to concur in the proposition that the legal title being wholly in libellant as trustee, he had the right to insure the property so held by him for the use of his beneficiary. As to the second point made by the defense, the contention is that the insured cannot add the cost of repairs to the cost of getting the schooner off the beach, and getting her to a port of safety and repairs, for the purpose of making such an amount as to equal or exceed half the amount insured.

Without going into a discussion of the somewhat technical learning on the subject of the right of abandonment, either at common law or under the old forms of policy, or under what is known as the "Boston clause," it is sufficient to say that it seems to me the only question to be considered for the purpose of settling the right of aban-

donment under the 50 per cent. clause in this policy is the amount of damage which the owner of the insured property received by reason of the disaster sustained by the schooner; and there can be no doubt from the proof that the damages by reason of the disaster in question consisted, first, in the expense of getting the schooner afloat, and getting her to a port of safety and repair, including the care and keeping of the schooner in the interval between the time she was got afloat and the time she reached a port of repair, and the cost of repairing her, so as to put her in as good a condition as she was before the disaster; and the proof abundantly shows that, after deducting from the cost of the repairs one-third new for old, and charging to the owner's interest his portion of the salvage expenses, the amount of the salvage expenses and the repairs would equal one-half of the amount insured.

It is argued that the owner should have exercised his right of abandonment at once when he learned of the disaster to the schooner, and that the insurers having, under what is known as the "sue and labor" clause of this policy, simply taken measures to get the vessel afloat and get her to a place of safety and repair, these expenses are to be adjusted as against all interests by a general average, and only the repairs are to be adjusted upon the basis of a partial loss, or particular average; but such course seems to be neither called for by the spirit or letter of this contract of insurance. The purpose and intent of the policy was to make the insured whole for any damage the schooner might receive from any of the perils insured against, and if such damage exceeded 50 per cent. of the amount insured, then the right of abandonment is given; and there can be no dispute but what the expense of getting the vessel off and of the necessary repairs, after making all deductions called for by the policy, more than equals 50 per cent. of the amount insured. I think the conclusion I have arrived at is fully supported by the opinion of Mr. Justice MATTHEWS in *Wallace v. Thames & M. Ins. Co.* 22 FED. REP. 66.

It is further urged that the insured is chargeable with unreasonable delay in giving his notice of abandonment,—the disaster to the schooner having occurred in November, and the notice of abandonment not having been given until the seventh of March following; but I do not see, under the peculiar facts in this case, how this delay can have worked any injury to the insurer, and if it did not it seems to me it should not in any way impair or affect the rights of the insured in the premises. If the agents of respondent had taken the schooner at once, upon getting her afloat, to a port where she could have been repaired, and where a survey could have been made to determine the cost of such repairs, it might have been the duty of the insured to have exercised his right of abandonment at an earlier time or as soon as an intelligent survey could be made, and the amount of damage by the disaster ascertained; but, inasmuch as the schooner in this case was detained at Northport by the act of the respondent,

and against the protest and objection of her master, acting as agent for the owners, so that the insured could not intelligently and fully ascertain the extent of the damage, and the probable cost of repairs, so as to determine the full extent of the damage by reason of the disaster; and inasmuch as, at the time the notice of abandonment was given, there was still ample time for the respondent to have repaired the schooner, or sold her without repair for the next season's business,—it seems to me it does not lie in the insurer's mouth to object to the delay. It certainly was not the fault of the owner of this schooner that she was kept from a port of repair and out of the possession of her own owner.

What are called "salvage" expenses and the "repair" expenses, when added together, make more than 50 per cent. of the amount insured, and this fact seems to me to give the insured the right of abandonment, unless he has lost it by unreasonable delay; and as I do not see that the delay under the circumstances was unreasonable, it appears to me that the right of abandonment was not lost or waived. It also seems quite clear to me that the underwriters have dealt with this property since the disaster in such manner as to make it their own. From the time the wrecking tug took hold of the schooner to get her off the beach up to the time she was tendered to the libellant and his co-owner on the eleventh of June, 1884, she was continuously in the possession and control of the insurance companies; and when she was tendered, on the eleventh of June, she had not been so repaired as to restore her to the condition in which she was immediately prior to the disaster. The right to repair and return the insured property after disaster implied of itself the obligation to return her in as good condition as she was in before the stranding; and yet the proof shows that no sails or running rigging were tendered with her, nor was her anchor or yawl-boat replaced, as they should have been. After the refusal of the libellant to accept the schooner, instead of promptly completing the reparation, respondent retained the schooner, without any apparent excuse, until more than half the season of navigation for that year had gone by, and then made another tender while she was still in an incomplete condition. I think there can be no doubt of the general proposition that where underwriters take possession of insured property under the "sue and labor" clause for the purpose of saving, and, if necessary, repairing the property, they must make reparation and return within a reasonable time, or they make the property their own, and are liable as for a total loss; and, it seems to me, the case is therefore brought clearly, by the facts, within the operation of this principle, and that the insurance companies could not keep this property in their own control for nine months after the disaster and then compel the owners to take it back, especially in an incomplete condition.

It was urged that the sails and running rigging of this schooner were stored in a sail loft, and where the owner could readily have

obtained them without expense for the purpose of putting them in place; but it was the duty of the insurers, who had assumed the task of restoring this vessel to her original condition, to have put her in complete sailing trim before they could compel the owners to accept her from their hands. They were not obliged to seek the sails and rigging where they had been stowed and take the expense or delay of putting them in place, but had the right to insist that this should be done by the insurers as part of the repairs. I am therefore of the opinion that the libellant makes out by the proof in this case a clear right of recovery as for a constructive total loss; and the finding will therefore be for the amount of the policy, with interest after 60 days from the time proofs of loss were served.

PEARSE v. QUEBEC STEAM-SHIP CO.¹

(District Court, S. D. New York. June 10, 1885.)

1. DAMAGE TO CARGO — PARTIAL LOSS — SUBROGATION OF INSURERS WITHOUT ABANDONMENT.

This suit arose out of damage to cargo on board the steamer *Hadji* in 1880. See *The Hadji*, 16 FED. REP. 861; affirmed 20 FED. REP. 876. Libellant was the assignee of insurers, who, having paid a partial loss, claimed to be subrogated to the rights of the owners. Respondent objected that there was no subrogation because no abandonment; and hence no title. *Held*, (following *The Frank G. Fowler*, 8 FED. REP. 360,) that the objection should be overruled.

2. SAME—VOLUNTARY PAYMENT BY INSURER — RIGHT OF CARRIER TO QUESTION PAYMENT.

As it was held in the case of *The Hadji*, *supra*, that the ship was unseaworthy, respondent contended that the payment by the insurer was voluntary, and therefore that the assignee was not entitled to recover in this action. *Held*, that a carrier who is liable for loss or injury is not entitled to raise that question as between insurer and insured, after the insurer has paid the loss.

3. BILL OF LADING—CONSTRUCTION OF EXEMPTION CLAUSE—"SHIP-OWNERS WILL NOT BE LIABLE FOR MORE THAN INVOICE VALUE."

The bill of lading was for 14 bales, three of which were damaged. It contained the clause that "in case of damage, loss, or non-delivery, the ship-owners will not be liable for more than the invoice value of the goods." The invoice value of the 14 bales was \$2,692.16; the price obtained for the whole in the foreign market was \$2,901.85. The invoice value of the damaged goods alone was \$571.05; the actual price received for them was \$184.85. Respondent relied on the analogy of insurance policies, and the rule that where such policy contains the clause "free from average, unless general," under a certain per cent., the percentage of loss is calculated upon the subject insured as a whole, and that there can be no recovery for loss of a part less than the agreed percentage calculated on the whole. Respondent contended, therefore, that as the shipper realized on the whole cargo more than the invoice value, he could not recover the loss on the three packages. *Held*, that the liability of a common carrier is not simply on contract, like the liability of an insurance company, but in tort as well, and arises separately for each item of loss. That the above clause in the bill of lading should be construed according to its natural import and evident intention, not as a condition of any liability at all, but as a limitation of the extent of the carrier's liability, and as applying distributively upon each article damaged; and that he is to be held liable, in the sense of being accountable, for no more than the invoice value of the goods damaged. For the same

¹Reported by R. D. & Edward G. Benedict, Esqs., of the New York bar.

reason, also, *held*, that on a partial injury the damage is to be computed on the basis of the invoice value of the goods damaged, and their net proceeds being credited against their invoice price and freight, the carrier is to be held for the difference only.

In Admiralty.

Sidney Chubb, for libelant.

Butler, Stillman & Hubbard and Wm. Mynderse, for respondent.

BROWN, J. The claim of the libelant in this case arises upon the same facts stated in the case of *The Hadji*, 16 FED. REP. 861. That case, having been affirmed on appeal, (20 FED. REP. 876,) is conclusive in this court as respects the respondent's liability for the loss. The bill of lading here is also the same as in the former case. It provides that "in case of damage, loss, or non-delivery, the ship-owners will not be liable for more than the invoice value of the goods."

1. The libelant claims under an assignment from the insurers, who paid the owner for the loss; and the insurers' title rests upon subrogation only to the rights of the owner. As the loss was but partial, there was no abandonment of the goods to the insurers; and it is objected that the libelant's title is not made out, because there is no subrogation, as it is contended, except upon an abandonment. This point was considered by my predecessor, CHOATE, J., in the case of *The Frank G. Fowler*, 8 FED. REP. 360, 364, and overruled.

2. A further objection is made that, under the ruling in the case of *The Hadji*, the insurers were not liable at all; because the defects in the ship that gave rise to the injury were there held to render the ship unseaworthy for her voyage; and that the insurers' payment of the loss was therefore a voluntary payment, and that their assignee is therefore not entitled to recover anything in this action. It has been repeatedly held, however, that a carrier who is liable for the loss or injury is not entitled to raise that question as between the insurer and the insured after the insurers have paid the loss. *The Sidney*, 23 FED. REP. 88, 96, and cases there cited; *Sun Mutual Ins. Co. v. Mississippi Valley Transp. Co.* 17 FED. REP. 919.

3. The principal question raised is in regard to the amount, if anything, recoverable under the limiting clause of the bill of lading. The bill of lading recites the shipment of 14 bales of goods: three were delivered damaged, and 11 were delivered uninjured, at the port of destination. The goods were invoiced at five cents per yard; their value at the place of delivery was six and one-half cents a yard. The three damaged bales upon sale there netted \$184.85. Their invoice value was \$571.05. Their value at St. Thomas, if sound, would have been \$742.36. The adventure as a whole stands as follows:

14 Bales, invoice value	-	-	-	-	-	\$2,660 00	
Freight	-	-	-	-	-	32 16	
Total	-	-	-	-	-		\$2,692 16
11 Bales at 6½ cents per yard	-	-	-	-	-	\$2,717 00	
Three Damaged Bales, net	-	-	-	-	-	184 85	
Total	-	-	-	-	-		\$2,901 85

The respondents contend that the stipulation of the bill of lading should be construed as limiting their responsibility to the invoice value of the shipment as a whole; and that the carriers are not to be liable for any loss or damage, provided the shipper ultimately realizes at the port of destination the whole invoice value. Upon that theory the respondents in this case would not be liable at all, because the owner has realized upon the whole shipment considerably more than the invoice value of the whole, notwithstanding the damage to three of the fourteen bales. In support of this contention, the analogy of insurance policies is adduced, and the construction adopted of the memorandum clause that insurance policies usually contain, warranting the goods "free from average, unless general," under a certain per cent. In such cases, it has long been the established law of this country, and it is now the law of England, although for some 50 years, until comparatively recently, the opposite construction there prevailed, that the percentage of loss excepted in the memorandum clause is to be computed upon the subject insured as a whole, and not upon its separate parts, such as cases, packages, or hogsheads; unless the insurance be clearly declared to be made upon each package or case separately. Under this rule, if a hundred boxes of oranges were insured "free from average, unless general," or "free from average under 5 per cent.," and four of the hundred boxes were wholly lost by a sea peril, the remaining 96 being uninjured, no recovery could be had of the insurers for the total loss of the four boxes. *Guerlain v. Columbian Ins. Co.* 7 Johns. 527; *Wadsworth v. Pacific Ins. Co.* 4 Wend. 33; *Biays v. Chesapeake Ins. Co.* 7 Cranch, 415; *Morean v. U. S. Ins. Co.* 1 Wheat. 219; *Ralli v. Janson*, 6 El. & Bl. 422; *Entwistle v. Ellis*, 3 Hurl. & N. 549; *Newlin v. Insurance Co.* 20 Pa. St. 312; *Hernandez v. Sun Mutual Ins. Co.* 6 Blatchf. 317; 2 Arn. Ins. 865; 2 Phil. Ins. 505; Marsh. Ins. 173.

The above rule in insurance cases is founded upon the nature of the insurance contract, which, unless the contrary appear, is an insurance of the cargo as a whole, and not a separate insurance upon each article. *Humphrey v. Union Ins. Co.* 3 Mason, 429, 442. The memorandum clause is a condition of the contract that excludes partial loss, or a partial loss under a certain percentage, and the computation of the percentage therefore follows the nature of the insurance contract; that is, upon the goods insured as an aggregate. The liability of a common carrier for goods lost by negligence is not a liability upon contract only, but in tort also. The liability arises separately for each item of loss. The limiting clause in this bill of lading is not a condition of the existence of any liability at all on the part of the carrier; it is a mere limitation of the extent of his liability. It must be applied, therefore, according to the nature of the liability itself; that is, distributively, upon each article lost or damaged, for which the carrier is accountable. As a limitation, this court held it valid in the case of *The Hadji*, 18 FED. REP. 459; and a similar decision upon the

same clause has been also made by Judge Nixon in the case of *The Lydian Monarch*, 23 FED. REP. 298. The principle of these decisions, so far as they uphold the carrier's right to limit his liability to some certain value, has been also recently affirmed by the supreme court in the case of *Hart v. Pennsylvania R. Co.* 112 U. S. 331; S. C. 5 Sup. Ct. Rep. 151; although the present question did not arise in that case, because the limitation was upon each item separately.

The limiting clause in this case must be construed as applying distributively upon each article damaged, because that is the most natural meaning of the words, and that best accords with the presumed intention of the parties. The clear intent was to provide not merely for the loss of the whole shipment, or for damage to the whole shipment, but for the loss of any part, and for damage to any part. When it is stipulated that in case of damage or loss, the ship-owner "will not be liable for more than the invoice value of the goods," the goods referred to are plainly the goods damaged, and those only; otherwise the clause would not be valid. The law makes the carrier liable for the loss or damage of *any* goods through his own negligence. Any stipulation that would annul this liability is void. If the carrier should be allowed, in ascertaining the amount for which he was liable, to charge against the invoice price of the whole the amount realized in a foreign market for the whole cargo, damaged and undamaged, that construction would be giving to the carrier the full benefit of the foreign market value, which is expressly denied to the shipper,—a result not presumably within the intention of the parties, and at variance with one of the reasons for upholding the clause in question, namely, the fixity and certainty it affords for the computation of damages.

If the construction contended for by the claimants were the proper meaning of this limiting clause, it would be void upon grounds of public policy, as unreasonable, and as affording a direct encouragement to the theft or non-delivery of the shipper's goods; for on every shipment, whether there was a loss or not, the carrier might, without accountability, appropriate to his own use enough of the owner's goods to reduce the aggregate value of what remained in the foreign market to the invoice value of the whole,—a result destructive of all commerce, because enabling the carrier to appropriate all its profits. A totally opposite construction of the clause, which, in my judgment, is equally at variance with its intention, would make it applicable only where the actual damage amounted to the invoice value; leaving the carrier to pay any amount of damage, estimated according to the foreign market value, which should be less than the invoice value of the goods damaged. The words of the clause, however, are not that the owners will not be liable to pay more *damage* than the invoice value of the goods; but that they will not be *liable* for more than the invoice value of the goods, *i. e.*, of the goods damaged. The true meaning

of the language, as well as the true intention, is, that the carrier is not to be *liable*, in the sense of being *accountable* or *responsible*, for more than the invoice value of the goods damaged or lost. Where there is a partial injury, therefore, the damage is to be computed upon the basis of the invoice value of the goods damaged, because the invoice value is the extent of the value for which the carrier assumes responsibility. Whatever is realized for the damaged goods must therefore be credited upon the invoice value, the same as though the goods were abandoned to the carrier, and the sale of the damaged goods were made by him. In that case he would pay the invoice value, and would receive the proceeds of the damaged goods.

It is immaterial by whom the sale of the damaged goods is effected: whether by the carrier or by the owner. The carrier's *responsibility* is for the whole invoice value of the goods damaged, and no more; and the net proceeds of the sale of the damaged goods, over all charges and expenses, if received by the owner, must therefore go in diminution of the invoice price and freight, and the carrier must pay the difference. Such, in effect, was the judgment of the court in the case of *The Lydian Monarch*, *supra*, in which it was said, (page 300:) "If it should turn out that the libellant has received from the sale of the damaged goods the invoice price, after deducting the costs of importation, sale, etc., the libel will be dismissed."

Such seems to me to be clearly the proper interpretation of this clause. Thus construed, I can perceive no reasonable objections to its validity. In effect, it only applies to damaged goods carried to the port of destination the same rule that has been long applied in courts of admiralty to the loss of goods at sea through collision; namely, that the value at the port of shipment, and not at the port of destination, shall control. *The Scotland*, 105 U. S. 24, 25; *The City of New York*, 23 Fed. Rep. 616, 619. The result is that the libellant is entitled to \$386.20, the difference between the invoice value of the goods damaged and freight, and the net proceeds of the sale of them, together with interest and costs, for which judgment may be entered.

DE WOLF v. TUPPER and others.

(District Court, S. D. New York. June 11, 1885.)

PURCHASE OF VESSEL—LIABILITY FOR OUTFIT—AUTHORITY OF MANAGING OWNER—SUPPLIES.

By the terms of the contract under which the defendant T. was to acquire a one-eighth interest in the brig C., then building by one P., the title would not pass to T. until the delivery of the brig, completed according to such contract. Before such delivery, libellant, on the order of P., who was afterwards managing owner, and who informed libellant that T. was a part owner, furnished

Reported by R. D. & Edward G. Benedict, Esqs., of the New York bar.

an outfit for the vessel, which was charged to the brig and owners, and was delivered to the ship before the title passed to T. The purchase was made without the knowledge of defendant T., who afterwards paid to P. the price of his one-eighth share. T. was afterwards informed of the purchase, but not that it was made in part on his credit. The evidence left it doubtful whether the price agreed on between P. and T. for the one-eighth interest was intended to cover the outfit. *Had* that, under the circumstances, P. had no authority to bind T. in the purchase of the outfit; that if T. was liable for the outfit it was solely to P., and subject to the state of their private accounts; that for supplies furnished subsequently T. was liable, and a reference as to these was ordered.

In Admiralty.

Wilcox, Adams & Macklin, for libelants.

Jas. K. Hill, Wing & Shondy, for respondents.

BROWN, J. By the contract under which the defendant Tupper was to acquire a one-eighth interest in the brig *Casiopeia*, which was building by Captain Pettis, the title would not pass to him, and he would not become a part owner, until the delivery of the brig when completed according to the contract. *Andrews v. Durant*, 11 N. Y. 35. By necessary implication, since she was to be complete in her hull and spars, this included the launching of the vessel; and she was not launched until September 26, 1874. In July or August previous, Captain Pettis came to New York and ordered through the libelants the purchase of the necessary outfit for the vessel, including all her standing and running rigging, chains, cables, anchors, etc. These were furnished by the libelants and forwarded in August before the launching of the ship. Captain Pettis, at the time, told the libelants that the defendant Tupper was one of the owners; and they charged the price of the outfit, amounting to some \$6,000, to the brig and owners. The purchase, however, was made by the captain on his own responsibility, and without the knowledge of Mr. Tupper at the time, although it was communicated to him afterwards; but he was not informed that the outfit had been procured upon his credit. The libelants afterwards furnished various supplies to the ship until the beginning of 1878, always dealing with Captain Pettis alone, and the account gradually increased until in 1880, when the libel was filed, it amounted to upwards of \$15,000, including \$6,000 for the outfit in 1874.

Although the libelants were pressing the captain for funds during these several years, the account was suffered to increase, as above stated, without any communication to Mr. Tupper, or any notice that they looked to him for payment of the outfit until April, 1878. The captain, in the mean time, had been acting as managing owner; and the other part owners becoming dissatisfied, a transfer of her management was made in 1877, and Captain Pettis at that time rendered his accounts, showing about \$4,500 surplus to the credit of the ship.

The liability of Mr. Tupper for the outfit must rest upon the authority of Captain Pettis to bind him as his agent at the time when the outfit was ordered. In my judgment, no legal authority to charge him as principal at that time existed in Captain Pettis. The

vessel was not then launched. The contract by which he was to acquire the title was not, therefore, completed; the title of the one-eighth had not passed to Mr. Tupper; he was not at the time an owner, and as respects him, Captain Pettis was not yet in the position of a managing owner, authorized to bind another part owner for necessary supplies or equipment. In addition to that, the original outfit of the vessel is a part of her equipment in preparing her for navigation as much as completing her hull. Captain Pettis does not claim any authority to bind Mr. Tupper, other than as ship's husband and managing owner, and the evidence shows that he had no express authority. This was not sufficient at the time when the outfit was purchased by his order, and when it was forwarded and delivered by the libelants.

The dealings between the parties, moreover, leave great doubt whether the price agreed on between Mr. Tupper and Captain Pettis was to include the outfit or not. From the written contract it would appear that the outfit was not included; but that circumstance would not make Mr. Tupper liable to the libelants for the outfit ordered by Captain Pettis, without authority to bind Mr. Tupper. It is certainly remarkable, if the price of the outfit was not included in the original understanding, that for some four years afterwards no demand should ever have been made upon Mr. Tupper for his share of this outfit, in addition to the price of his interest, which he had promptly paid to Captain Pettis; nor any notice given him of his liability therefor either by Captain Pettis or by the libelants. If, however, the price of his one-eighth interest did not, as between him and Captain Pettis, include the outfit, his liability therefor was only to Captain Pettis, and it was therefore subject to the state of the account between them; an important consideration, inasmuch as Captain Pettis is insolvent, and is apparently a large debtor to the ship.

Upon these grounds I must exclude the outfit from the libelants' claim upon Mr. Tupper. The sheathing of the vessel in New York, in November, 1874, was a charge apparently within the scope of the power of Captain Pettis to incur, at the joint expense of the owners. The other items of supplies furnished appear to have been in part made within the apparent authority of Captain Pettis, as captain and managing owner. As respects others, including all loans or drafts of Captain Pettis from other ports upon the libelants here, they are of doubtful authority, and require a detailed examination. If the parties do not agree, the residue of the account, excluding the outfit, must be sent to a commissioner, to take such proof as the parties may offer, in addition to that already taken, both as to the amount due, and as to the validity of the various items, as against absent owners.

THE SNAP. (Two Cases.)

(District Court, E. D. Virginia. May 27, 1885.)

1. TOWAGE—NEW YORK HARBOR—CANAL-BOAT.

In New York harbor, when the wind is from the north-east, blowing at the rate of about 22 miles an hour, there is no undue risk, and it is not a fault on the part of a tug to take in tow an open canal-boat loaded with soft coal down to 18 inches or two feet above the water, and tow her across the North river from Fifth street, Hoboken, to the New York shore, and then along the protected New York shore, down around the Battery, to a point off pier No. 1, East river.

2. SAME—GALE.

A wind of that velocity is neither a "gale" nor a "storm," but merely a "brisk" wind, and, when from the north-east, need not suspend navigation in New York harbor during its prevalence.

3. SAME—SINKING OF CANAL-BOAT—NEGLIGENCE.

Held, on the evidence in the case, that the sinking of the canal-boat *M.* was caused by her own unseaworthiness, through leaks in her bottom,—a fact carefully concealed by her master from the master of the tug,—and was not caused by her shipping in water over her combings from the rough sea in the river, as alleged by libelants.

Libel in rem, in Admiralty.

Sharp & Hughes, for libelants.

White & Garnett, for petitioner and co-libellant.

Whitehurst & Hughes, for the Snap.

HUGHES, J. The first of these suits is a libel by the owners of 250 tons of soft coal lost upon the canal-boat *Martha*, while in tow of the tug *Snap*. The other is a libel by the owner of the *Martha*, *Michael Downs*, for the value of the canal-boat, which was sunk in the East river, near the Battery, New York, on the twenty-sixth day of June, 1884. The *Martha* had been taken in tow by the *Snap* at Fifth street, Hoboken, some time after 9 o'clock on that morning, had been towed across the North river to a point opposite *Desbrosses street*, and had been thence taken down along the piers of North river around the Battery, beyond East river pier No. 1, to the place of sinking. The sinking occurred within an hour after the departure from Hoboken, probably about 10:15 A. M. The *Martha* had been loaded with coal about 17 days before the twenty-sixth of June, and had been moored at Hoboken ever since, and had lain there, sometimes afloat, but much of the time resting on the mud at the bottom of the river or dock. She was an old boat and had been frequently repaired. Just before the last load of coal had been put upon her, she had sprung a leak by the starting of one end of a plank under the port bow, which was repaired by her owner, *Michael Downs*, while she was lying on the mud. Her bottom does not seem to have been examined during the time she was loaded with coal. She was in charge, during these 17 days, of a man by the name of *Flaherty*, whom the evidence shows to have been a worthless, faithless, false person. No faith can be

placed by the court in any statements made by him in the testimony which are contradicted by any other witness.

The early part of the twenty-sixth June was a rainy day. A north-east wind was blowing at the rate, as shown by the reports of the Signal Service, of 20 miles an hour at 7 A. M., increasing to 24 miles at 11 A. M. The cautionary signal flag was not put up at the signal station in New York on that day until 10:30 A. M., which was after the Snap and the Martha had crossed North river, and probably after the Martha had sunk in East river. The steam-tug Morris had been ordered to tow the Martha and another canal-boat, similarly loaded, over to Pierrepont stores, Brooklyn, the afternoon before; but the boats could not then be got off the mud. The Morris waited till the morning of the 26th, and tried again to pull the boats off. She failed with the Martha, but succeeded in getting the other boat adrift, and proceeded with that one to its destination. The tug Snap, which shortly afterwards came to Hoboken, was then ordered by S. W. Morris, agent of the libelant for the cargo, to pull the Martha off, and tow her over to the Pierrepont stores, Brooklyn. This was after the tide had begun to set in. The Snap pulled the Martha adrift, took her in tow, and proceeded with her across North river. The Martha, having been chartered, when her cargo was put on, by the agents of the West Virginia Central & Pittsburgh Railroad Company, one of the libelants, was under their orders. Michael Downs, her owner, says that the agent of this company had entire control of her, he himself having none, for the time. The testimony is that when afloat with her load the sides of the Martha were 18 inches to two feet above the water, when taken in tow by the Snap; and that no intimation was given to the master of the Snap that she was leaking at her bottom, but that, on the contrary, positive assurances to the contrary were given repeatedly during the voyage. The Martha was taken on the starboard side of the tug, which was on the lee side, and the tug thus formed a partial breakwater for the Martha from a north-east wind.

During the 15 or 20 minutes' time of crossing North river, the wind was blowing probably at the rate of 22 miles an hour. This was a "brisk" wind. It was not the "terrible storm" which the man Flaherty declared it to be. A "gale" blows at the rate of 40 to 60 miles an hour; a "storm" at the rate of 60 to 80 miles. There was neither storm nor gale nor high wind when these vessels crossed North river, but only a "brisk" wind. See Telegraphic Cipher, U. S. Signal Service, (6th Ed.) 33, 39, for classification of winds. Moreover, the wind was from the north-east; from which the North river was protected by Manhattan island, and the tall structures of the compactly built city of New York. It is incredible, therefore, that such "terrible" waves, as the man Flaherty speaks of, were encountered at all; or that they rose two feet up the sides of canal-boat and surmounted her combings; or that they swept over the decks, or made

a pool of water on the soft coal in the Martha three feet deep! The crew of the Snap all testify that the passage across North river was not rough; that no water at all washed over the combings of the canal-boat; and that, after crossing the river, and while going down close in front of the piers on the New York side of the river, the water was smooth.

It is obvious to me, therefore, that the Martha sunk from a leak in her bottom, and that she did not sink from high waves coming in over her decks during her passage across the Hudson. The probabilities would seem to be that this leak opened some time after she was taken in tow, and probably about the time she reached the New York side of North river. She had perceptibly begun to sink when she passed pier 13 of North river. The cargo was owned by, and the canal-boat was under charter to, the West Virginia Central & Pittsburgh Railroad Company. Both tug and canal-boat were under the orders of the agents of this company. One of these agents, S. W. Morris, who was well acquainted with the dangers of the navigation of North river in bad weather, ordered the tug Snap that morning to take the Martha in tow. The responsibility of the trip was thereby assumed by the libelant in the first of these suits. But, in point of fact, no undue risk was encountered. The navigation of the waters around New York city is not suspended whenever a "brisk" wind of 22 miles an hour sets in from the north-east. There was nothing in the weather to forbid the Snap to take the Martha on that morning across North river.

The case is rather different with a *north-west* wind sweeping down the Hudson at the rate of 25 to 42 miles an hour, as to canal-boats on the open bay below. It has been held that it is fault in a tug to tow canal-boats in the open bay during such winds. But the Hudson river itself is land-locked from a *north-east* wind, and I am sure that it would require a "gale" or a "storm" from that point of the compass to imperil a canal-boat in crossing from Hoboken to the foot of Desbrosses street. I gather from the testimony that the Martha did not begin appreciably to take in water from her leak or leaks in the bottom until after she had crossed North river. Certainly, her own master, the man Flaherty, protested that she had no such leak until after she had rounded the Battery. He did not seem to know that she had been gradually sinking until about the time he became alarmed lest he might himself go down with her, after passing pier 1, East river. He had pumped with his tin pumps several times during the trip, and, though his vessel was gradually filling with water in the bottom, pronounced her dry, because his pumps had sucked. It was not until a short time before the sinking, when the master of the Snap insisted that he should try whether or not there was water in the hold with a rod, that he was confounded with the demonstration that there was much water down there, and that his pumps were worthless. No warning had come from him that his boat was leaking from the bot-

tom, either at Hoboken or during any part of the trip up to the time of sinking. I cannot see that the Snap was in fault in this matter, and I will sign decrees dismissing both of the libels, with costs.

THE RHODE ISLAND.¹

(District Court, S. D. New York. June 10, 1885.)

STEAMER'S SWELL—DAMAGE CAUSED THEREBY—LIABILITY.

Where the swell from a passing steamer overwhelmed and sank a loaded canal-boat lying at a bulk-head, and it appeared that the canal-boat was lying in a proper place, well known to the pilot of the steamer, and also that the steamer was proceeding at a high rate of speed, *held*, that the steamer was liable for the damage.

In Admiralty.

Hyland & Zabriskie, for libellant.

Miller, Peckham & Dickson, for claimants.

Brown, J. On the twenty-sixth of December, 1883, the canal-boat *Helen*, loaded with coal, was lying along the bulk-head at the foot of Sixty-second street, East river, being the outside boat of four that lay along-side. Between 10 and 11 o'clock in the forenoon the large passenger steamer *Rhode Island*, coming down the East river, caused a large swell, which broke over the canal-boat and filled her with water so that she sank in four minutes. This libel was filed to recover the damages.

The principles of law applicable to the conflicting rights of large passenger steamers and of canal-boats about the harbor, in all respects similar to the *Helen*, have been considered in repeated decisions of the circuit court, which are binding and conclusive upon me. *The C. H. Northam*, 13 Blatchf. 31; *The Morrisania*, Id. 512; *The Daniel Drew*, Id. 523, 532. See, also, *The Massachusetts*, 10 Ben. 177; *The Drew*, 22 FED. REP. 853.

In the case of *The Batavia*, 9 Moore, P. C. 286, in the privy council, it was said that if the steamer "was going at such a rate as made it dangerous to any craft, which she ought to have seen, she had no right to go at that rate; at all events, she was bound to stop, if it was necessary, to do so, in order to prevent damage being done by the swell to the craft that were in the river. She ought not to have made that swell in the river if she was aware that there was any vessel that might be damaged and put in jeopardy by her doing so."

This canal-boat was an open boat, loaded so that her sides were about two feet out of water. She lay at a place long used for the discharge of such boats, as was well known to the pilot of the *Rhode*

¹ Reported by R. D. and Edward G. Benedict, Esqs., of the New York bar.

Island. She had been lying in the same position for three days awaiting her discharge. During this interval many steamers must have passed back and forth, at all times of the tide, several of them of equal size with the Rhode Island; and the Rhode Island during this interval probably passed there twice herself; and none of these had previously done any damage. On the day in question the Rhode Island was some five or six hours behind time, having been delayed during the night by fog. Her engineer says that her time from Hallett's Point to her pier in the North river, a distance of 9 or 10 miles, was made in 32 minutes, which would be her full speed of 18 miles per hour. The engineer and the captain testify, indeed, that her speed was reduced from 19 revolutions per minute, her full speed, to 15 revolutions per minute, in passing this part of Blackwell's island, where the west branch of the river is only from 800 to 900 feet wide. But the engineer, at least, speaks from his general habit only, and not from recollection of this occasion. Two other witnesses upon the shore testify that the steamer appeared at this time to be going at unusual speed.

Considering that no previous damage had been done, the fair inference to be drawn from all the circumstances and the testimony is that the Rhode Island on this occasion was going at her full speed, which was an unusual and improper speed for this locality, and that this speed caused a greater swell than common, and thereby produced the accident. Upon this ground the libelant is entitled to recover. A reference may be taken to compute the amount, if not agreed upon.

THE S. B. HUME.

THE PENNSYLVANIA.

McLAREN and others, Owners, etc., v. THE PENNSYLVANIA.

(Circuit Court, E. D. Pennsylvania. April 7, 1885.)

COLLISION—MID-OCEAN—MUTUAL FAULT—STEAMER AND SCHOONER.

The steamer in this case being guilty of negligence in running at full speed on a dark and foggy night, and the schooner also being negligent in not having on board and displaying a torch, *held*, that only half damages should be allowed, and that the costs should be apportioned.

Appeal in Admiralty. See S. C. 12 FED. REP. 914, and 15 FED. REP. 814.

J. Warren Coulston, for libelants.

M. P. Henry, for respondent.

McKENNAN, J. On the night of July, 23, 1878, the schooner S. B. Hume was on a voyage from New Brunswick to Gloucester, England,

and was sailing on a course E. S. E., and in an eastwardly direction. The night was dark, and the atmosphere thick and foggy. The wind was south-west strong, and the speed of the schooner was about seven knots an hour. She had all the required lights properly set and burning; a starboard watch was on deck, under the command of the second officer; a competent lookout was on duty; and a fog-horn was blown at proper intervals. Such was the condition of the atmosphere that vessels could not see each other at a greater distance than one-fourth of a mile. When the schooner observed the mast-head light of the steamer the vessels were in close proximity, and the helm of the schooner was put hard a-port. This caused her to luff up, and changed her course more towards the south. The course of the steamer was W. by N., and its general direction was westwardly. She was under "full speed bells," making between nine and ten miles an hour, when the red light of the schooner was first seen about one point on the starboard bow, and about four lengths of the ship distant. She then reversed at full speed, with her helm hard a-port. But these maneuvers were ineffective to avoid the collision, the stern of the steamer striking the schooner twice on her port side, thereby causing her to fill with water, and rendering the vessel and her cargo a total loss. The collision occurred about midnight, in mid-ocean. The schooner was not provided with a torch-light, and therefore did not display any at any time while the vessels were approaching each other.

The facts thus found are, in my judgment, decisive of the merits of this case, and it is not, therefore, deemed necessary to burden the record with others which might be deduced from the voluminous evidence, and which, if not of unimportant pertinency, are at least indecisive in their effect. The steamer was in default in pursuing her voyage at a rate of speed clearly excessive, under the circumstances. The night was dark and the atmosphere thick with fog, so that approaching vessels could not see each other until they were in dangerous proximity. Such was the case here, as neither vessel saw the other until they were so close as to render a collision almost unavoidable, although both of them seem to have employed the customary means of giving warning of their approach. With existing conditions, to move under "full speed bells" at the rate of nine or ten miles an hour was manifestly incautious, if not positively perilous; hence a reduction of speed to a moderate rate was a primary and imperative duty on the part of the steamer. If this had been observed, the collision would not have occurred. The master of the steamer himself admits this in his testimony, for he says that with a speed of five or six miles an hour he could have avoided the collision. But certainly, with a reduced rate of speed, the vessels would have been so far distant from each other that a collision could not have occurred when and as it did. And this fundamental fault of the steamer is not averted or mitigated by anything in the evidence.

Is any contributory fault imputable to the schooner? The law imperatively required her to have on board a torch-light, and to light and display it to an approaching vessel. She had no such torch, or, if she had, none was exhibited, and in this she was confessedly derelict. She was therefore presumptively guilty of contributory negligence. Nor is this presumption repelled by the suggestion that the red light of the schooner was seen by the steamer before, or as soon as, a torch-light could have been seen by the latter. If the torch-light had been displayed when the mast-head light of the steamer was first sighted, her officers would have seen the glare of its flash before the red light came into view, and in time, probably, to determine the direction of the schooner, and thus have aided the officers of the steamer in averting the collision, either by reversing the engine or by altering her course. Both vessels having been thus culpable, there can be a decree for only half damages in favor of the schooner.

In the district court the costs were apportioned, and this is earnestly opposed here. With the conclusion reached by the learned judge of the district court I am entirely satisfied, and I therefore approve and adopt the opinion delivered by him on that question. The disallowance of one-half the damages sustained by the schooner is due to her culpable negligence, and is therefore, to that extent, practically an adjudication against her. That she should be subject to the usual consequences of an adverse judgment, in whatever form it may be rendered, seems to me to be consonant to both reason and justice. So it seems to have been regarded in this district for many years, and by the supreme court in *The America*, 92 U. S. 432.

A decree will therefore be entered in favor of the libellant for \$7,684.13, with interest from January 24, 1883; the costs to be taxed, apportioned, and paid as decreed by the district court.

THE OSAGE v. RIDGWAY.

(District Court, E. D. Pennsylvania. May 18, 1885.)

TOWAGE—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—RUNNING AGROUND.

On examination of the evidence, *held*, that the defense of contributory negligence is not made out, and that the libellant is entitled to damages.

In Admiralty.

Gibbons & Henry, for libellant.

H. R. Edmunds, for respondent.

BUTLER, J. The bark *Osage* anchored near the breakwater, in the Delaware bay, and soon after engaged the respondent to tow her to Philadelphia. The bark's hawser was taken, and the tug started on her course. A short time after, the bark struck bottom, the hawser

parted, and she drifted upon the shoals, sustaining some injury, and being subjected to considerable charges in getting off. Compensation for this injury, and these charges, she claims from the respondent.

The defense is that she was anchored in a dangerous place, from which she could not be removed without striking, and that the hawser was defective. The first branch of this proposition is not sustained by the evidence. While the testimony of Capt. Hallenger, of the tug, tends to support it, he is not sustained by surrounding circumstances, and is flatly contradicted by several witnesses, who swear directly and positively to the fact. It seems incredible that Capt. Hallenger should have said nothing of the danger at the time, if it existed. It concerned him very seriously, as well as the libellant, imposing, as it did, on both the necessity for especial caution in the work about to be commenced. He accounts for his silence by saying that he desired to avoid the appearance of forcing his services on the bark, or exaggerating their importance. This is an admission that he believed the bark to be ignorant of her danger,—that she had not touched bottom at the time; and is furthermore indicative of a degree of modesty very unusual in the captains of tug-boats. To withhold such information, under such circumstances, would be highly improper; and it cannot be believed that any captain would do it.

The master of the bark and his officers say he entered the bay in pursuance of the directions in the chart, taking bearings from the breakwater light, and sounding as he proceeded and came to anchor. There is no reason, in my judgment, to doubt that he anchored where his testimony points out,—a place showing three and one-half fathoms at low water, marking, as the witnesses say, about five fathoms when he reached it, the tide then being up. But if it were true that the bark lay where Capt. Hallenger alleges, this fact would afford no excuse. He knew the locality familiarly. If it was not safe to undertake her removal at the time, he was guilty of gross negligence in attempting it without informing her master, and thus allowing him to judge of the risk and the propriety of moving, or remaining where he was. He also knew that in a short time the tide would be up, and her removal, with proper care, be entirely safe. He had but to wait for a brief period, and then bear southward to find ample water. Instead of this he concealed the danger, started with the water at its lowest condition, and, according to his own statement, ran a course that necessarily must, as it would seem, take him into shallower water.

The other branch of the respondent's proposition—that the hawser was defective—is no better supported. The decided weight of the testimony is against it. Bringing the hawser into court for inspection is not a proper method of ascertaining its condition; the question is one for experts. To the extent such information is before me, the conclusion is against the respondent. The hawser appears to have been nearly new, and amply sufficient for towing the bark

while afloat. If the master of the tug expected to tow her on the bottom, (at times,) as may be inferred from his testimony, he should have so informed her master, and exercised extraordinary care respecting her fastenings. It might have been a serious question, under the circumstances, whether one hawser, of ordinary strength, would be sufficient. It is unnecessary to enlarge on the subject. As already indicated, I believe the bark was safely anchored, with ample water for maneuvering and getting away; that the hawser was of ordinary strength, and that the disaster occurred from the tug's failure to keep sufficiently southward in starting, hugging the shoals too closely, in the desire to shorten his course; but that, if the master, Hallenger, is right respecting the bark's anchorage and situation, then it resulted from his failure to await the effect of the tide, and to inform the bark of the danger in moving at the time.

A decree must be entered in favor of the libelant

THE BRADY.

(District Court, E. D. Pennsylvania. May 12, 1885.)

COLLISION—SCHOONER—BARGE AT ANCHOR—DAMAGES.

Where a schooner runs into a barge at anchor the burden is on the schooner to rebut the presumption of negligence on her part. Schooner *held* liable.

In Admiralty.

Coulston & Driver, for libelant.

H. R. Edmunds, for respondent.

BUTLER, J. The burden of proof is on the respondent. Running into the libelant, lying at anchor, the respondent must repel a presumption of negligence, or make good the loss. She has sought excuse by appealing to her situation at the time, and her efforts to avoid collision. I find nothing in these circumstances, however, tending to relieve her. She knew that the William and James was aground on the southern side of the channel, or entrance to the canal, materially in the way; she knew also that boats habitually lay along the pier at the northern side of the entrance; saw as she came down the river the stack of a tug there, and should have seen the tall derrick of a barge, and have anticipated the presence of other similar vessels by her side; and, in the condition of the tide and direction of the wind, she should not have attempted to enter without careful *reconnaissance*, and ascertaining that she could do so with safety. It seems quite plain that the collision resulted from the fact that the mind of her master was so intent upon the danger threatened by the situation of the William and James that he failed to observe any precaution respecting the opposite side. Thus, with his eyes upon the grounded

schooner, he ran close to the northern side, taking in his jib, and allowing his mainsail to remain partially up, that his vessel might readily swing round into the entrance. His purpose manifestly was to keep as far as possible from the William and James.

His calculation and maneuver might have answered, but for the presence of the barges at anchor on the other side. He seems, however, to have made little calculation for the effect of tide and wind, which swung his stern too far down and brought his head around towards the northern pier. With his mainsail up and the tide ebb, this is precisely what he should have anticipated. If the situation was such that he could not enter with safety, he should not have attempted to enter. There was nothing in the way of anchoring outside, or running by. He therefore was clearly in fault.

Was the libellant also in fault? If she was, it was for lying by the pier where struck. She came through the lock at 12 o'clock the previous night, and was made fast to the tug, by means of the intervening boat, for the purpose of being towed away. This was in pursuance of the usual custom, and was unobjectionable at the time. The William and James grounded on the opposite side, a short time before the collision. The most that can be said is that she should have moved as soon after as was reasonably practicable. Her situation was such that it would seem unreasonable to hold that she should have moved before the collision occurred. Other boats lay in front, and there was not room in the rear. She was properly fastened at bow and stern, and with her companions lay as near the wharf as practicable. The allegation that her stern was swung off towards the channel is not supported by the proofs. What the respondent's witnesses say respecting this is evidently mere guessing, while the testimony upon the other side is positive and conclusive. The blow parted the stern line, and then the tide swung her round. I do not see, therefore, how she can be held to have been in fault. It is true, her master saw the respondent coming down the river, and did nothing to warn her of the situation, but he had no reason to doubt that she understood it as well as himself. Nothing further need be said. The respondent must answer for the damages.

A decree will be entered accordingly.

THE SALLY McDEVITT v. THE J. W. PAXON.

(District Court, E. D. Pennsylvania May 29, 1885.)

TOWAGE—TUG AND BARGE—STRIKING SUNKEN WRECK—NEGLIGENCE—DAMAGES.

The tug in this case was guilty of negligence, and should be held liable for the loss of the barge being towed, caused by striking a sunken wreck, the existence of which was known to the tug's captain.

In Admiralty.

Henry R. Edmunds, for libellant.

Pugh & Flanders, for respondent.

BUTLER, J. Two questions only were presented on the argument: *First*. Did the libellant strike on the sunken "wreck," (the location of which was known to the respondent,) or upon some other obstacle whose existence was unknown? *Second*. Was the bark properly steered? After listening attentively to counsel, and reading the testimony submitted, I am satisfied both these questions must be answered in the libellant's favor.

It seems to me quite plain that the striking was upon the "wreck." Notwithstanding the conflict in testimony, the weight of the evidence, in my judgment, sustains this view. Rodenbush, master of the McDevitt, and Standerling, master of the other boat in tow, are clear and positive respecting it. They knew nothing of the "wreck" until attention was called to it at the time, but they say it was this they both struck. Standerling is entirely disinterested,—the only witness not connected with either party. The deck hand and engineer of the tug support this view. A careful reading of their testimony, in the light of surrounding circumstances, seems to make it clear that both vessels struck the same thing. That the vessel towed at the tug's side struck the wreck is not questioned. The allegation that the libellant encountered something else, further over to port, finds but feeble support in the evidence. If such obstruction existed it could readily have been found; and finding it might have been important to this inquiry. Yet it was not sought for. It is said that slight obstructions suddenly obtrude themselves in this creek, and as suddenly disappear. While this is quite probable, it is not probable that so serious an obstacle as that encountered by the libellant, was of this temporary character. The respondent, being familiar with the existence of the sunken wreck, should have avoided it.

That the barge was not steered directly in the wake of the tug, may be granted. When the rate of speed at which the vessels were moving, the state of the water, and the shape or form of the channel at or near the point, are considered, it cannot well be doubted that it was impossible she should have been kept directly astern. The speed was about two miles an hour. The tide was, I think, turning downward, and the tow was rounding, or had just rounded, a bend in the

creek. The master of the tug says: "We had just come around a turn a short ways when the accident happened. The tug was straightened up, and had been about a minute." That the libellant kept as nearly behind the tug as was reasonably practicable, is shown, I think, not only by her master's testimony, but also by that of Capt. Standering. While the respondent's witnesses testify otherwise, they seem to be plainly contradicted by the circumstances of the case. If the libellant ran off to port, as they say, she could not have passed over the obstruction encountered by the other boat. The fact that she hit the obstruction well to her port side, while the other boat, lashed to the tug, seems to have passed directly over it, shows that she must have been pretty nearly astern of the tug,—as nearly as could have been expected. Her master was on his guard from the start, having provided himself with a new tiller especially adapted to the occasion.

A decree must be entered in favor of the libellant.

CRAWFORD, Master, v. JESSUP & MOORE PAPER CO.

(District Court, E. D. Pennsylvania. May 29, 1885.)

DEMURRAGE—CROWDED WHARF—DILIGENCE IN UNLOADING VESSEL.

Where a vessel loaded with wood was delayed several days by reason of the crowded condition of the wharf, and it appeared that due diligence was used to unload her, *held*, that her owner was not entitled to demurrage.

In Admiralty.

Henry R. Edmunds, for libellant. \

E. Hunn Hanson, for respondent.

BUTLER, J. The respondent was bound to take the cargo with reasonable diligence. This was the extent of his obligation. That he did take it with such diligence seems clear. I am not satisfied that he could have done more than he did, under the circumstances. Furthermore, he appears to have warned the libellant, on arrival, that he would not be responsible for the vessel's detention; and advised him to go elsewhere, if unwilling to remain with this understanding. The weight of the testimony sustains this view.

The libel must be dismissed.

TYGERT Co. v. THE CHARLES P. SINNICKSON.

(*District Court, E. D. Pennsylvania. May 29, 1885.*)

CARRIER OF GOODS BY WATER—DAMAGE TO CARGO OF KAINIT—DELIVERY OF PART ONLY.

In this case the vessel was held liable for the damage to the cargo and the failure to deliver the whole of the kainit taken on board.

In Admiralty.

Theodore M. Etting, for libelant.

Henry R. Edmunds, for respondent.

BUTLER, J. The cargo, kainit, was taken on board in good order, and put off damaged, by water. For this damage the respondent must pay. It is not shown to have occurred from "peril of the sea." I am convinced, also, that the quantity delivered was not the whole quantity taken on board. The weighing on delivery was not so careful as on loading, and the precise extent of shortage may be difficult, if not impossible, of ascertainment. The disadvantage of this must fall on the libelant, whose agents are responsible for want of care. But that some allowance should be made on this account seems clear. How the shortage occurred, whether in pumping out the water, with which the kainit became mixed, or otherwise, need not be considered. The burden of accounting for it is on the respondent, and he has failed to give us any information. The commissioner appointed to assess damages may hear further testimony respecting the amount lost; and will be careful to avoid charging the respondents excessively, confining his allowance to the loss clearly shown.

HAMLET and others v. FLETCHER and others.¹*(Circuit Court, E. D. Louisiana. June 4, 1885.)***REMOVAL OF CAUSES—SEPARATE CONTROVERSY—SERVICE OF PROCESS.**

In a suit in a state court against a commercial firm, which is brought into court by service of process upon one of its members, who appears and defends for it and himself to a point beyond the time allowed for the legal removal of the cause to the federal court, service at that late day of process upon another member of the firm would not affect the removability of the cause, and make it a removable one, unless there is in the suit a controversy which is wholly between citizens of different states, which can be fully determined as between them, and which could not have been tried before the term at which the removal was applied for.

On Motion for Rehearing on order to remand to the state court.

B. R. Forman, for plaintiffs.

E. H. Farrar and *E. B. Kruttschnitt*, for defendants.

PARDEE, J. The petition of Hamlet, Bliss, and Elliott, citizens of Alabama, against Fletcher, Weissenberg & Co., alleged to be a commercial firm, residing and doing business in New Orleans, and composed of John F. Fletcher, Thomas O'Connor, William Weissenberg, and George M. Fletcher, was filed in the civil district court of the parish of Orleans, March 17, 1883. Service of citation was made, as appears by the sheriff's return, on the same day on the firm, and on William Weissenberg through William Weissenberg in person. April 6, 1883, William Weissenberg individually, and on behalf of the firm, appeared and filed exceptions on his own behalf, and on behalf of the firm, which exceptions went to the merits of the whole case. The exceptions were tried on April 13, 1883, and sustained on the seventeenth of the same month. An appeal was taken to the supreme court of the state, and at the November term of that court the judgment below was reversed, and the case was remanded for further proceedings.

In the lower court, May 22, 1884, the said William Weissenberg answered for himself and the firm. June 4, 1884, citation and the original petition were served on John F. Fletcher individually, and as a member of the firm of Fletcher, Weissenberg & Co. June 17th of the same year Fletcher filed exceptions individually and on behalf of the firm. These exceptions, it appears, were cumulated with the merits, and on November 28, 1884, Fletcher filed his answer. The case was set down for trial on December 4, 1884, but not being reached was ordered to be continued to the next jury term. February 5, 1885, William Weissenberg and John F. Fletcher joined in a petition for the removal of the case to this court, on the ground that they were citizens of Tennessee, and the plaintiffs were citizens of Alabama, and that the suit involves a controversy wholly between citizens of

¹ Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

different states. Bond was filed, and the case removed to this court.

It is clear that the case was not removable at the time service of citation was made on Fletcher. This is conceded. If Fletcher was a party before the service by reason of the commercial character of the partnership of Fletcher, Weissenberg & Co., and his membership thereof, then service of citation at a late day in the suit would not affect the removability of the case.

If he was not a party until served with citation, and at the time of such service the suit was not removable, then bringing him in would not make the case a removable one, unless there is in the suit a controversy which is wholly between citizens of different states, which can be fully determined as between them, and which could not have been tried before the term at which the removal was applied for.

No such controversy is alleged, and the record, as recited, shows that Fletcher's appearance brought no new controversy into the cause; that after his appearance it was the same as before; and that such controversy not only could have been tried at a previous term, but actually was tried. How the case would stand, as to right to remove, had Fletcher made such defense that there could be said to be in the suit a controversy wholly between him and citizens of a different state, and which could be fully determined as between them, and had removed the case by himself on such ground, it is not necessary to determine. As the cause stands here now it is clear that it should be remanded, and therefore the rehearing on the order heretofore granted remanding the cause is refused.

JACKSON COUNTY HORSE R. CO. v. INTERSTATE RAPID TRANSIT RY. CO.¹

Circuit Court, D. Kansas. March 3, 1885.

MUNICIPAL CORPORATIONS—GRANT OF EXCLUSIVE PRIVILEGE TO STREET RAILWAYS—POWER OF KANSAS CITY, KANSAS—ELEVATED RAILROAD—INJUNCTION.

In 1872 the city of Kansas, in Kansas, passed an ordinance granting to the Kansas City & Wyandotte Street Railway Company "the sole right, for the space of 21 years, to construct, maintain, and operate their railway over and along all the streets in said city," subject to restrictions as to grade and condition of road. In 1881 the company leased to the Jackson County Horse Railroad Company a part of its road running through a certain street, and in 1883 the city passed another ordinance granting to the Interstate Rapid Transit Railway Company the right to construct and operate an elevated railroad through certain streets, including the street occupied by the Jackson County Horse Railroad Company, which filed a bill to enjoin the building of the elevated road. *Held*, that so much of the ordinance of 1872 as purported to give exclusive privileges to the lessor or to complainant was beyond the powers vested

¹Reported by Robertson Howard, Esq., of the St. Paul bar.

in the city of Kansas and void, and that complainant had no right to challenge the validity of the ordinance of 1883, or to restrain defendant from building its road.

In Equity.

John C. Tarsney and B. F. Stringfellow, for complainant.

J. P. Usher, W. C. Stewart, and W. Freeman, for defendant.

BREWER, J. In this case I shall notice but a single question, and that because such question, vital to this controversy, was recently made by me the subject of a careful examination; and the opinion then formed has not been changed by the able and exhaustive arguments of the learned counsel for complainant.

In the case of the *Atchison Street Ry. Co. v. Missouri Pac. Ry. Co.*, decided by the supreme court of Kansas last spring, and reported in 31 Kan. 660, S. C. 3 Pac. Rep. 284, in which case I was charged with the duty of preparing the opinion of the court, the right of a street railway to occupy the streets of the city was challenged. There, as here, the city had passed an ordinance giving to the street railway company the exclusive right to occupy the streets with its railway for a term of years. There, as here, the city was given by its charter general supervision and control of the streets, but was not given, in express terms, power to authorize street railroads. In other words, the power vested in the city and the extent to which that power had been exercised by the city are alike. The court did not decide the precise question here presented, but expressly declined to give any opinion thereon, holding that, under the grant of general supervision and control of the streets, the city had power to *permit* the occupation of its streets by a street railroad. But obviously there was opened for inquiry the broad question of the powers of a city under such a general grant, and that question was made, as I have stated heretofore, the subject of full and careful investigation. To guard against any possible misapprehension, let me here state that in what I shall hereafter say I am in no manner speaking for that court, or expressing the conclusions reached by my associates, but am only giving my own views formed then, and strengthened by the arguments presented now.

The precise question is, had the city of Kansas the power to grant for a term of years the exclusive right to occupy its streets with street railroads? That question must be answered in the negative. Let me in the outset formulate two or three unquestioned propositions: (1) The legislature has, as the general representative of the public, the power, subject to specific constitutional limitations, to grant special privileges; (2) it may, with similar limitations, grant the like power to municipal corporations as to all matters of a purely municipal nature; but, (3) as the possession by one individual of a privilege not open to acquisition by others apparently conflicts with that equality of rights which is the underlying principle of social organization and popular government, he who claims such exclusive privilege

must show clear warrant of title, if not also probable corresponding benefit to the public. Hence the familiar rule that charters, grants of franchises, privileges, etc., are to be construed in favor of the government. Doubts as to what is granted are resolved in favor of the grantor, or, as often epigrammatically said, a doubt destroys a grant.

Now, coming closely to the question, the legislature has not in terms given to the city the power of granting an exclusive privilege of occupying the streets with railroads; it has not in terms given to it the right to contract away its continuous control of the streets, and its future judgment of the needs of the public in those streets, by a surrender of their occupation, for railroad purposes, to individuals for a series of years. Indeed, it has not in terms made any specific grant in respect to the occupation of streets by railroads, and their operation thereon.

Upon what, then, can it be claimed that the city has the power to give to an individual the right to occupy the streets with railroads, secure him that right for a term of years, and also the right of debarring, during such term, every other citizen from a like use of the streets? It was held in the *Atchison Case, supra*, that the city might permit a street railroad, and this because the legislature had granted to it a general control and supervision of the streets. In this the current of opinion and authority was followed. Under such power the city may permit any ordinary use of a street as a street. A street railroad comes within the ordinary scope of such use. But power to permit one citizen to use the streets in a given way is a very different thing from power to give such citizen the right to keep every other citizen from a like use of the streets. The one is a mere street regulation—a license; the other rises into the dignity of a contract—a franchise. The one may rest upon the ordinary powers of street management and control, the other requires the support of a special grant.

Doubtless the city may practically secure exclusive occupation to one railway company; *i. e.*, by giving permission to one, and withholding permission from all others, the occupation of that one becomes, for the time being, exclusive. But that is an altogether different matter. In the one case the exclusiveness depends on the continuous will of the city; in the other upon that of the individual company. In the one the full and constant control of the streets is retained; in the other it is partially transferred to the company.

Again, exclusiveness of occupation is not necessary to the full performance of a street railroad company of all its functions. The running of a street railroad on one street is in no manner interfered with by the running of a similar road on a parallel street. Doubtless the profits of the one will be increased if the other is stopped. Monopoly implies increase of profits. But the question of profits is very different from that of the unimpeded facilities for transacting business. The latter may be granted without any exclusiveness. And power to grant all facilities for transacting busi-

ness does not imply power to forbid all others from transacting like business. Even where a charter is granted by the legislature directly, it grants no exclusive right, unless the exclusiveness is expressly named, As said by Judge DILLON, 2 Mun. Corp. § 727:

"But a legislative grant of authority to construct a street railway is not exclusive, unless so declared in terms, and therefore the legislature may at will, and without compensation to the first company, authorize a second railway on the same streets or line, unless it has disabled itself by making the first grant irreparable and exclusive."

And if a direct grant from a legislature carries no implication of exclusiveness, why should it be presumed that the legislature intended to vest in a city the power to give exclusive privileges, when it has in terms granted no such power? Will the power to create monopolies be presumed unless it is expressly withheld? That would reverse the settled rule of construction, which is that nothing in the way of exclusiveness or monopoly passes, unless expressly named. It will not do to say that the grant of general supervision and control of the streets carries with it, by implication, the power to give exclusive privileges; for that grant implies a vesting in the city of continuous control. It is no authority for surrendering its constant supervision and management to any other corporation or individual. It implies that the city to-day, to-morrow, and so long as the grant remains, shall exercise its constant judgment as to the needs of the public in the streets, and not that it may to-day surrender to an individual or a private corporation the right of determining a score of years hence what the public may then need. The city may to-day determine that one street railroad will answer all the wants of the public, and so give the privilege of occupying the streets to but a single company. Ten years hence its judgment may be that two railroads are needed. Where is the language in the charter which restricts it from carrying such judgment into effect by giving a like privilege to a second company? It is doubtless true, as counsel say, that capital is timid, and will not undertake such enterprises without abundant guaranties and undoubted security. But this suggests matters of policy, and presents considerations for the legislature. It does not aid in determining what powers have been granted, or in the construction of charters or ordinances. When the legislature deems that the public interests require that cities should be invested with power to grant exclusive privileges, it will say so in unmistakable terms, as it already has in some instances. Till then courts must deny the possession of such power.

Decided cases on this question are few in number, yet these all speak one voice. In *Davis v. The Mayor, etc.*, 14 N. Y. 506, it appeared that the city council had passed a resolution granting to a company the privilege of constructing and maintaining for a term of years a street railroad in Broadway, in the city of New York. The city had simply the general supervision and control of streets, as in

the case at bar. The court of appeals held the resolution void; that the city had no power to make such a grant; and while some of the judges thought that the city might permit the occupation of the street by a street railway company, all agreed that so much of the resolution as purported to bind the city for a term of years, and thus practically divest it of full control over the street, was beyond the powers granted to it. In *Cooley*, Const. Lim. (2d Ed.) 207, it is said that "a corporation, having power under its charter to establish and regulate streets, cannot, under this authority, without explicit legislative consent, permit an individual to lay down a railway in one of its streets, and confer privileges exclusive in their character." *People v. Kerr*, 27 N. Y. 188; *State v. Gas-light Co.* 18 Ohio St. 262; *Gas-light Co. v. Gas Co.* 25 Conn. 20; *Mayor v. Railroad Co.* 26 Pa. St. 355; *Com. v. Railroad Co.* 27 Pa. St. 339.

My conclusion, then, is that so much of the ordinance as purported to give exclusive privileges to the lessor or complainant was beyond the powers vested in the city of Kansas, and therefore void. It has no right, therefore, to challenge the validity of the ordinance giving defendant its privileges, or to restrain the defendant from building its road. Whatever of annoyance or inconvenience the latter's road may cause, passes among those consequential injuries which give no cause of action. It must suffer these just as the citizen who uses the street where its road is constructed suffers some annoyance and inconvenience, and occasionally loss, and still without any action against it. *Pro bona publico* all suffer somewhat.

I have considered in this case the exclusiveness of complainant's rights, but, before closing, let me suggest whether, even if it had exclusive right as to street railroads, the defendant's road would be an invasion of that right. In other words, is an elevated road technically a street railroad? Can any company having a street railroad charter, without further authority, construct an elevated railroad? I do not care to enter into any discussion of this question, but merely suggest it as one which may sometime become of importance.

The bill will be dismissed, with costs.

SCOTTISH-AMERICAN MORTGAGE Co., Limited, v. WILSON and others.

(Circuit Court, D. Kansas. April 13, 1885.)

MORTGAGE—STIPULATION AS TO INTEREST—DEFAULT—ELECTION OF MORTGAGOR TO DECLARE WHOLE AMOUNT DUE.

Where a mortgage given to secure a debt drawing interest at 7 per cent. covenanted that in case the mortgagor made default in payment of any sum of interest when due, for more than 30 days, the mortgagee might elect to declare the whole principal debt due at once, and in such case that the principal debt should draw interest at 12 per cent. from the date of the note, *held* that, on

default by the mortgagor as aforesaid, and election and declaration by the mortgagees that the whole sum become due, that the covenant for an increased rate of interest was sufficient to support the increased rate from the time of such election and declaration, although the agreement to pay the increased rate from the date of the note might not be allowed, as being in the nature of a penalty.

On Exceptions to Master's Report.

On June 9, 1881, the defendant made a note to the order of the plaintiff, to pay, on the first day of July, 1886, the sum of \$65,000, at the rate of 7 per cent. per annum, payable semi-annually. In the note was a condition that if the note was not paid at maturity it should bear interest at the rate of 12 per cent. per annum from the date thereof. To the note were attached 10 interest coupons, calling for the payment, at the semi-annual period of the note, of the amount of the interest at 7 per cent. In each coupon was a clause that if not paid when due the note was to draw 12 per cent. interest after maturity. The note was secured by a mortgage, which contained the following clause:

"The said first parties further agree that if they fail to pay any of said money, either principal or interest, within thirty days after the same becomes due, or fail to perform or comply with any of the foregoing conditions or agreements, the whole sum of money herein secured may become due and payable at once, at the election of the said second party, its representatives or assigns, without notice of such election to the first party, and this mortgage may thereupon be foreclosed immediately for the whole of said money, interest, and costs, together with statutory damages in case of protest; and upon such election by said second party, its legal representatives or assigns, that the whole sum herein secured become due and payable at once, or if default be made in the payment of the principal sum when due, or in default of payment of any sum herein covenanted to be paid for the period of thirty days after the same becomes due, or in default of performance of any covenant herein contained, the said first parties agree to pay to the said second party, its legal representatives or assigns, interest at the rate of twelve per cent. per annum, computed annually on said principal note from the date thereof to the time when the money shall be actually paid. Any payments made on account of interest shall be credited in said computation so that the total amount of interest collected shall be and not exceed the legal rate of twelve per cent."

The defendant failed to pay the second interest coupon, and the plaintiffs, after electing to declare the whole mortgage due, brought an action to foreclose the same. The plaintiff, before the master in chancery, claimed interest at 12 per cent. on the note from the time the default was made and election declared by the plaintiff, and the master allowed the same. Exceptions to his report were filed, and those exceptions are now heard.

J. D. S. Cook, for complainant.

Howard M. Holden, in person.

FOSTER, J. Had the agreement between the contracting parties stipulated for 12 per cent. interest on default of any covenant in the mortgage, commencing from the date of such default, and not relating back to the date of the contract, there could hardly be a doubt but it

would have been a valid contract, and not in the nature of a penalty. I can see no objection to parties entering into an agreement that on failure of payment or other covenant the whole debt shall become due at the election of the creditor, and shall then and thereafter draw a greater rate of interest. The master reports and the complainant asks for the increased rate of interest only from the time the mortgagee declared its election to make the whole debt due, which was some time after default by the mortgagor. Is this contract sufficient to sustain that claim, or must it stand or fall as a whole? Assuming that so much of the contract as provides for computing the increased rate of interest from the date of the note until default is in the nature of a penalty, does it present a case materially different from a suit on a penal bond? In such cases courts do not apply such a rule as the *whole or nothing*. The uniform rule is to remit the penalty, and give judgment for the amount actually and equitably due. Contracts for penalties on a failure to perform agreements are not necessarily and absolutely void *in toto*. They are not considered repugnant to public policy or good morals, although courts may consider it against good conscience to enforce them according to their terms. This mortgage provides that, in case of default by the mortgagor in any of the covenants therein contained, the principal debt should draw interest at 12 per cent. per annum, instead of 7 per cent., to be computed from the date of the note until the money is actually paid. Of course, those periods of time cover and include the date from which this interest has been computed; *i. e.*, from the time default was declared by the mortgagee.

There are quite a number of reported cases which hold that a greater rate of interest may be contracted for, contingent on default, commencing from the *date of the note*, and it seems to me the weight of authority in law, if not in equity, is to that effect. *Satterwhite v. McKie*, Harp. 397; *Daggett v. Pratt*, 15 Mass. 177; *Horner v. Hunt*, 1 Blackf. 213; *Gully v. Remy*, Id. 69; *Rumsey v. Matthews*, 1 Bibb. (Ky.) 242; *Jasper Co. v. Tavis*, 76 Mo. 13; *Reeves v. Stipp*, 91 Ill. 609; *Per contra Waller v. Long*, 6 Mumf. (Va.) 71; *Tierman v. Hinman*, 16 Ill. 400; *Shiell v. McNitt*, 9 Paige, 101.

The exceptions to master's report must be overruled; and it is so ordered.

AMES IRON WORKS v. WEST and others.

(Circuit Court, E. D. Louisiana. April, 1885.)

1. TRUST—FUNDS MISAPPLIED—RECEIVER.

Previous defaults of debts, under a previous contract, where the parties were not the same, and the waiver of default by complainants accepting a balance due with interest, do not amount to a consent on the part of complainants to the misapplication of trust funds.

2. SAME—EQUITY JURISDICTION—ADEQUATE REMEDY.

Where complainant has no adequate remedy at law, and where he presents such a case of a breach of trust as to entitle him to relief in equity, it makes no difference if the defendant is insolvent; complainant's right to have an accounting, and to follow his fund, if it can be traced, is indisputable.

In Chancery. On motion to appoint a receiver.

J. Ward Gurley, Jr., for complainant.

Chas. B. Singleton, Richard H. Browne, B. F. Choate, Thomas L. Bayne, and George Denegre, for defendant.

PARDEE, J. The bill alleges that in March, 1884, complainant entered into a contract with the defendants by which the said defendants were appointed complainants' agents for the sale of their steam-engines and boilers, for a commission of 25 and 5 per cent., and upon other terms and conditions, and by which contract the defendants stipulated to render an account on or before the tenth of every month of all sales of the previous month, and to make remittances to complainants of the net proceeds within 30 days from date of sales, and to keep all proceeds of sales separate until remittance, and under no circumstances to blend said proceeds with moneys of themselves or of other parties, and to hold said proceeds as trust funds until remittance. That complainants supplied the defendants with a number of steam-engines and boilers, which they accepted and received, to be sold according to the terms and conditions of said contract, and that during the months of March, April, May, and June, 1884, said defendants sold a number of said engines and boilers, for which they received and collected the price, but that they have wholly failed and neglected and refused to pay over the net proceeds of said sales as required by said contract, amounting to the sum \$9,903.47, all of which is due and unpaid. That said B. J. West's Son & Co., defendants, failed and suspended payment on or about June 6, 1884, and are insolvent, but they are still in control and possession of their said property and assets and the proceeds of complainants' said engines and boilers, and are daily selling from their stock and disposing of their assets, and the same are rapidly diminishing in number and value, to orators' prejudice and damage. That part of the property and assets now in the possession of defendants was purchased and paid for with the proceeds of the sale of complainants' engines and boilers, or with

¹ Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

a part thereof, which defendants held in trust for complainants under the contract aforesaid. And complainants claim an accounting, and, fearing waste, pray for a receiver, etc.

The case has been heard contradictorily, on notice, with reference to the appointment of a receiver. By the affidavits and showing made, the contract, the sales thereunder, the amount thereof, the failure to keep the same as a separate fund, and to pay the same, and the insolvency, all as alleged, are admitted. The defendants deny that the amount received for engines and boilers under the contract was a trust fund, because in prior dealings between the same parties, since March, 1883, under a similar contract, defendant did not treat the funds as trust funds to the knowledge of complainant, who consented to such use, by receiving interest when funds were not remitted on time; and defendants deny waste, or intended waste.

This is the case proper; but in addition the court has been furnished with affidavits of several reputable citizens and merchants, to the effect that they are acquainted with the business and management of defendants since the failure; that it is well managed; and that, in their opinion, the possession of the court through a receiver will result in waste. In addition is a petition signed by some 30 creditors in various sums, praying the court not to appoint a receiver, on the ground that it would be injurious to the interests of all the creditors.

The proposition of defendants that their previous defaults under a previous contract, where the parties were not the same, and the waiver of the default by accepting the balance due, with interest, amounts to a consent to the misapplication of the trust funds under the present contract, is untenable. The parties to the previous contract were not the same, and there is very serious doubt whether the acceptance of interest on payment after short delay could be taken as an acquiescence in the misapplication of the trust funds. The rule in its widest scope is that long acquiescence by the *cestui que trust*, with full knowledge of the misapplication of the trust fund, will waive the trust. Here there is no long acquiescence with knowledge of misapplication.

The contract in hand was made only four and a half months ago. The only settlement made under it, where interest was paid, was but two days delayed, and that is shown, by affidavit, not to have been to the knowledge of the complainants. In the face of the contract so recently made, that "all proceeds of sales are to be kept separate by the parties of the second part until remitted, and under no circumstances to be blended with moneys of themselves, or of other parties, but to be held as trust funds," it would be preposterous to infer from the one remittance of interest of \$1.25, not over two months ago, acquiescence in the diversion of the trust funds, so carefully guarded by the terms of the contract. It is not shown affirmatively what has become of the trust fund. It was tacitly admitted at the bar, on the

hearing, that it had gone into the general business of the defendants, either to pay debts or buy more stock.

The case seems to me to be a clear one of such a breach of trust as to entitle the complainant to relief in equity. He has no adequate remedy at law, and so far as jurisdiction in equity is concerned it makes no difference that defendants are insolvent. Complainant's right to have an accounting and to follow his fund if it can be traced is indisputable. The appointment of a receiver, in a proper case made, is within the sound discretion of the court. The appointment should be made whenever it is necessary, in the opinion of the court, under the showing made, to protect the assets to which complainant must look to satisfy his lien and meet the demands of the decree to which it is clear he will be entitled. In cases of insolvency, where the court is properly informed of the existence of other creditors, their interests in the matter should be looked to and guarded in the exercise of such sound discretion.

In this case the insolvency is conceded, and the court is informed that there are many creditors, but of their number, the amount of their claims, their character as to security, their residence or representation, and of the amount of the insolvent's assets, the court is wholly uninformed.

The showing made on this hearing, so far as it goes, indicates that the insolvents have notified their creditors, and proposed a composition at 30 cents on the dollar, payable in 2, 6, and 12 months, without security, looking to a continuation of the business; and the indications are that such or a similar proposition would be acceptable to those creditors who have petitioned the court against appointing a receiver. If there was a definite proposition before the court from a majority of the creditors, looking to the speedy liquidation and settlement by responsible parties of the business, and guarding and protecting liens and rights like complainants, it would be listened to with favor. But anything looking to the indefinite continuance of the business, or the indefinite liquidation thereof by the defendants, is incompatible with the clear rights of complainant, and, as the court conceives, against the interest of all creditors not secured and not interested in the continuation of the business.

On the sixth day of June, as is shown by affidavit and not denied by defendants, the defendants failed in business. They had then in their hands, or had, in violation of their contract, put into their failing business, nearly \$7,000 of trust funds belonging to complainant, and yet, on the day they failed, as shown by their own exhibit filed, they sold over \$3,000 worth more of complainant's goods, increasing the trust fund by that amount, which increase has shared the fate of the other trust fund. With every disposition to defer to the judgment of reputable merchants, and to protect the general interest of creditors, the court feels bound to protect, as far as may be, the rights of complainant, which protection seems incompatible, under the circumstances,

with leaving the assets of the defendant firm longer in their present condition, and requires that they should be in the possession of the court. A receiver will therefore be appointed.

MARCHAND v. SOBRAL, ¹

(Circuit Court, E. D. Louisiana. February 11, 1885.)

EQUITY PRACTICE—PROVISIONAL SEIZURE—EXECUTORY PROCESS.

The statutory proceeding known in Louisiana as "provisional seizure" cannot be cumulated with the proceeding known in Louisiana as "executory process," in an equity proceeding in this court for "executory process," not being authorized by the equity rules and practice, and not being incidental to the "executory process" under the Code of Practice in Louisiana.

In Chancery. On writ of provisional seizure issued in a case of executory process.

John D. Rouse, Wm. Grant, and Andrew J. Murphy, for complainant.

James R. Beckwith, for defendant.

PARDEE, J. The equity rules adopted by the supreme court, nor the present practice of the high court of chancery in England, contemplate nor provide for such a proceeding in a court of equity as is known in Louisiana as "executory process." The classification of this proceeding among equity cases, as well as the authority to institute it in the United States circuit court, are based upon rule 39 of this court, a long-standing rule which was adopted by our predecessors, and has been followed by us, and under which titles have passed. The matter seems to have embarrassed our predecessors, for the minutes of the court show that rule 39, as originally adopted, placed this proceeding on the law side of the court. The supreme court seem to have labored under a similar embarrassment, for in *Levy v. Fitzpatrick*, 15 Pet. 167, they seem to have considered it a case at law, and in *Marin v. Lalley*, 17 Wall. 14, they treated it as a suit in equity. We therefore do not feel disposed, even if at liberty so to do, to deny, in the present case, that the petition was properly filed and docketed, and that an order of seizure and sale thereon was properly granted and issued.

The statutory proceeding known in Louisiana as "provisional seizure" is not authorized by the equity rules of the supreme court, nor by the practice of the high court of chancery in England, and has not been adopted nor authorized as an equity proceeding by the rules of this court. That in equity a similar remedy to the Louisiana "pro-

¹Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

visional seizure" may, in certain cases, be granted, is admitted, but such similar remedy, which is by receiver and injunction in aid, should only be granted on bill filed, notice, hearing, and proof. The claim by counsel that the writ of provisional seizure, obtained in this present case, is incidental to and really forms part of the "executory process" as authorized by the Louisiana Code of Practice, and therefore is authorized under our thirty-ninth rule, cannot be admitted. If the provisional seizure authorized in article 285 of the Code of Practice in executory proceedings, when the plaintiff sues on a title importing a confession of judgment, refers to or includes any other seizure than the order of seizure and sale, as regulated by articles 732 *et seq.*, then paragraph 1, art. 285, would seem to be inoperative, for the reason that the Code provides no method of obtaining any writ of provisional seizure, except in cases of suits for rent, for labor, or against vessels or other watercraft, or *in rem*, where the *res* is either lost or abandoned, or its owner unknown or absent, a different affidavit being required in each case. See articles 285, 287, 289, and 291, La. Code of Practice.

It is extremely doubtful if the courts of the state would uphold a writ of provisional seizure in executory process which contemplated any other seizure than the one after three days' notice to the debtor, as required in article 735 of the Code, unless it should be in a case where the owner of the property to be seized was proved to be either unknown or absent. We have not been referred to, nor have we been able to find, any case where the courts of the state have permitted such practice. Sequestration seems to be the remedy in the state practice in cases where the facts are similar to those alleged in the present case. See article 275, Code of Practice, par. 6; *Williams v. Duer*, 14 La. 531; *Fink v. Martin*, 10 Rob. (La.) 147; *McFarlane v. Richardson*, 1 La. Ann. 12; *Patterson v. Hall*, 1 La. Ann. 108. There is another serious difficulty in admitting this extra provisional seizure in this case. The *via executiva* is not favored in the courts, as the law lends itself with facility to change the proceeding to the *via ordinaria*. *Richard v. Bird*, 4 La. 306. Praying for citation or judgment, or presenting a contestation, are taken as abandonment of the *via executiva* in favor of the *via ordinaria*. The writ of provisional seizure authorized by the Code of Practice, except in the case of executory process, when seizure is authorized after three days' notice, contemplates a suit, citation, either personally or by publication, an answer, an issue joined, a hearing, and a judgment. If such writ should be permitted as has been asked and issued in this case, it seems probable that we might be called on to hold that plaintiff, by proceedings looking to an answer and contestation, has changed the executory process into an ordinary suit for foreclosure of a mortgage.

We therefore incline to the opinion that the provisional seizure referred to in paragraph 1 of article 285 of the Louisiana Code of Practice is the seizure authorized after three days' notice to the debtor to

pay, which seizure is provisional in that it may be set aside for the reasons set forth in the Code.

The "provisional seizure" issued in this case not being warranted by the equity rules and practice, and not being incidental to "executory process" under the Code of Practice of Louisiana, and therefore not warranted by rule 39 of this court, must be discharged and vacated. The order for "executory process," pure and simple, we feel compelled to maintain. It is therefore ordered that the provisional seizure issued in this case be dismissed, with costs, and that defendant's motion to quash the "executory process" be dismissed, with costs.

BILLINGS, J., concurs.

FINK v. QUEEN INS. CO.¹

(Circuit Court, E. D. Louisiana. January 24, 1885.)

FIRE INSURANCE—REFORMATION OF POLICY.

Where it appears that an insurance policy against loss by fire was issued to secure a mortgage of the insured property, but by mistake was made in the name of the owner of the property, instead of the mortgagee, who was the contracting party for the insurance, and the property was destroyed by fire during the term of the policy, it is against equity to permit the insurance company to set up its mistake and the actions of the owner to defeat the claim of insurance under the contract, and the contract was reformed and judgment given against the insurance company in favor of the mortgagee for the amount of his mortgage.

In Chancery.

B. R. Forman, for complainant.

J. Ad. Rozier, for defendant.

PARDEE, J. This cause came on to be heard upon the bill, answer, exhibits, and evidence, and was argued; and, it appearing to the court that the complainant, Peter Fink, owned a debt secured by mortgage, and had paid taxes on the property insured, and described in the bill, exceeding in the aggregate \$700, and did make a contract of insurance of said mortgage interest with the defendant for said amount of \$700, and that the policy, by mistake, was made in the name of Mrs. A. S. Lacey, the owner, as the assured, instead of in the name of said Peter Fink, the real contracting party, and whose mortgage interest was intended to be assured; and it appearing that the mortgaged property was destroyed by fire during the term of the policy, to the loss of the said mortgagee of over \$700; and that it is against equity to permit the defendant to set up its mistake and the actions of Mrs. A. S. Lacey, who was no party to the contract, to

¹ Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

defeat the claim of insurance under said contract,—it is thereupon and therefore ordered, adjudged, and decreed by the court that the policy of insurance dated twentieth of April, 1881, issued by the defendant to Peter Fink, be reformed, so as to read as follows in its substantive parts, to-wit:

"The Queen Insurance Company, of Liverpool and London, England, in consideration of twelve 50-100 dollars paid to it by Peter Fink, do hereby insure said Peter Fink to the amount of seven hundred dollars against loss or damage by fire on the one-story frame shingled dwelling-house, \$625, fences, \$45, cistern, \$30, situated on east corner Chestnut and Homer streets, in New Orleans, to secure and protect his claims secured by mortgage lien and privilege upon the said property to the amount of seven hundred dollars, within and for the term of one year from the twentieth of April, 1881."

And it is further ordered, adjudged, and decreed that the defendant, the Queen Insurance Company, of Liverpool and London, England, do pay to the said plaintiff, the said sum of \$700, with 5 per cent. per annum interest from the twentieth of January, 1882, until paid, and the cost of this suit, to be taxed by the clerk of the court.

BALTIMORE & OHIO TEL. CO. v. WESTERN UNION TEL. CO.¹

(Circuit Court, E. D. Louisiana. October 24, 1884.)

TELEGRAPH COMPANIES—EXCLUSIVE PRIVILEGES—CONTRACT AGAINST PUBLIC POLICY.

A contract between a telegraph company and a railroad company, by which it is attempted to give an exclusive right to the former to build and operate a telegraph line over the lines and right of way of the railroad company, and by which the railroad company agrees to discriminate in the carriage and rates of freight against competing telegraph companies, being against public policy, is absolutely null and void.

In Chancery. On motion for an injunction.

James R. Beckwith, for complainant.

Thomas L. Bayne and George Denegre, for defendant.

PARDEE, J. This cause came on to be heard on the motion of the complainant for an injunction *pendente lite*, and was argued by counsel, whereupon it is considered by the court that the several clauses in the contract of May 9, 1879, between the Western Union Telegraph Company and Morgan's Louisiana & Texas Railroad & Steam-ship Company, and in the contract of October 17, 1879, between the Western Union Telegraph Company and the Louisiana & Western Railway Company, by which the said Western Union Telegraph Company is apparently given the exclusive right of building and operating a telegraph line over the lines and right of way of said railroad companies, and by which the said railroad companies agree to discriminate in the car-

¹ Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

riage and rates of freight against competing telegraph companies, (being against public policy and in violation of law,) are absolutely null and void as against the complainant herein, and ought not in justice and equity to be alleged, pleaded, or set up against said complainant by said Western Union Telegraph Company in any suit or at any place; and considering, further, that the matters set up in the bill herein and the exhibits produced are within the equity jurisdiction of the court, and call for the exercise of the equitable writ of injunction, it is ordered that an injunction pending this suit issue as prayed for; with the condition, however, that the said injunction shall not be taken or construed as enjoining or prohibiting proceedings in any state court.

VITERBO v. FRIEDLANDER.¹

(Circuit Court, E. D. Louisiana. June 9, 1885.

1. LEASE—LOSS OF THING LEASED.

Under the Louisiana law a lease is dissolved by loss of the thing leased, (La. Civil Code, art. 2728;) and a lease shall end if the thing leased be destroyed by an unforeseen event. La. Civil Code, art. 2697.

2. SAME—OVERFLOWS NOT UNFORESEEN EVENTS.

It is the settled jurisprudence of the state of Louisiana that *overflows* and overflows of the Mississippi river are not unforeseen accidents, and this is in accordance with the natural state of things as they exist in the alluvial portion of Louisiana. *Jackson v. Michel*, 33 La. Ann. 723, followed.

In Chancery. S. C. 22 FED. REP. 422.

Charles Louque, for complainant.

Geo. H. Braughn, *Chas. F. Buck*, and *Max Dinklespeil*, for defendants.

PARDEE, J. This cause was on application and consent of both parties referred to one of the masters of this court. His report covers all the issues in the case, and seems to be in accord with the evidence. His findings are as follows: (1) That the property leased was not destroyed; (2) that the loss of the growing crop, the partial filling of the canals and ditches, and the washing away of the bridges, were not caused by an unforeseen event; (3) that the plantation is as suitable for cultivation as a sugar plantation, if not in better condition, as it was prior to the overflow, and that the clearing of the canals and ditches and the repairing of bridges are incidents necessary to the cultivation of a sugar plantation; (4) that equity can give no relief to complainant, and that his bill should be dismissed, with costs.

The exceptions filed attack the entire report and conclusions, and

¹Reported by Joseph P. Hornor, Esq., of the New Orleans bar.
Reversed, see 7 Sup. Ct. Rep. 962.

the arguments in support of the exceptions cover the entire issues between the parties. As to the amount and extent of the damage resulting to the leased property by the *crevasse* and consequent overflow, there is little, if any, dispute, either in evidence or in argument. The plant and stubble cane was destroyed, the ditches were, some partially and some wholly, filled, the canals were partially filled, and the bridges generally swept away. The water remained over the land until July, and when the water retired a deposit of sand was left over the land of from three to six inches. To cultivate the place as a sugar plantation the following year, 1885, would require the cleaning out and re-opening of the ditches and canals, the replacing or rebuilding of the bridges, and the obtaining and planting of seed cane, all of which would require considerable outlay and expense, particularly if the plantation should be put in the condition it was in at the date of the *crevasse*. So that if we dispose of the conclusions of the master, we dispose of the case.

1. The thing leased is described in the notarial act of lease as "a certain sugar plantation, situated in the parish of St. Charles, in this state, known as Friedlander's plantation, * * * and with said plantation (which embraces all the land in said parish owned by said lessor) are also leased all the buildings, out-houses, fences, and other appurtenances thereof, consisting of," etc.

Then follows a minute description of the sugar-house and machinery, and all the buildings and surroundings, etc., not one nor any of which are shown to have been impaired or lost. In fact none of the property so described as leased has been wholly or partially destroyed by a foreseen or unforeseen event, and there can be no question that if the contract between the parties had gone no further as to the property to go into the possession of the lessee, no argument even could be had about the matter. But it is contended that as the property leased is generically described in the lease as "a sugar plantation," and as the contract between the parties contains this provision, to-wit:

"And the said lessor further declared that he does hereby give unto said lessee all of the growing cane crop of 1883, now standing in the field, which the said lessee expressly binds himself to plant as seed cane on said plantation, and to reimburse said lessor for said cane crop, said lessee binds himself to leave on said plantation, for the sole use and benefit of said lessor at the termination of this lease, December 15, 1888, eighty-five acres of full stand seed cane, (such as is usually called first year's stubble,) which has been thoroughly cultivated, cut at the proper time for saving seed, and carefully wind-rowed, especially for seed; and, in addition thereto, said lessee shall also leave on said plantation, for said lessor, not less than 200 acres of stubble from what is called plant cane, which shall be properly protected in the ground:"

—and as the seed cane so given was planted on said place, and was destroyed by the *crevasse*, together with the bridges and ditches,—that the thing leased was a sugar plantation, with growing and standing cane, and the necessary appliances and conditions to grow and

raise each year sugar, and that the "thing" so leased has been destroyed.

The term "sugar plantation," used in the lease to denote the property leased, may or may not, by itself, mean a plantation ditched and bridged, and supplied and appaeled with adequate machinery, and furnished with seed cane, and planted cane, and stubble cane, all requisite to the present growth and production of sugar, but as used in the lease it is undoubtedly limited and explained by the circumstantial description of exactly what was leased. The very terms thereafter used with reference to the cane then in the field, and the obligations entered into with reference to it, show that such cane was not leased, but was loaned for consumption, and the effect of such loan was that the cane became the property of the lessee of the plantation. See Civil Code La. arts. 2910, 2911. In this case I think it is clear that the thing leased has not been destroyed.

2. In view of the first conclusion I deem it of little importance whether the *crevasse* and overflow, resulting in the damage aforesaid, was or not an unforeseen event. Under Louisiana law the lease is dissolved by the loss of thing leased. See article 2728, Civil Code La. It is true that in article 2697 of the Code it is provided that the lease shall end if the thing be destroyed by an unforeseen event, but it seems to me that article 2728, *supra*, is all embracing, and as it is without condition, and as by other articles of the Code the existence of the thing leased is essential to the life of the lease, (see articles 2692, 2710, Civil Code La.,) it matters little to the continuance of the lease how the thing leased is destroyed, if destroyed or lost at all. However this may be, it is the settled jurisprudence of the state of Louisiana that *crevasses* and overflows of the Mississippi river are not unforeseen accidents. *Vinson v. Graves*, 16 La. Ann. 162; *Masson v. Murray*, 21 La. Ann. 535; *Jackson v. Michie*, 33 La. Ann. 723; and this is in accordance with the natural state of things as they exist in the alluvial portion of Louisiana, where the plantation in question is located.

3. The third conclusion of the master is not exactly clear. He hardly means that a sugar plantation without canals and ditches, and bridges over the canals and ditches, is more suitable for cultivation than one with those ordinarily considered useful improvements. But taking his conclusion to mean that the alluvial deposit left on the place by the overflow has improved (probably) the fertility of the land, and the cleaning out ditches and canals, and the repairing of bridges, are usual and incidental to the cultivation of a sugar plantation, the conclusion is in accord with the evidence in the case.

4. As to equitable relief, the complainant repudiates any demand for a reduction of rent, and claims a dissolution of the contract of lease, on two grounds:

- "(1) The destruction of the leased premises in the whole, or at least in part;
- (2) the failure of the lessor to comply with the warranty of the lease to main-

tain the thing in a condition such as to serve for the use for which it is hired, inasmuch as the use of it has been much impeded, indeed, so much so that it may well be said that the use of it has entirely failed."

No relief is claimed under the general rules and principles of equity, as administered ordinarily in a court of chancery. Indeed, it may be doubted if any could be given. See Story, Eq. Jur. §§ 101, 102; Pom. Eq. § 823. The complainant is then, of course, remitted to the Louisiana Code for authority to grant such relief as he asks. From the facts found by the master the thing leased has not been destroyed in whole or in part, the crops on the place forming no part of the thing leased; and if they do, and were destroyed by an unforeseen event, for such destruction the Code only gives an abatement of rent, (Code, art. 2743,) which, as has been said, is repudiated by the complainant.

The Code, article 2692, expressly stipulates that the lessor is bound to maintain the thing in a condition such as to serve for the use for which it is hired; but, except as provided in article 2699, failure to keep in repair or condition does not annul the lease, for in such case the lessee is required to make the repairs himself and deduct from the rent, (article 2694;) and in this case it may be noted that complainant, in his supplemental bill, admits that by his contract he was to keep the place in repair. Article 2699, *supra*, is as follows:

"If, without any fault of the lessor, the thing cease to be fit for the purpose for which it was leased, or if the use be much impeded,—as, if a neighbor by raising his walls shall intercept the light of a house leased,—the lessee may, according to circumstances, obtain the annulment of the lease, but has no claim for indemnity."

The thing leased in this case was for the purpose of serving as a sugar plantation, a place on which cane was to be grown, thereafter to be made into sugar; and it is vigorously contended that it has "ceased to be fit for that purpose," and that its "use has been much impeded." The argument is that as the ditches and canals are filled up and all the seed cane destroyed, requiring great labor and expense and much delay to put the place in the condition it was before the overflow, and so as to make sugar cultivation thereon profitable, the thing has ceased to be fit, and the lessee is much impeded within the terms and meaning of article 2699, *supra*.

The facts in the case do not warrant the finding that the place has ceased to be fit for a sugar plantation. It is incontestable that it can be used for the purpose of growing cane and making sugar; labor and expense are all that is required, and I take it they are always required; and this place can differ from others in that respect only in requiring more of each. Nor can it be said that the lessee by the overflow is much impeded in the use of the place. If the water had remained, and now covered any considerable portion of the place, there would be much impediment in the use of the thing, but as the facts appear the lessee has the full, unobstructed use of the thing he

leased. The case is that complainant has lost crops, and the present prospect of making profitable crops, and under his contract, according to equitable and Louisiana jurisprudence, he must bear his loss, as he does not bring his case within the provisions of article 2743, Civil Code La., for an abatement of the rent. There is no adjudicated Louisiana case cited that supports the complainant's demand for annulment of the lease on the ground that the defendant has failed to comply with the obligations of the contract. The Louisiana cases cited by the master are adverse. *See *Dussnau v. Generes*, 6 La. Ann. 279; *Denman v. Lopez*, 12 La. Ann. 823.

A few words as to the French authorities cited:

The extracts from Troplong (*Troplong du Louage des Choses*, c. 695, 697) on the effects resulting from the loss of the fruits and the harvest from fatal circumstances and through violent perturbations, and claiming that the fruits not gathered are at the risk of the lessor, are taken from his commentaries on articles 1769, 1770 of the Code Napoleon, relating solely to the reduction of the rent in case of the loss of the harvest.

The extract from 6 Marcadé, 499, is an isolated extract from his commentary on article 1771, Code Napoleon, in relation to the loss of fruits separated from the soil. The extract from the same author, volume 6, art. N. C. 1720, is from a commentary on article 1720 of the Code Napoleon, the place of which is supplied in the Louisiana Code by articles 2693 and 2694, in relation to the repairs made by the lessor. A comparison of the two codes will show that the Louisiana Code goes further than the Code Napoleon in this: that it provides that in case of the refusal of the lessor to make the repairs, the lessee may cause them to be made at the lessor's expense.

The case of *De Silly C. de Pommeréau*, Journal de Palais, 1872, p. 939, which counsel cite "as having the advantage of presenting precisely the features of the present cause," has been misapprehended, as in that case the Court of Cassation refused to rescind and annul the lease, but held that the rent might be reduced, and so ordered. No adjudicated French case is cited which justifies the court in concluding that the French jurisprudence in cases similar to the present differs from our own.

The complainant's case is a hard one, and if the justification could be found, either in Louisiana law or the general principles of equity, I should be very glad to afford him relief, even to compelling the defendant, who is in no wise in fault, to share part of the inevitable loss; but as I understand the case, under the authorities, the complainant can have no reduction of rent, because the overflow was not an accident of such an extraordinary nature that it could not have been foreseen by either of the parties at the time the lease was made, (Civil Code La. art. 2743;) nor can he have a dissolution or annulment of the lease, because the thing leased has not been destroyed in whole or in part by an unforeseen event, (Civil Code La. art.

2697;) nor lost, (Civil Code La. art. 2728;) nor has it ceased to be fit for the purposes for which it was leased, (Civil Code La. art. 2699;) nor is the use of it much impeded. Civil Code La. art. 2699.

The exceptions to the master's report will be overruled, with costs; and the report will be confirmed and homologated, and the defendant will be allowed to take a decree dismissing the complainant's bill with costs.

THE QUANTICO COTTON.¹

EVANS and others v. STATE NAT. BANK.¹

(Circuit Court, E. D. Louisiana. June 20, 1885.)

CONVERSION AND SPOILIATION.

In order to hold a party for an alleged conversion and spoliation, it is necessary to prove, either that he or his agents participated in the conversion, or received or benefited by the proceeds of the conversion, in whole or in part.

In Chancery.

Albert G. Brice and *Albert H. Leonard*, for complainant.

James McConnell, for defendant.

PARDEE, J. The facts as claimed by complainant are as follows: On December 27, 1859, S. D. Linton, a very wealthy planter, executed a mortgage on a valuable plantation situated in the parish of Rapides, known as the "Quantic Plantation," and on the improvements thereon, and the stock, cattle, horses, mules, farming utensils, implements of husbandry, and 195 slaves thereto attached, to secure a debt of \$130,000, which he owed his commission merchants, W. & D. Urquhart, of New Orleans, evidenced by 12 notes, each for \$10,-833.33 $\frac{1}{3}$, drawn to his own order and by him indorsed, maturing January 10-13, February 10-13, March 10-13, and March 15-18, of years 1861-62-63. A few days after, the Louisiana State Bank, now the State National Bank, discounted three of said notes, viz., those maturing February 10-13, March 10-13, and March 15-18, A. D. 1862, and received four of said notes, viz., those maturing January 10-13, 1862, February 10-13, March 10-13, and March 15-18, 1863, as collateral to secure payment of note given by W. & D. Urquhart to the bank for money borrowed equal to the face amount of the notes pledged.

The ability of Linton to provide for his notes was not questioned by himself or those who held them. They would doubtless have been met when due, but shortly before the notes first falling due matured, the country was precipitated into a revolution. Louisiana seceded,

¹ Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

joined other states in creating the Southern Confederacy, and marshaled all her resources to meet the shock of rapidly approaching war. The state became a military camp; her people were wild with excitement; the ordinary affairs of life were ignored or neglected, and confusion reigned.

In view of probable contingencies, Linton (as he stated under oath) effected an arrangement by which the notes falling due in 1861 were extended one year. Such being the situation, on March 15, 1861, W. & D. Urquhart, who, for some cause, real or fancied or feigned, considered, or affected to consider, themselves in some manner aggrieved by Linton, instituted in the Fourth district court of Orleans parish a suit against him for \$3,108, based on an open account, and on commissions alleged to be due on cotton, which they claim should have been shipped to them by Linton. On the same day, and in the same court, David Urquhart, one of the firm of W. & D. Urquhart, instituted cause No. 14,665, entitled *David Urquhart v. S. D. Linton*,—a suit for executory process. In the petition signed by J. K. Elgee, attorney, it is alleged that Linton is indebted to Urquhart in the sum of \$32,500, with interest for three of the notes hereinbefore mentioned, viz., those maturing respectively January 13, February 13, and March 13, 1861. The mortgage executed by Linton is made part of the petition, and an order of seizure and sale prayed for. On the same day an order of seizure and sale was granted, directing the sheriff of Rapides parish to seize and sell the property mortgaged, for cash, to satisfy amount sued for, "and on such terms of credit as will correspond with the falling due of the remaining nine notes, set forth and described in the act of mortgage aforesaid."

A writ of seizure and sale issued in said cause, No. 14,665, directed to the sheriff of Rapides parish, under which that officer advertised the mortgaged property for sale on the first Saturday in May, 1861. This writ does not appear in the transcript; it was neither executed nor returned, and was destroyed, with all other papers of the sheriff's office, when the court-house of Rapides parish was burned by the federal army, in 1864. The sheriff made a mere paper seizure, if any. He certainly did not take actual possession of the property mortgaged; it remained in Linton's possession, and was managed and controlled by him, through his overseers and agents, until August, 1863. The execution of this writ was enjoined by Linton, who, on April 20, 1861, instituted, in Fourth district court of Orleans parish, suit No. 14,846, entitled *S. D. Linton v. D. Urquhart*. In his petition Linton alleged that, by agreement between himself and Urquhart, the time for payment of all notes which on their face matured in 1861, including those sued on by Urquhart, had been extended one year. On Linton's affidavit to that effect, and in accordance with the prayer of his petition, an injunction was granted by the judge of the Fourth district court against D. Urquhart and the sheriff of Rapides parish, ordering them to suspend the sale of said mortgaged property under the said

writ of seizure and sale issued in the suit of *D. Urquhart v. S. D. Linton*, No. 14,665, until the final hearing and decision of the suit instituted by *Linton v. Urquhart*. On this order writs of injunction were issued to David Urquhart and to the sheriff of Rapides. No further action has since been taken in said cause.

In April, 1862, the federals captured New Orleans, and in a short time thereafter occupied and held, until the close of the war, a considerable portion of southern Louisiana. Meanwhile their fleet ascended the Mississippi river and the Red river, and some time in the spring of 1863 held Alexandria, on Red river, in Rapides parish, for a few days, the Confederate forces resuming possession when the gun-boats withdrew; and from that time until the Banks expedition arrived in Rapides, in the spring of 1864, the Confederate army held the parish, and the Confederate government was paramount therein. It was evident, however, that the federals could occupy Alexandria or any other place on a river navigable by their gun-boats whenever they desired to do so, and this fact was well known by the parties through whose combined action Linton was despoiled of his property.

In the month of April or May, 1863, Linton, accompanied by his wife, went to the Quantico plantation. It was then in his possession and under his exclusive control. He placed an overseer or manager in charge of the place; employed an engineer,—there being a steam-gin on the plantation,—and, remaining only a short time, went to Texas, and from there to Cuba, and from there, in the fall of 1863, to Europe, where he remained until after the close of the war.

On the twenty-first day of August, A. D. 1863, J. K. Elgee, the same attorney who represented Urquhart and Cohen in their suits against Linton, instituted in the parish of Rapides two other suits against Linton,—one in the name of Urquhart, and one for the Louisiana State Bank,—in which suit two writs were issued by the clerk of the district court of Rapides, and by that officer placed in the hands of the deputy-sheriff of the parish, John Clements, then in full and sole charge of the sheriff's office, the sheriff being absent in the Confederate army.

Under these writs, and acting under written instructions given by J. K. Elgee, attorney of the plaintiffs in said suits, Clements seized some 1,800 bales of cotton, (or rather cotton amounting to some 1,800 bales, only a portion of it being baled at the time,) the property of S. D. Linton, and then on the Quantico plantation; served notice of seizure on William Morris, who had been left in charge of the plantation when Linton went to Europe; and, still acting under Elgee's written instructions, appointed J. Madison Wells keeper of the property he seized, and put him (Wells) in possession of same. These suits, writs, instructions of Elgee, attorney, and sheriff's returns, showing seizure, were all destroyed with the court-house of Rapides parish, when that building was burned, in 1864. Some months after Wells had been put in possession of Linton's cotton, he left Rapides parish and came to

New Orleans, where he remained some time, became a candidate for the office of lieutenant governor of Louisiana, at an election held under federal auspices in February, 1864, and was elected. Meanwhile, Gen. Banks was moving northward on his Red river expedition, and Wells returned to Rapides with him. The expedition continued on to Mansfield. On his return, Wells chartered a railroad which ran from Alexandria through the Quantico plantation to Lecompte, and by means of this railroad removed to Alexandria all of the cotton which he held as keeper. The federal forces were repulsed at Mansfield and retreated, making, however, a stand at Alexandria for several days. During their stay, Wells managed to ship on government transports, which accompanied the Banks expedition, the cotton which he had brought into Alexandria from the Quantico plantation. A portion of the same, about 1,000 bales, was carried to New Orleans, and the balance, about 800 bales, was taken up the Mississippi river to some point in Illinois. The cotton which arrived at New Orleans was consigned to and received by C. A. Weed & Co., who sold same and paid to Wells net proceeds thereof, some \$340,000. The evidence gives no further account of the cotton, worth at that time at least \$300,000, which went up the Mississippi river.

Linton, absent in Europe, had no knowledge of the seizures made in 1863, or of the removal of his cotton, and died ignorant of the facts. In 1866 he was interdicted by one of the courts of Paris, France, where he then resided, and soon thereafter, to-wit, in the early part of the year 1867, died. Meanwhile, after the close of the war, and some time in the fall or winter of 1865, Linton, with his wife, came back to Louisiana, remaining in New Orleans some months. Linton's mental condition, however, prevented him from learning the true condition of his affairs, and his wife, reared in luxury, was absolutely without any experience in matters of business. They returned to Paris some time in the year 1866, no wiser than when they left there. Linton died in Europe as stated. His widow remained there until the winter of 1869-70, when she returned to this country, where she has since lived. Some time after her return she was informed of the facts hereinbefore stated, and thereupon commenced a struggle, against desperate odds, to compel the spoliators to account for the property which they had wrongfully taken.

Before proceeding further it may be well to state: (1) That the Louisiana State Bank was, some time since, changed into a national bank, and is now known as the State National Bank. It is conceded that the State National Bank succeeded to all the rights and is liable for all obligations of the Louisiana State Bank. For convenience it will be referred to as the bank. (2) The succession of Linton is now represented by the complainant, Marie P. Evans, his widow, executrix of his last will, in which she is constituted his sole universal legatee.

The State National Bank, the only contesting defendant, in a

lengthy answer, responsive to the bill and amended supplemental bills, denies all participation in and responsibility for any and all acts charged by the complainants, so far as any liability is sought to be attached to the bank.

From the evidence in the case I find :

1. The seizure of the Quantico plantation in the suit of *Urquhart v. Linton*, No. 14,665 of the docket of the Fourth district court of New Orleans, was actual seizure, and thereunder J. M. Wells was appointed keeper, and as such keeper had possession. This appears by the averments of complainants' bill; by the record of the case No. 14,665; by the judicial allegations and admissions of Linton in his suit, No. 14,846, of the same court, for an injunction; by the testimony of Wells, who swears he was appointed keeper under the process which issued from the Fourth district court of New Orleans; and by the testimony of the complainant herself, who swears that in the early spring of 1863 she was herself on the plantation, and that the property was then in the possession of Gov. Wells, who was living on the place in possession and charge.

2. It is not satisfactorily shown that any suit was entered by the Louisiana State Bank against Linton in 1863, nor that any seizure of Linton's property was made in that year on behalf of the bank. Neither the original in this case nor any of the supplemental or amended bills allege any such suit and seizure; the only allegation on the subject being, "that during the time of such occupation by said David Urquhart, and on or about the twenty-first of August, A. D. 1863, the defendant the State National Bank of the city of New Orleans, then known as the Louisiana State Bank, joined with the said defendant David Urquhart in the possession of the said above mentioned and described piece or parcel of land, and continued in such possession and occupancy until on or about the ——— day of January, A. D. 1869."

Such suit and seizure were very unlikely proceedings to be had at that time. The State Bank was in the hands of loyal liquidators, appointed by the general commanding the United States forces in Louisiana; the parish of Rapides was at best debatable ground, with none but a Confederate court and officers; and whether such a suit was instituted in Rapides or Orleans parish, it is not likely that a seizure could have been made in Rapides, except, perhaps, in the latter case, during the short time the federal troops occupied the parish in 1863, and any such seizure would have been vain and illusory. The main witness on this point, Clements, who testifies that he was the deputy-sheriff that made the seizure, says the suit was instituted in Rapides, and was during the federal raid of 1863, which, he says, lasted about 10 days, and that he then and there appointed Wells keeper. The witnesses Mrs. Morris and Jackson Johnson, whose testimony was taken 21 years after, are certain that Clements made the seizure at the suit of the bank, on process from Rapides parish, in August, 1863,

and then and there appointed Wells keeper. Henry Perkins, uncle of complainant, and to some extent agent for Linton, swears he was on the place in September or October, 1863; that Wells was in charge as keeper; that he saw his authority, and it was signed by Neal, the sheriff.

Wells swears that he was appointed under process from the Fourth district court in New Orleans, and in this he is corroborated by the appointment (a copy of which is in record 14,665) from said Fourth district court. It is argued strenuously that as both complainant and defendant agree that in 1865 the court-house and records of Rapides parish were destroyed, that the papers presented in 1865, in the Fourth district court, purporting to be the original order of seizure and sale in No. 14,665, and the appointment thereunder of Wells as keeper, were manufactured for the occasion. The high character of the attorneys appearing at that time in this case, one of whom (Senator Jonas) swears that he saw the originals, forbids the court from such conclusion. And what more natural than that Gov. Wells, as keeper, should have in his possession his appointment as keeper? Henry Perkins, whom the complainant ought not to dispute, swears that Wells showed it to him in September or October, 1863.

It seems to me, from all the circumstances in proof, that Deputy-Sheriff Clements, from lapse of time and confusion of seizures, is mistaken, and that the witnesses Mrs. Morris and Jackson Johnson are not entitled, under the circumstances, to much credit when they swear so positively as to the bank's being creditor in a suit between other parties 21 years before. The history of this case, as shown by the pleadings, strongly tends to show that their testimony was an after-thought or lucky find for the complainant, if not to themselves.

3. The evidence does not show that the bank had any hand in the removal and conversion of cotton from the Quantico plantation at any time during or after the war; nor that any agents of the bank had anything to do with such removal and conversion. There is a great deal of hearsay evidence to the effect that Wells and the parties who assisted in bringing cotton out of Red river in 1864, and in selling and disposing of it, said at times that "the bank had an interest,"—"that the bank had a lien;" "that Wells said, in removing cotton from Quantico, he acted as agent of the bank;" "that Weed & Co. said it was cotton which had been seized by some bank;" but there is no evidence shown that any agent of the bank had anything to do with the removal and conversion of any cotton, except that of V. A. Ward, secret service officer, who says that he reported to Col. C. W. Kilbourne, provost marshal, that cotton was brought to New Orleans on government transports attached to the Banks expedition, and that J. Madison Wells had some connection with it; that thereupon Col. Kilbourne sent him (Ward) for J. M. Lapeyre, who came to the provost marshal's office, and thereupon the "provost marshal asked him about the cotton that came down the river, supposing it to

be John A. Stevenson's, who had a contract to bring in cotton which the government had an interest in to a certain extent, and he said no; it was cotton that he had got a permit to bring in. *It was Madison Wells' cotton, which the bank had a lien upon.*"

Col. Kilbourne, the provost marshal, testifies that he sent for Lapeyre at the instance of Gen. Bowen, and that the interview with Lapeyre was in the presence of Gen. Banks, Gen. Bowen, and himself, and that Lapeyre explained that it was not Stevenson's cotton, but cotton purchased with money belonging to some other fund, and he says nothing of any claim on the part of the bank. Now Lapeyre had been president of the Louisiana State Bank, and was, at that time, one of the three military liquidators and commissioners of the bank. That he was engaged in cotton speculations, and was interested with Wells and others in the cotton brought from Red river, may be conceded, and still the case is far from showing that in such interest with Wells he (Lapeyre) represented the bank, or pretended to do so. Nothing would be more natural, if Wells and others were engaged in spoliating the owners of cotton and bringing it in through the Union lines, than for them to answer that the bank had "an interest," or "a lien," well knowing that the bank was in the hands of a loyal commission, under the protection of the general commanding, and that the bank held large mortgage interests on plantations, and on "Quantic" in particular.

4. The case shows that on June 11, 1863, the commanding general of the department of the gulf, by special order No. 138, appointed Col. C. C. Dwight, A. Miltenberger, and J. M. Lapeyre commissioners to effect the liquidation of the Louisiana State Bank, and ordered that the said commissioners enter upon the discharge of their duties immediately, and that accordingly, on the seventeenth of June, over the protest of the president and board of directors of said bank, the said commissioners took possession of all the assets, affairs, and business of said bank, ousting the directors from all control, and that the affairs and control of the bank remained in the hands of said commissioners, and out of the control of its legal board of directors, until Gen. Canby restored the bank and its affairs to the directors and stockholders in January, 1866. This period, from June 17, 1863, to 1866, covers the time of all operations complained of in the present case.

5. There is no evidence to show that any of the proceeds of the alleged spoliation and conversion of the "Quantic" cotton ever came to the hands of the bank, or to the hands of any of its agents for the bank; while the sworn answer of the bank, and the evidence of Samuel H. Kennedy, a director from before 1863 till now, and for many years president of the bank, and that of C. L. C. Dupuy, cashier, is positive that the bank received no part or parcel of such proceeds; and they are corroborated by the books and records of the bank covering its entire history.

The evidence in this case is very voluminous, and relates to many

matters I find no time nor necessity to review, for they throw no light upon the issues as I understand them. It seems to me very clear that in order to hold the bank liable for the alleged conversion and spoliation it is necessary to find that either the bank, through its agents, participated in the conversion, or received or benefited by the proceeds of the conversion in whole or in part. Under the evidence in this case, and the facts as I have found them, neither of these is shown, nor is there under the evidence a well-founded suspicion that the bank was guilty of either. Whatever figure the agents of the bank cut in the whole matter (and we have proof only of the single declaration of Lapeyre, military commissioner, as testified to by Ward) would not, in my judgment, bind the bank, even if it had been in the control of its own agents; but when it is considered that at that time the bank was in the possession and under the control of the military authorities, and not under the control of its directors and stockholders, it would seem preposterous to hold the bank responsible for torts and wrongs with which the stockholders and directors had nothing to do, and that, too, on flimsy hearsay evidence, only supported by Ward, who is directly contradicted by Kilbourne. That wrongs were committed by the military liquidators, and that the bank ratified them by its stockholders resuming control, is an assumption without proof, and a conclusion that does not follow.

A decree will be entered dismissing the bill and amended supplemental bills as to the State National Bank, with costs.

SEIGNOURET v. HOME INS. Co. and others.¹

(Circuit Court, E. D. Louisiana. July 2, 1885.)

CORPORATIONS—REDUCTION OF CAPITAL STOCK.

Under the laws of Louisiana authority to increase the capital stock of a corporation must be express. As the constitution and laws of Louisiana provide for the increase of the capital stock, but are silent as to a decrease, the power to reduce the stock of a corporation was intentionally denied.

In Chancery.

E. H. Farrar and *E. B. Kruttschnitt*, for complainants.

Chas. B. Singleton, *Richard H. Browne*, *B. F. Choate*, for defendants.

PARDEE, J. The suit is brought to restrain the Home Insurance Company from reducing its capital stock. The question is one of the power of the company, and not of the propriety of its proposed action. It is well-settled corporation law, "that a corporation has no implied authority to alter the amount of its capital stock where

¹ Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

the charter has definitely fixed the capital at a certain sum. The shares of a corporation can neither be increased nor diminished in number, or in their nominal value, unless this be expressly authorized by the company's charter." *Mor. Priv. Corp.* § 230. See *Tayl. Priv. Corp.* § 133; *Green's Brice's Ultra Vires*, 158; *Granger's Life Ins. Co. v. Kamper*, 73 Ala. 325. And it is understood that the same law prevails in Louisiana. See *Percy v. Millaudon*, 3 La. 569. Article 239 of the constitution of Louisiana prohibits increase of stock of corporations, except in pursuance of general laws. See, also, act 26 of 1882, of the Laws of Louisiana, specifically providing the mode and manner by which the stock of corporations may be increased. See, also, section 693, *Rev. St. La.* From these Louisiana authorities it seems clear that the authority to increase the capital stock of a corporation must be express. It would also seem that, as the constitution and the law thereunder provide for the increase of the stock, but are silent as to a decrease, the power to decrease the stock of a corporation was intentionally denied.

All the authorities examined, and the nature of things, are to the effect that a decrease of capital stock affects injuriously more parties and interests than would an increase; increase of capital being generally considered to be beneficial to shareholders and creditors alike,—to the former as tending to diminish and not to add to their individual risks; to the latter as increasing the amount of their security. See *Green's Brice's Ultra Vires*, 160.

In *Percy v. Millaudon*, *supra*, Judge MARTIN, speaking of the attempted reduction of the capital of the Planters' bank, says:

"Creditors and customers have a claim to the preservation of the capital in its original integrity, for the faith of which they accept the notes of the institution, deposit their money, and lodge paper for collection. So has the public, on account of the advantages which the legislature has stipulated the bank should afford, as a consideration for the immunities and privileges which the charter confers. So have the stockholders, on account of the profits which they have a right to expect on the investments they have respectively made."

I do not understand counsel for defendant to seriously deny that the authority to increase or decrease the amount of capital stock of a corporation must be express; but he claims that to corporations created under the general law, as the Home Insurance Company was, the power to increase or diminish stock is given by section 687, *Rev. St. La.*, which reads:

"It shall be lawful for the stockholders of any corporation, at the general meeting convened for that purpose, to make any modifications, additions, or changes in their act of incorporation, or to dissolve it with the assent of three-fourths of the stock represented at such meeting; any such modification, addition, change, or dissolution shall be recorded as required by the preceding section."

And he contends that his construction of the power given in said section has been sanctioned by long-continued practice and usage among the corporations of the state, and the case proves that a num-

ber of leading insurance companies in the city of New Orleans, under such construction, have either increased or decreased their capital stock. Some have done both. The legislative construction of section 687 can be found in the proviso of section 693, "provided that nothing in this act shall be so construed as to authorize an increase in the capital stock of any railroad company." The judicial construction should be found in the reports of adjudged cases, but an examination of the Louisiana Reports shows no case where the question has been raised. It is a fair inference, then, that in every case where there has been an increase or decrease of capital stock, under authority claimed to be given by section 687, there has been unanimous consent of stockholders and creditors, which makes a very different case from the present one.

While the Louisiana courts have not been called on to determine whether an increase or decrease of the capital stock of a corporation is within the scope of section 687, and there are few if any cases from sister states, the English courts have construed similar provisions against the claimed authority.

In *Smith v. Goldsworthy*, 4 Adol. & E. N. S. 430, it was held that a provision "that for the better conduct and management of the affairs of the company, it should be lawful for a special general meeting called for the purpose, from time to time, to amend, alter, or annul, either wholly or in part, all or any of the clauses of the said deed, or of the existing regulations and provisions of the company," did not authorize a reduction of the number and value of the shares of the company. See, also, *Droitwich Patent Salt Co. v. Curzon*, L. R. 3 Exch. 35; *In re Ebbw Vale Steel, etc., Co.* 4 Ch. Div. 827; *In re Financial Corporation, Holmes' Case*, L. R. 2 Ch. 714; *Society v. Abbott*, 2 Beav. 559. For American cases, see *Granger's Life Ins. Co. v. Kamper*, 73 Ala. 325; *Salem Mill Dam v. Ropes*, 6 Pick. 23.

The power to dissolve does not carry the power to change the capital stock. Reducing the capital stock is practically the dissolution of the company and the organization of a new company. It did appear to me on the hearing that the proposed action of the Home company was not a reduction of the capital stock, for the capital and assets of the company are to remain the same. It seems that since the organization the capital has been nominal, to the extent that only by estimation has the actual capital of the company been equal to the par value of the shares, and the proposed action now is but to write off the par value of the shares so that the par value and the estimated value may be equal, the actual capital not being affected,—the actual stock being the same after the proposed action as before. It seems clear to me that the writing off the value of shares is such an infringement of the rights of property as can only be accomplished by consent, or a clear power given in the charter. However, I have concluded to treat the case as the parties have presented it, and not from this latter view. It seems perfectly clear to me that the proposed action of

the Home Insurance Company cannot be lawful over the protest of dissenting stockholders.

The injunction issued in the case will be perpetuated in the decree.

In re Intervening Petition of PRATT and another, Partners, etc.

KING and others v. OHIO & M. RY. Co. and others.

(Circuit Court, D. Indiana. July 18, 1885.)

1. NEGLIGENCE—VESSEL PASSING THROUGH DRAW—DUTY OF BRIDGE-KEEPER—FAILURE TO OPEN DRAW—SIGNALS.

Semble, in cases where the draw of a bridge cannot be opened to an approaching boat promptly, the keeper of the bridge, by a proper signal, in answer to the boat's whistle, should give notice of the fact; and again, when ready to open the draw, should give a signal of the fact.

2. SAME—DUTY OF VESSEL.

Where the only notice a boat approaching with a tow of barges has that a draw will not be opened is seeing it closed, it is not negligence on the part of the boat, after giving the proper signals, and there is no apparent reason why the draw should not be opened, to drop down under the slow bell until reasonable prudence requires a different course.

3. SAME—EVIDENCE—CONTRIBUTORY NEGLIGENCE.

On examination of the evidence in this case, *held*, that contributory negligence on the part of the boat is not shown, and that the managers of the bridge were negligent, and liable for the injury resulting therefrom.

Chancery. On exceptions to master's report.

F. Winter and *U. J. Hammond*, for petitioners.

Harrison, Miller & Elam, for respondents.

Woods, J. The master's report contains a sufficient statement of the case. It is as follows:

"To the Honorable Court:

"This is a claim against the receiver for injuries to a steam-boat and barges belonging to the petitioners, which injury, it is alleged, was occasioned by the negligence of the receiver's employes in the operation of a draw in a bridge over the Wabash river at or near Vincennes.

"The steam-boat *D. A. Goodin* was descending the Wabash river between 6 and 7 o'clock A. M. on the fourteenth of February, 1884, the river being at that time at a very high stage. It is alleged that the steamer approached the bridge in the usual and proper channel for passing through the draw, and repeatedly gave the proper signal by sounding its whistle to notify the person in charge of the draw of the bridge of the approach of the vessel, and that it was desired to pass through. It is averred that the receiver's employes failed and omitted to open the draw so as to permit the vessel to pass through, and negligently and wrongfully kept the draw of the bridge closed, by reason whereof the vessel, which had approached nearly to the draw of the bridge before petitioners' employes in charge of the vessel discovered that the draw would not be opened, was carried by the force of the current against the bridge, and was injured, all of which occurred solely by reason of the negligence of the receiver's employes, and without any fault or negligence on the part of the petitioners' employes.

"There is no dispute as to the injury of the vessel and the barges, nor any serious controversy as to the amount. The items of expenditures for repairs, and the amount of damages, are set forth in the evidence, and I find that the petitioners were damaged by reason of the collision in the sum of \$——.¹ But the right to recover at all is strenuously resisted by the receiver.

"The steamer Goodin was used by the petitioners in transporting timber up and down the Wabash river. At this time the Goodin was descending the river, having in tow three barges, which were lashed together and placed in front of the vessel. The vessel was a stern-wheeler. The extreme length of the fleet from the end of the barges to the wheel was 153 feet, the longest barge being 70 feet in length, and the vessel being 83 feet from out to out. The testimony of the pilot of the steamer Bellgrade, which met the Goodin over a mile above the bridge, is that the barges were so heavily loaded that he feared the waves made by his boat in passing would swamp them. About a mile and a half above the bridge there is a bend in the river, and it was about this place where the Goodin, descending the river, met the Bellgrade ascending the river. The meeting boats exchanged the customary signals. This was also about the place where the customary signals were given for the opening of the draw in the railroad bridge. The course of the river from where the boat came in sight of the bridge to the bridge is south. There was a strong wind blowing from the north-west. The boat descended the river with a slow motion, after the first signal was given, to a point opposite or near Tindolph's mill, which is nearly a mile above the bridge, without there being any indication on the bridge that the draw would be opened. At this point the signal was given again by the descending boat, and nothing was done at the bridge indicating a purpose to open the draw. The boat then descended with a slow bell to a place near Barrett's mill, which is about a half mile above the bridge, where the wind and current drove the barges against some rafts and logs on the Indiana shore. At this point the master of the Goodin became alarmed, and signaled the pilot of his boat to "hold the fleet," which meant that he should back and use steam enough to hold the vessel, and keep it from descending with the current, which at that place was pretty swift. He discovered that there was not power enough in the engine to keep the vessel from drifting with the current towards the bridge, although the engineer says he gave it all the steam it would bear. The engineer and the pilot both say that when extra steam was put on the strain was increased, and one of the chains broke. Seeing that the boat could not then be held, the vessel was rounded to, to go to the Illinois shore to a sycamore tree which stood in the water some distance from the west shore, where they hoped to make the boat fast. Just as the turn was made and the boat headed up stream, the key-seat which kept the chain in place slipped off, and the other chain came off the shaft. Being at the mercy of the current, the pilot and engineer got into a skiff with a line or rope, and attempted to reach the tree. The rope was too short, and, just as they were making fast to the tree, the boat had drifted so far down stream that the boat end of the rope, before it was made fast, slipped off into the river. The vessel, with the barges, then drifted against the bridge, and was injured.

"There was nothing to obstruct the view of the vessel from the watch-house on the draw-bridge to the point near and above Tindolph's mill. If the watchmen and others in charge of the draw-bridge had been on the lookout they could have seen the vessel as it approached. From the fact that the place where the steamer Goodin and the steamer Bellgrade met on the river above was about the place where the signal for the draw is usually given, it is probable that the men in charge of the bridge mistook or confused the meeting signals with the signal for the draw, and may have supposed that the descend-

¹ See *infra*.

ing vessel did not intend to pass the bridge at that time. The testimony of the men at the bridge is that they heard no signals for the opening of the draw, and made no effort to open it because they did not suppose the Goodin desired to pass down the river at that time. The master is of the opinion that the men at the bridge were not giving proper attention, or they would have heard the signals to open the draw.

"There was not force enough in the engine of the Goodin to hold it against the current, with the heavily loaded barges which were attached to it. Besides this, the breaking of the chain indicated, either that it was insufficient for the purposes of safe navigation, or had become so by reason of the unusual strain to which it was subjected by the unusual weight of the barges which the vessel was towing.

"Upon the whole case the master is of the opinion, and therefore reports and finds, that, although the employe of the receiver, who had charge of the draw, was negligent, the negligence of the employes of the petitioners in the management of the boat, and the negligence of the petitioners in failing to supply said boat with machinery of the requisite strength, and the negligence of the petitioners' employes managing the boat, and in descending the river with the barges so heavily loaded as to prevent the safe navigation of the river at that stage of the water, materially contributed to the damages and losses to which petitioners have been subjected.

"I therefore report that the claim of petitioners should be disallowed. I append to this report an abstract of the evidence.

"Respectfully submitted.

"WILLIAM P. FISHBACK, Master."

With the burden of proof upon the respondent in respect to contributory negligence, it does not seem to the court that the master's conclusion is the right one. *Wabash, etc., R. Co. v. Central Trust Co.* 23 FED. REP. 738. If the boat's chain had not broken, it is not apparent that, after it became evident that the draw would not be opened, the effort to reach the Illinois shore would not have been of easy and safe accomplishment. The evidence shows that before the boat was started that morning the machinery had been carefully inspected—the chain, link by link—and all found to be in apparent good order. The defect, therefore, was a hidden one, and consequently affords no ground for the finding that there was negligence in failing to supply the boat with adequate machinery.

The captain of the Bellgrade thought the barges so heavily loaded as to be in danger of being swamped by the waves from his boat. They were not swamped, and this evidence, at most, tends to show no other undue or improper peril to the navigation of the boat and barges. It was the right of the boat-owners, as against the owners of the bridge, to employ the power of the boat to the fullest extent consistent with a reasonably safe navigation in respect to the bridge, and there is no proof that in this instance more than this was done. On the contrary, only two days before, when the stage of water was not greatly different, this boat, with the same barges loaded to the same extent, passed down safely through this draw. In respect to the wind at that time there is no proof. It is true that on account of passing and approaching railway trains there were times when the draw of the bridge could not be opened without delay, and of

this the masters of descending boats of course had notice, and were bound not to approach dangerously near until assured of an open passage. It would seem to be a better practice that in cases when the draw of a bridge cannot be opened to an approaching boat promptly, the keeper of the bridge, by a proper signal in answer to the boat's whistle, should give notice of the fact, and again, when ready to open the draw, should give a signal of that fact. But no such practice seems to have been adopted, and, so far as is shown, the only notice which an approaching boat could receive that this bridge could not be opened for it, consisted unless a train of cars were seen to be upon or approaching the bridge, in the mere fact that the draw remained closed. The not unreasonable course for a boat in such a case, therefore, was to do as this boat did; that is, after giving and repeating the proper signals, and there being no apparent reason why the draw should not be opened, to drop down under the slow bell until reasonable prudence required a different course. It is not shown that less than reasonable prudence, in the light of known facts, was employed by the managers of this boat. But for the breaking of the chain it is reasonably certain that the boat would have been brought to the shore and safely moored; and the breaking of the chain, as already shown, was so far an improbable and unforeseen occurrence as to afford, either by itself or in connection with the other circumstances, no basis for the imputation of contributory fault on the part of the petitioners.

It is therefore ordered that the exceptions be sustained, and the claim of the petitioners be allowed to the amount proven; and, as the report has been left blank in respect to the amount, it will be returned to the master for correction, unless the proper sum can be inserted by agreement of the parties.

THOMPSON and others v. MEMPHIS, S. & B. R. Co. and others.

(District Court, N. D. Mississippi, W. D. June 16, 1885.)

RAILROAD COMPANIES—CONTRACT TO ISSUE BONDS—MORTGAGE—CERTIFICATES—LIEN FOR MATERIAL AND LABOR USED IN CONSTRUCTING ROAD.

Rights of the holders of certificates entitling them to bonds secured by mortgage considered, and *held* not to entitle them to a first lien as against those who furnished labor and material for the construction of the road.

In Equity.

J. W. Clapp and J. W. C. Watson, for complainants.

T. W. Harris, J. T. Faut, R. S. Stith, M. Green, W. L. Nugent, and Minor Meriweather, for defendants.

HILL, J. This cause is submitted upon bill, amended bill, cross-bills, answers, exhibits, and proofs which are very voluminous, and present quite a number of intricate questions for solution. These

questions have been very thoroughly argued by the learned counsel representing the respective interests involved, and have received all the consideration of which I am capable, and by which I have been brought to the conclusions hereinafter stated.

The facts, as shown by the pleadings and proofs, and admitted by counsel, necessary to be stated to an understanding of the rights of the respective parties, are briefly as follows:

A corporation created under the acts of the legislatures of the states of Tennessee, Mississippi, and Alabama, under the name of the Selma, Marion & Memphis Railroad Company, for the purpose of constructing and operating a railway from Memphis, in Tennessee, to Selma, in Alabama, under the rights conferred by the charters granted them, located its line of railway from these designated points, and obtained the right of way as far as it could be done, and proceeded to construct portions of its road-bed, and completed and equipped a portion of the railway in Alabama. To raise the means for what had been done, and contemplated to be done, the corporation issued its bonds with interest coupons attached. For want of means the enterprise failed, the bondholders proceeded in the circuit court of the United States for west Tennessee and obtained a decree of foreclosure of the mortgage executed to secure the payment of these bonds and interest coupons. Under this decree a sale of all the property, real and personal, and franchises belonging to said corporation, and all of which were conveyed by said mortgage, were sold and bid off by J. J. Busby, one of the complainants in that suit, for himself and co-complainants, at the sum of \$10,000, which sale was confirmed by the court and the title rested in the purchasers. Upon the completion of this purchase the purchasers, under the authority of the laws of Tennessee and Mississippi, formed themselves into a corporate body known as the Memphis, Holly Springs & Selma Railroad Company, and as such relinquished to parties in Alabama, who held superior rights to all the property, etc., in Alabama, all right and claim thereto; and thereafter confined its claim to that portion of the property, rights, etc., from Memphis to the Alabama line. The new corporation proceeded to fix its capital stock at \$1,000,000, and to estimate the value of the property, etc., so purchased at the sum of \$263,000, to be divided into shares of \$100 each, to be divided among the purchasers according to the interest of each, and to be held and treated as so much paid-up capital stock not subject to call, certificates of which were executed and delivered to the respective shareholders.

The corporation having been fully organized by the election of the necessary officers, and the adoption of a code of by-laws, a deed of conveyance was executed by the purchasers at the foreclosuresale, and the title to all the property and franchises so purchased was vested in the corporation. On the first day of June, 1881, a resolution was passed by the stockholders of the corporation authorizing the president and directory, for the purpose of raising money for the construction and equipment of the railway, and expressly to be for no other purpose, to issue bonds, with interest coupons attached, and a mortgage upon the property and franchises of the company to secure their payment. Nothing was done under this authority, other than a resolution of the directory authorizing the president and finance committee to execute the bonds and mortgage, until the second day of August, 1881, when, by another resolution of the stockholders, in convention assembled, the former resolution was amended so as to authorize the amount of bonds and coupons to be issued for the purpose stated in the former resolution, and no other, to be \$3,500,000, and to be payable January 1, 1921. The proceedings under the resolution of August 2, 1881, constitutes the only authority for the execution of bonds and mortgages which needs be considered.

It is admitted that some time prior to the meeting in August, 1881, a change

was made in the officers of the corporation, by which Fred. Wolffe, who had become a stockholder, was made president of the company, and M. Calm secretary. At the meeting of the stockholders on the second of August, 1881, the name of the corporation was changed to that of the Memphis, Selma & Brunswick Railroad Company. Some few other changes were made, but of no importance, in reference to the questions under consideration. Prior to the sixth of July, 1881, the stockholders placed their certificates of capital stock in the hands of J. J. Busby, to be sold by him to W. M. Forrest, one of their number, at 25 cents on the dollar, which was paid by Forrest to Busby, and by him paid to the stockholders, and the certificates of stock were then delivered to Forrest as the holder.

On the sixth day of July, 1881, a contract was entered into between Forrest and Wolffe, which was reduced to writing and signed by both parties, in which Forrest agreed to sell, and Wolffe to purchase for himself and those associated with him, the entire capital stock in said corporation, and for which Wolffe agreed, as soon as the bonds could be lawfully issued, to procure first mortgage bonds to the amount of \$263,000, to be secured by a mortgage conveying all the property and franchises of the company. The other provisions in this contract need not be stated. Upon the execution of this agreement Forrest delivered the certificates of stock to Wolffe, and received from Wolffe a certificate for each bond, to be delivered in the following form:

"MEMPHIS, SELMA & BRUNSWICK RAILROAD COMPANY—FIRST MORTGAGE BONDS.

"Total issue, \$3,500,000.

\$1,000 each.

"This is to certify that William M. Forrest is entitled to one bond of one thousand dollars, with coupons thereto attached, No. — of first mortgage bonds of the Memphis, Selma & Brunswick Railroad Company, dated July 1, 1882, and bearing interest at rate of six per cent. per annum, payable semi-annually, which will be delivered to him, or order, upon the surrender of this certificate, as soon as said mortgage is executed and said bonds engraved.

"Witness the seal of the company, and the signature of the president and secretary, at Memphis, Tennessee, this first day of July, 1882.

"FRED. WOLFFE, President.

"M. CALM, Secretary."

The complainants have purchased and hold these certificates, or a portion of them, paying therefor various sums, from 20 cents on the dollar and over. No bonds or mortgage were entered until the third day of January, 1883, when the company, by its president and secretary, executed a mortgage on the property and franchises of the company to secure the payment of bonds thereafter to be executed. This mortgage was filed for record in the proper counties between the twenty-fifth of January and second of February, 1883. On the twenty-third day of June, 1882, a contract was entered into between the company, acting through its president, Wolffe, and Green, Hamilton & Co., by which the latter agreed to construct the road from Memphis to Holly Springs at stipulated prices, to be paid in first mortgage bonds of the company at 90 cents on the dollar.

At the time this contract was made, or afterwards, it does not clearly appear which, Wolffe individually agreed to cash the bonds, or rather certificates, for their delivery at 90 cents on the dollar, and did so for all the work done and materials furnished up to November 1, 1882, amounting in bonds to \$75,000. The certificates were transferred to Wolffe. For the estimates for November and December, 1882, Green, Hamilton & Co., though tendered, declined to receive certificates for the reason that Wolffe was unable to cash them, as before; Wolffe, however, paid them in cash \$20,039.39, and gave

them the acceptance of the company, indorsed by him individually, for the balance of the estimates for these months, but which acceptances have been duly protested and remain due and unpaid.

On the first of January, 1883, Wolfe being unable to advance more money, the contract was changed between the company and Green, Hamilton & Co., by which the former contract was annulled and set aside, and the materials furnished, and the work thereafter to be done, was to be made in cash by the company. Under this last contract work progressed until in March or April following, but without any payment for the same, and all of which remains due and unpaid. The work was stopped by order of the company, and the failure of the contractors to complete the work was caused by the failure of the company to meet its obligations. The defendant, the Indianapolis Rolling Mill Company, furnished a large portion of the iron rails which have been placed on the road at stipulated prices, and for only a small portion of the same has any payment been made. Wolfe, as president of the company, employed engineers and other employes in the construction of the road, and for whose services no payments have been made, amounting to something over \$12,000.

Green, Hamilton & Co., The Indianapolis Rolling Mill Company, and Wolfe, on behalf of these unpaid employes, instituted proceedings in the circuit court of Marshall county, in this state, against the Memphis, Selma & Brunswick Railroad Company, to enforce the statutory liens given by the laws of Tennessee and Mississippi for work and labor done and materials furnished in the construction of railroads and improvements and buildings. These causes were removed to this court, and judgments upon the law side of the docket of this court were, on the twenty-second day of January, 1884, rendered in their favor, respectively, as follows: In favor of Green, Hamilton & Co. for \$191,125.61, with costs; in favor of Indianapolis Rolling Mill Co. for \$69,153.65, with costs; and in favor of Wolfe, on behalf of said unpaid employes, for \$13,508.52, with costs. Each judgment was declared to be a co-ordinate lien with the others upon the property and franchises of said company.

These facts are about all that need be stated, and present, among other things, a curious state of inflation and contraction of estimated value. *First.* The property was only worth \$10,000; in a week or two it swelled to be worth \$265,000; in about the same time the owners were willing to accept one-fourth that sum; then in less than that time a sale is made at \$265,000, the payment to be secured beyond a doubt; but the holder of the obligation for payment was willing in some cases to take one-fifth the amount, and so parted with his supposed valuable rights; then, after about \$400,000 in materials and labor had been added, the whole property, etc., was estimated at only \$250,000. The complainants, in their original and amended bills, and who are the holders of the certificates given by Wolfe to Forrest, allege that these certificates have all the force and effect of the bonds agreed to be issued, and that the court will regard the mortgage for their payment as having been executed at the execution and delivery of the certificates. In other words, that the court will consider all as having been done which was required to be done, and will in equity create the bonds and mortgage to secure their payment, and declare this mortgage as creating a superior lien prior in date to the liens of those claiming these statutory liens. Since these proceedings have

been commenced, by agreement of all parties, the present cash value of property and franchise, subject to the liens, have been estimated at the sum of \$250,000, and is to be considered as a fund in court of this amount, subject to the further orders and decrees of the court in this cause.

It is conceded that the judgment in favor of the Indianapolis Rolling Mill Company is superior and prior to that of complainants, and, if this concession was not made, it is evident to my mind that it is such prior lien and need not be further considered. There is more doubt in regard to the judgment in favor of Wolffe in behalf of the employes, but in my opinion in equity they should have a prior lien to complainants, as it was only in part their labor which enhanced the value of the property really beyond \$10,000, and besides the complainants do not seriously controvert their claim. The controversy is thus narrowed down to the questions arising between complainants and Green, Hamilton & Co.

The first question to be determined between them is the effect to be given to the certificates upon which complainants base their claim. To make them binding obligations upon the part of the corporation they must have been authorized upon the part of the stockholders, or the directory of the company, or must have been within the scope of the business of the company and powers of the president and secretary, or, by some clear and unmistakable act on the part of the stockholders and directory, ratified and confirmed. There can be no authority found by any action upon the part of either the stockholders or board of directors for their issuance. The contract was not made upon the part of the corporation, but was an individual contract between Forrest and Wolffe, and the fact that Wolffe added the word "president" to his name, and that the certificates were countersigned by Calm with the addition to his name of the word "secretary," and that the seal of the corporation was affixed to them, did not change them from an individual to a corporation liability. Forrest, who took them, knew their true character, and they not being unimpeachable commercial paper the complainants can set up no greater rights under them than Forrest could have done had he remained the holder. They are simply promises upon the part of Wolffe at a future day to deliver to Forrest, or his order, a \$1,000 first mortgage bond each, in payment for the capital stock purchased, and nothing more.

There was no authority to issue bonds or to incumber the property and franchises of the company for any other purpose than to be used in the construction and equipment of the railway, and until they were so used, and thereby became a circulating medium, their use for any other purpose would have been unlawful as between Wolffe and those receiving them from him, or having a knowledge of their unlawful use, which Forrest would have had, and also the holders, if, as it is contended, the understanding was that the bonds were to be immediately issued and delivered to Forrest or the holders; and certainly

no greater effect can be given to the certificates or their use than the bonds had they been issued and immediately delivered to Forrest or his order.

I am satisfied that this court, under the facts, has no power to convert these certificates into bonds, and to create an equitable mortgage to secure their payment. But notwithstanding this is so, Forrest had a right to sell, and Wolfe to purchase, this capital stock, to be paid for in such mortgage bonds as the company might thereafter lawfully issue,—which means to be issued and used for the payment of the construction and equipment of the railway. The only bonds shown to have been so issued and used are the 75 bonds for \$1,000 each that were issued in payment for the work done and materials furnished by Green, Hamilton & Co. up to the first of November, 1882, the certificates for which were transferred to Wolfe. This bill is filed in part to compel Wolfe to comply with his contract in delivering the bonds contracted to be delivered, and as the bonds are in court their beneficial interest will be decreed to be in complainants, and they entitled to their payment out of such portion of the fund in court as may not be subject to a prior claim, or a *pro rata* share with those standing in the same relation to this fund.

The first contract between the company and Green, Hamilton & Co. was that they were to take in payment first mortgage bonds at 90 cents upon the dollar; this was the only contract between the company and them. The contract with Wolfe to cash them, or the certificates for them, was a personal obligation on his part, and for its breach he alone is responsible. The promise to receive bonds in payment having long years to run is inconsistent with the idea of reserving a statutory lien upon the property of the corporation for payment, and Green in his deposition, and who was the active partner in making the contract, tacitly admits, and gives as a reason for changing the contract to a moneyed obligation, that it was to secure the statutory lien; and this is borne out by the fact that the work was continued so long after payment ceased, which they certainly would not have done but for a reliance upon the statutory lien. I am satisfied that Green, Hamilton & Co. are entitled to a lien upon the fund in court for all the materials furnished and work done on the railway after the change of the contract made the first of January, 1883. This change in the contract the parties had a complete right to make. This lien was not displaced by the execution of the mortgage, as neither Forrest nor the holders of these certificates are purchasers or incumbrancers without notice, and the statutory lien holds good as to all others.

The acceptance of the acceptances given by the company, and indorsed by Wolfe, and received as a means of payment by Green, Hamilton & Co., were not a payment; and, not having been paid, I am satisfied that Green, Hamilton & Co. should be treated as though they now hold the bonds contracted to be received for the materials

furnished, and work and labor done, prior to the first of January, 1883, in the construction of the railway, and for which payment has not been made; and that upon this sum, whatever it may be, they are entitled to share *pro rata* with complainants in whatever fund may remain of the \$250,000, after the satisfaction of prior demands upon it.

The result is that the cause must be referred to a master to take and state an account of the sums due the several parties under the statutory liens, as stated; and, after deducting these sums and any others chargeable for costs from the fund in court, then divide the surplus that may be found *pro rata* between Green, Hamilton & Co. and the complainants, and then the sum found due the complainants divided *pro rata* between them, according to the amounts respectively due each, and report the result to this term of the court.

ROGERS v. WALKER. (Intervention of BUSH & LEVERT.)¹

(Circuit Court, E. D. Louisiana. June 24, 1885.)

1. LIENS AND PRIVILEGES—CIVIL CODE LA. ART. 3217.

The privilege purporting to be given by paragraph 3, art. 3217, Civil Code La., "on everything which serves to the working of the farm," should be construed to apply only to such things as serve to the working of the farm, but do not constitute a part of the farm itself; that is, to movables by nature and destination,—movables serving to the making of the farm, but not belonging to the owner.

2. SAME—WAGES OF LABORERS ON PLANTATION.

The services of laborers on a plantation inure directly to the benefit of those having liens or privileges upon the crop, in preserving the thing on which their mortgage and privilege rested, and therefore were entitled to an equitable as well as a statutory lien on the proceeds of the crop, but they in nowise benefited the owner of the land, and their wages have no equitable lien whatever against him, and a very doubtful statutory privilege.

3. SAME—MOVABLES AND IMMOVABLES.

The Civil Code La. arts. 3253-3270, inclusive, contemplate that privileges bearing on both movables and immovables shall be first satisfied from the movables before resorting to the immovables; and this seems to be also the equitable rule in marshaling assets.

On Distribution of Proceeds of Sale of a Plantation and its Crop.
Don A. Caffrey and F. L. Richardson, for plaintiff.

Chas. B. Singleton, R. H. Browne, B. F. Choate, and E. D. White, for intervenors.

PARDEE, J. The intervention and opposition of Bush & Levert, claiming the laborer's lien and privilege on the proceeds of the plantation sold to satisfy complainant's mortgage, to the extent that such proceeds may be made up from or by the value of the movables by

¹Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

nature, but immovables by destination, sold with and as a part of said plantation, will be rejected, because—

(1) I doubt if, under the Code, laborers on a plantation have any privilege on immovables. The privilege purporting to be given by paragraph 3, art. 3217, Civil Code La., "on everything which serves to the working of the farm," should be construed to apply only to such things as serve to the working of the farm, but do not constitute a part of the farm itself; that is, to movables by nature and by destination,—movables serving in the working of the farm, but not belonging to the owner. This seems clear, because the section of the chapter of the Code containing the article is specially designated, "Of the privileges on particular movables," and because the landlord or lessor is given the same privilege in the same paragraph; and it is absurd to give the lessor a privilege for rents on his own property, constituting, by law, a portion of the thing leased. The privilege in 3217, given for laborers' wages, is exactly the same as that given in the old Code for *the hire of slaves*; and yet, in the jurisprudence of Louisiana, there is not a reported case that I can find where such privilege was ever claimed on immovables by destination. In the chapters of the Code devoted to "privileges on immovables" and "privileges which embrace both movables and immovables," no such privilege is referred to.

(2) Because the services of the laborers, for whose wages a privilege is claimed, inured directly to the benefit of the intervenors, in preserving the thing on which their mortgage and privilege rested,—in fact, as they say in their bill, "prevented the loss and destruction of the crop,"—and therefore was entitled to an equitable as well as a statutory lien on the proceeds of the crop; while the services of the laborers in nowise benefited the complainant, and against him the said wages have no equitable lien whatever, and, as I think, a very doubtful statutory privilege.

(3) Conceding that the laborers' wages have, by law, a first privilege on the crop, and on the plantation to the extent of the mules and implements of husbandry thereon, and that intervenors are rightfully subrogated to that privilege, yet, as the Code (articles 3253–3270, inclusive) evidently contemplates that privileges bearing on both movables and immovables shall be first satisfied from the movables before resorting to the immovables, it follows that, when the proceeds of the crop came to the hands of the intervenors, they were bound to apply them to the satisfaction and payment of the laborers' wages which they had paid, and to the privilege of which they had been subrogated, before they can claim a resort to immovables. The rule claimed as above, for the Code of Louisiana, seems to be also the equity rule in marshaling assets. See *Fonbl. Eq.* 288; *Lupton v. Lupton*, 2 Johns. Ch. 628; *McKay v. Green*, 3 Johns. Ch. 58.

(4) Except as above, I can see no advantage in resorting to the equity jurisprudence in relation to marshaling securities, as stated in 1 Story, *Eq. Jur.* § 538, note, and cases cited; 3 Pom. *Eq. Jur.* § 1414,

notes, and cases; because, while there may be said to be two funds, there are two liens claimed on each fund. On the crop fund there is—*First*, the laborer's lien; and, *second*, the factor's lien. On the plantation fund, to the extent of the mules, etc., there is claimed—*First*, the laborer's lien; and, *second*, the mortgage lien. Rogers says "the laborers have two securities, while I have only one;" and the intervenors, while they are hampered with the fact that they hold both the laborer's and the factor's lien, make practically the same claim. It rather seems to be a case for the application of the maxim, *qui prior est tempore, potior est jure*. See Broom. Leg. Max. 263.

(5) The fund in court has been brought in by the complainant Rogers to satisfy his acknowledged prior—in time—mortgage, and the intervenors show no superior right or equity; and there is no basis in the case to render any decree recognizing a concurrent equity.

(6) For all the foregoing reasons, I am satisfied that the equity of the case is with complainant, Rogers.

LAFOLLYE and others v. CARRIERE and others.¹

(Circuit Court, E. D. Louisiana. March, 1885.)

1. ATTACHMENT—SECTION 933, REV. ST.

Under section 933, Rev. St., writs of attachment issued from the federal courts are dissolved, in conformity with state laws, by a surrender of property under the insolvent laws of the state.

2. SAME—INSOLVENT LAWS OF LOUISIANA.

By the law of the state of Louisiana, as construed by its supreme court, a cession of property made by insolvents dissolves all writs of attachment which have not matured into judgment prior to the cession; and under section 933, Rev. St., the rule must be the same in the federal courts.

3. INSOLVENCY—PARTNERSHIP.

A cession made by the surviving members of a partnership, who are in possession of the partnership property, carries that property into insolvency, and defeats all claims of attaching creditors upon it.

The plaintiffs in these suits applied for and obtained writs of attachment against the defendants, A. Carriere & Sons, and under these writs seizure was made of various notes, bonds, and other securities. Subsequently, on the eighteenth of July, 1884, the defendants, A. Carriere & Sons, through E. L. Carriere and C. J. Carriere, surviving partners, made a cession of all their property to their creditors under the insolvent laws of the state of Louisiana. James M. Seixas was elected syndic of the creditors, and he appeared in court and through his counsel moved for the dissolution of the writs of attachment, on the ground that as the effect of the cession of the property of the insolvents was to dissolve all writs of attachment

¹ Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

against said property in the state court, a similar result must follow in the federal court, under the operation of section 933, Rev. St.

In order to give to the parties a full hearing on these questions, and to establish uniform rules of practice in the district with reference to this matter of the maintenance or dissolution of such attachments, the circuit judge, Hon. DON A. PARDEE, and district judge, Hon. E. C. BILLINGS, sat together.

Charles Louique and *Henry Denis*, for attaching creditors.

R. H. Browne, for defendants.

Thos. L. Bayne, for the syndic of the creditors.

E. D. White, for executor of A. Carriere.

PARDEE, J. The partnership of A. Carriere & Sons, after May 31, 1884, was a partnership at will. It was dissolved by the death of A. Carriere on June 4, 1884. On the dissolution the partnership property either went into the hands of the surviving partners, or in the hands of the probate court having jurisdiction of A. Carriere's succession, depending on the nature of the proceedings had after the dissolution. So far as the plaintiffs here are concerned, on proper grounds shown, they could have an attachment for their claims against the firm of Carriere & Sons to run against the property of the surviving partners, and the property of the firm in their possession. The cession shown in the case is made by E. L. Carriere and C. J. Carriere, individually and as surviving partners, and by operation of law carries into the surrender all their individual property, and all the property of the firm.

The effect of such cession and proceedings thereon was to stay and practically dissolve all attachments then issued against the said surrendering partners, and all property surrendered; in the state court, by the direct operation of state laws, and in the national courts by force of section 933, Rev. St.

The insolvency laws of Louisiana are not unconstitutional by reason of their having been re-enacted by codification in 1869, while the bankruptcy laws of the United States were in force. The creditor not placed on the *bilan* of a ceding debtor is not bound by the proceedings in insolvency until he shall be made a party to the cession; but in case of attachment previously issued by a creditor not placed on the *bilan*, the creditor is considered as being made a party by a motion made to dissolve the attachment on the ground of the cession properly pleaded, or by other proper proceedings, whether by answer or intervention, properly pleading the cession.

The effect of these views in the present cases results in giving judgment to plaintiffs for amounts of debt against E. L. and C. J. Carriere, individually and as surviving partners, in all cases; and in such cases as the executor of A. Carriere is sued, against him also,—the same to be satisfied in due course of administration; and that all attachments be dissolved. As in our view the attachments were rightfully issued, and are dissolved by reason of subsequent events not imputable to

plaintiffs, all costs of attachment should be paid by the syndie intervening, before the property attached is surrendered.

BILLINGS, J., concurred.

UNITED STATES *v.* ADAMS and others.

(Circuit Court. D. Oregon. July 27. 1885.)

1. LIABILITY OF A SURETY.

The liability of a surety in an official bond is *stricti juris*; and he is not to be held responsible for the conduct of his principal beyond the scope of his undertaking, reasonably construed.

2. ASSISTANT SECRETARY OF THE TREASURY—AUTHORITY OF.

The assistant secretary of the treasury is not the deputy of the secretary, but only his aid; and his acts are not valid unless specially authorized by law or prescribed by the secretary, (sections 161, 245, Rev. St. ;) but a letter written by him to a collector of customs, concerning the deposit of money in his custody, will be presumed to have been written by authority of the secretary until the contrary appears.

3. CASE IN JUDGMENT.

In 1866 A. was collector of customs at Astoria, Oregon, when and where he received a letter, signed by the assistant secretary of the treasury, directing him to take \$46,500 in gold coin, theretofore received by him in payment of duties, and then in his custody, to San Francisco, and deposit the same with the assistant treasurer; in pursuance of which direction the collector sailed for San Francisco on the current steamer with said money in his trunk, and on the way \$20,500 of the same was stolen therefrom, without any want of ordinary care and diligence on his part, a portion of which was afterwards recovered, so as to reduce the loss to \$12,696.28, for which the government sued the collector and his sureties on their bond. The defendants pleaded these facts in defense and claimed they were not liable on the bond, to which the plaintiff demurred. *Held*, (1) that the carriage of this money to San Francisco was no part of the duty of A. as collector, (section 3639, Rev. St. ;) and therefore his sureties are not responsible for his conduct while so engaged; and (2) that in the transportation of said money, A. was simply acting as private carrier for the government, and is not liable on his bond for his conduct, or otherwise, except for the want of ordinary care and diligence.

Action on the Bond of Collector of Customs.

James F. Watson, for the United States.

James K. Kelly, for defendant Adams.

George H. Williams, for defendants Parker and Gillette.

DEADY, J. This action is brought by the United States to recover of the defendants the sum of \$12,696.28, with interest, at 6 per centum per annum, from September 18, 1873. The complaint alleges that in 1865 the defendant William L. Adams was appointed collector of customs for the district of Oregon, and that on September 15 of said year he, together with the defendants Charles L. Parker and Preston W. Gillette, as his sureties, executed their bond to the plaintiff in the penal sum of \$50,000, conditioned as follows: "That the said Adams has truly and faithfully executed and discharged, and

shall continue truly and faithfully to execute and discharge, all the duties of said office according to law;" that said Adams failed to keep the condition of said bond, in this, that, of the moneys received by him as collector aforesaid, he failed and refused to pay over to the proper officers of the treasury department the sum of \$12,696.28.

The answer of the defendants contains a specific denial of the material allegations of the complaint, except the execution of the bond, and two special pleas or defenses, as follows: (1) That on and prior to February 3, 1866, the defendant Adams, as collector of customs at the port of "Astoria," Oregon, had in his custody \$46,500 in gold coin, and \$1,000 in currency, belonging to the plaintiff; that a short time prior to said date said Adams had received instructions from the treasury department, through the assistant secretary thereof, "to deposit said moneys with the assistant treasurer of the United States at San Francisco," California, with advice that only the actual expenses incurred "in making the deposit and returning to Astoria would be allowed him;" that, in obedience to said instructions, said Adams, on February 3, 1866, sailed from Astoria, with said money, on the steam-ship Oregon for San Francisco, with the intention of personally depositing the same, as directed by the department; that said money was secured by said Adams on board the said vessel "in the best manner he was able to provide, and carefully watched and guarded by him, as much as he was able to do, during the voyage to San Francisco," but that about February 6th, while off the coast of California, \$20,500 of said gold coin was stolen from the trunk in which it was deposited, by some of the servants employed on said vessel, "during the temporary and necessary absence of said Adams from his room in which said trunk was kept, and without any fault, negligence, or carelessness on his part;" that all of said money was afterwards recovered from the thieves and paid into the treasury of the United States, except the sum of \$12,696.28, which is the money sought to be recovered by this action. (2) That said Adams, on February 3d aforesaid, had in his possession, as collector of customs aforesaid, the money of the United States aforesaid, at Astoria, when and where he received instructions from the proper officer of the treasury as aforesaid, to receive and carry said moneys, "as a special carrier," from the custom-house in Astoria, to the assistant treasurer in San Francisco, which he then and there undertook to do, as aforesaid; "that as such carrier said Adams used all proper precautions to safely keep the said moneys so intrusted to him," and that "the passage by steamer was the easiest and safest way of traveling with money from Astoria to San Francisco;" that on the passage \$20,500 of said gold coin was stolen from said Adams, as aforesaid, "without any fault, negligence, or carelessness" on his part; that said Adams was not authorized to employ any person to assist him in transporting said money, and received no compensation therefor except "his necessary expenses from Astoria to San Francisco, and return to As-

torias;" and that, through the efforts of said Adams, all the money so stolen was recovered and paid to the proper officers of the United States, except the sum of \$12,696.28, for which this action is brought.

To these two pleas the United States demurs, for that the facts stated therein do not constitute a defense to the action. The argument in support of these pleas is this: (1) The defendant Adams, in transporting this money to San Francisco, was not acting as collector of customs at Astoria, or in the district of Oregon, but as a special or private carrier, at the request of the treasury department, and that as said carrier or bailee, he was only bound to the exercise of ordinary care and diligence, and is therefore not responsible for a loss by larceny that occurred, notwithstanding the use of such care and diligence; and (2) although it should be held that Adams is liable for such loss, either as a common carrier or collector, still he was not then engaged in the performance of a duty within the obligation of his bond, or the purview of the statute regulating his duties thereunder, and therefore the sureties in such bond are not liable thereon for such loss.

The argument in support of the demurrer is—*First*, that the assistant secretary of the treasury had no authority to direct the defendant Adams to transport this money to San Francisco, and therefore, when he removed it from the custom-house and undertook to carry it to that place, he did so in his own wrong, and contrary to the condition of his bond; but if the assistant had such authority, then said Adams, in obeying his instruction was acting as collector, and in either case he and his sureties are liable on their bond for the loss accordingly, for the law is well settled that a larceny or robbery will not excuse the parties to a collector's bond for a failure to pay over all money that may have come into his hands as such collector; citing *U. S. v. Prescott*, 3 How. 578; *U. S. v. Morgan*, 11 How. 154; *U. S. v. Dashiell*, 4 Wall. 182; *Boyd v. U. S.* 13 Wall. 17.

By sections 1 and 2 of the act of September 2, 1789, (1 St. 65, §§ 233, 234, Rev. St.,) organizing the treasury department, the secretary of the treasury was authorized to appoint an assistant secretary; and by section 13 of the act of March 3, 1849, (9 St. 396; section 245, Rev. St.,) the provision for the appointment of such assistant was repeated, with a specification of certain powers and duties, and concluding as follows: "Who shall perform all such other duties in the office of the secretary of the treasury, now performed by some of his clerks, as may be devolved on him by the secretary of the treasury." By section 5 of the act of March 3, 1857, (11 St. 220,) the appointment of the assistant secretary was given to the president; and by section 3 of the act of March 14, 1864, (13 St. 26,) it was further provided that "an additional assistant secretary of the treasury" should be appointed by the president, "who shall perform all such duties in the office of the secretary of the treasury belonging to that department as shall be prescribed by the secretary of the treasury, or as may be required by law."

An "assistant" is one who stands by and helps or aids another. He is not a deputy, and cannot, therefore, act in the name of and for the person he assists, but only with him and under his direction, unless otherwise expressly provided by law. It is a question whether an assistant secretary, appointed under the act of 1849, could be even authorized by the secretary to do anything in his department, except such acts or duties as were performed at the passage of such act by some of the secretary's clerks. But no such restraint is imposed on the power of the secretary as to the assistant authorized by the act of 1864. Any duty pertaining to his office which the secretary may prescribe for him, such assistant may do; and it is highly probable that in practice the same rule was followed as to the first assistant. Besides, it is hardly to be doubted that in 1849 some clerk in the treasury department was performing the duty of directing collectors as to the disposition of public money in their hands.

But I think that an act done by the assistant, and within the authority and power of the department, must, until the contrary appears, be presumed to have been done under the direction of the secretary of the treasury. In *U. S. v. Tichenor*, 8 Sawy. 152, S. C. 12 FED. REP. 415, this court said that where the president was authorized to reserve land for certain military purposes, the action of the secretary of war, to whose department the subject belonged and the duty pertained, would be presumed, in the absence of evidence to the contrary, to have been authorized by the president. For the purpose, then, of this case, it must be presumed that the assistant secretary was acting in pursuance of the direction of the secretary when he required the defendant Adams to take this money to San Francisco, and deposit it with the assistant treasurer at that place.

By section 15 of the act of August 6, 1846, (9 St. 62, 63; section 3616, Rev. St.,) persons having public money of the United States, and not included in the directions contained in section 9 of said act, (section 3615, Rev. St.,) as was not the collector of the district of Oregon, might pay the same to the treasurer or assistant treasurer of the United States, or such other depository, constituted in pursuance of the law, as the secretary of the treasury might designate; and by section 6 of said act (section 3639, Rev. St.,) all public officers, including collectors of customs, "are required to keep safely, without loaning, using, depositing in banks, or exchanging for other funds than as allowed by this act, all the public money collected by them, or otherwise at any time placed in their possession and custody, till the same is ordered by the proper department or officer of the government to be transferred or paid out; and when such orders for transfer or payment are received, faithfully and promptly to make the same as directed, and to do and perform all other duties as fiscal agents of the government which may be imposed by this or any other act of congress, or by any regulation of the treasury department made in conformity to law."

Admitting that the order of the assistant secretary was given under the direction of the secretary, and also that the latter had the authority to direct or employ the defendant Adams to carry this money to San Francisco, the sureties maintain it was a duty or service for the discharge or conduct of which they were in no way bound. The undertaking of the defendant Adams, as collector, is stated in the condition of his bond as follows: "To truly and faithfully execute and discharge all the duties of his office according to law;" which duties were, according to section 6 of the act of 1846, *supra*, "to keep safely * * * all the public money collected by him" till the same was duly ordered "to be transferred or paid out;" and "faithfully and promptly" make such transfer or payment when required. There is no provision here looking to the collector being engaged in the transportation or carriage of public money from one state or district to another for a distance of six or seven hundred miles.

It may be and probably is the duty of a collector, under this section, to transfer the public money in his possession when so ordered, by depositing the same with a depository in the town or place where his office is situated, or its immediate vicinity, and that his sureties are liable for any loss that may occur while he is so engaged, from either a larceny or robbery. To safely keep the public money under these circumstances may be a part of the collector's duty to faithfully "transfer" the same when required, and if so, the undertaking of the sureties makes them responsible for its faithful performance. But I doubt very much whether the duty of a collector "to transfer" public money in his possession, when required, includes the carrying or transportation of such money to any point beyond the vicinity of the custom-house, even in his own district, as from Astoria to Portland. The transfer and transportation of money from hand to hand and place to place are business transactions, and parties who undertake for a collector as sureties expect, and have a right to expect, that when the government engages in any such transaction with reference to the money in the possession of their principal, it will do so in a business way and according to business methods.

At the time of this transaction, as well as before and since, the usual method on this coast of transmitting any quantity of coin was by express; and that is the way this money should have been sent to San Francisco. Assuming that there was no designated depository in Oregon at the time, the collector should have been instructed to transfer the amount to Wells, Fargo & Co., at Astoria, for transportation to San Francisco, who then would have been responsible for its safe delivery at the latter place. No business man in Portland would have thought of sending a clerk or messenger to San Francisco with \$40,000 in coin, or the tenth part of it; and the assistant secretary who directed it to be done in this case, unless he did so on the advice of the collector, is the primary cause of this loss and morally responsible for it. The improvidence of this order appears to have soon

become known to the department, for it was stated and admitted on the argument of the demurrer that, within a day or two after the collector had left for San Francisco, a counter-command was received at this office, directing him to send the money by Wells, Fargo & Co.

The law is well established that the liability of a surety is *stricti juris*, and therefore he is not to be held responsible for the conduct of his principal beyond the scope of his undertaking, reasonably construed. But the rights and interests of the public, to whom the surety has voluntarily become bound for the conduct of his principal, are not to be overlooked in the consideration of the matter, and therefore courts ought not to be astute or alert, as they sometimes appear to have been, to raise doubts and start quibbles to save a surety from the otherwise legal consequence of his undertaking. Yet there is nothing in the nature or purpose of his undertaking that should make him liable beyond the fair and reasonable construction of its terms and the provisions of law relating thereto, considered in the light of the surrounding circumstances and with reference to the object of the transaction. *U. S. v. Cheeseman*, 3 Sawy. 429, and cases there cited. Nor do the words of the statute, (section 3639, Rev. St.), to the effect that the collector shall "do and perform all other duties as fiscal agent of the government" prescribed by law, include the duty of acting as agent for the transportation of this money, without some law directly imposing such duty on him, or authorizing the secretary to do so in his discretion. This section, it must be noticed, includes assistant treasurers, receivers, and all other custodians of public money, and the provision in question must be construed in each case with reference to the nature of the office and the duties primarily and ordinarily pertaining thereto. An assistant treasurer might very properly be required to receive, keep, and pay out public money in any quantity and from any source, but not to act as a collector of revenue, either under the excise or tariff laws. Nor can a collector of customs be legally charged with the duty, and his sureties with the responsibility, of receiving, keeping, and paying out sums of money not collected by him as duties on imports. And even if this could be done, it would require a still more expanded construction of the provisions to require a collector to act as a carrier of public money, at the risk of his sureties.

In *U. S. v. Singer*, 15 Wall. 122, Mr. Justice FIELD says:

"The official bond of parties undoubtedly covers, not merely duties imposed by existing law, but duties belonging to and naturally connected with their office or business imposed by subsequent law. But the new duties should have some relation to or connection with such office or business, and not be disconnected from and foreign to both."

And in *U. S. v. Cheeseman*, *supra*, 431, Mr. Justice SAWYER, in considering the effect of this very provision, says:

"We think these words only intended to include such duties as naturally and ordinarily belong to the particular officer giving the bond, or have some
v.24f, no.7—23

obvious relation to such duties, and such as the sureties, acquainted with the duties of the various public officers as usually devolved on them by law, might reasonably be expected to contemplate at the time of executing the bond as likely to be imposed upon their principal in case the exigencies of the government should require it, and not those duties which are usually imposed upon, and more appropriately belong to, an entirely different class of officers."

Neither is the defendant Adams liable on his bond as collector for this loss, if at all. In carrying this money to San Francisco he was acting, not as collector, but as a carrier for the department. In contemplation of law, Collector Adams delivered—transferred—this money to Carrier Adams, at Astoria, and thereafter his duty and responsibility concerning it, as collector, ceased, and that as carrier began. His liability as carrier does not arise on his bond as collector, nor is it measured by his duty as such. But his liability arises upon the obligation which the law imposes on him as a carrier. If he was a common carrier,—a person undertaking, for hire, to carry the treasure or goods of all persons indifferently,—he would be responsible for the loss, although it was the result of a larceny. A common carrier is an insurer of the safe delivery of the goods committed to his care, unless the loss is caused by the act of God or the public enemy. *Orange Bank v. Brown*, 3 Wend. 162; *Lawson, Carr.* §§ 1-3; *Story, Cont.* § 920; *Story, Bailm.* § 496.

But Adams was not engaged in the business of a common carrier, nor acting as such. He did not hold himself out as a person engaged in the business of carrying treasure, or anything else. He only undertook, at the request of the department, to carry this particular money, in consideration of receiving his actual expenses while so engaged, without any deduction of his salary during his absence from his office. He was therefore a private carrier, and responsible only as an ordinary bailee for hire, namely, for ordinary care and diligence, which, in this case, is alleged to have been duly bestowed on the undertaking. *Story, Cont.* 920; *Story, Bailm.* § 457; *Allen v. Sackrider*, 37 N. Y. 341.

Upon the facts stated in these two defenses, neither the principal nor his sureties in this bond are liable for this loss, and the demurrer thereto must be overruled.

ARNSON and another v. MURPHY.¹

(Circuit Court, S. D. New York. December, 1884.)

1. CUSTOMS DUTIES—ACTION TO RECOVER EXCESS OF DUTIES—CONDITIONS PRECEDENT.

Under section 14 of the act of June 30, 1864, (13 St. at Large, 202; section 2931, Rev. St.,) it is incumbent upon the plaintiffs, in a suit to recover an alleged excess of duties paid by them on their importations of merchandise, as a condition precedent to their recovery, to show—*First*, that they have protested; *secondly*, that they have appealed; and, *thirdly*, that they have brought their suit within the time required thereby.

2. SAME—DECISIONS OF SECRETARY OF TREASURY.

Under this section it is not incumbent upon the secretary of the treasury to communicate to the appellant his decision on an appeal from the decision of the collector of customs.

The plaintiffs in 1871 made certain importations of "nitro-benzole" at the port of New York, from Liverpool, England. The defendant, as collector of customs, classified said "nitro-benzole" as an "essential oil" not otherwise provided for, under section 5 of the act of July 14, 1862, (12 St. at Large, 543,) and in 1871 exacted of the plaintiffs duty thereon at the rate of 50 per centum *ad valorem*, as provided in that section for "essential oils." The plaintiffs duly protested in 1871 against such exaction, (except in case of their importations per the Pennsylvania, April 11, 1871, and per the Italy, May 24, 1871,) and duly appealed in 1871 from the decision of the defendant, as collector of customs, to the secretary of the treasury, (except in case of their importation per the Queen, March 24, 1871,) as provided in section 14 of the act of June 30, 1864, (13 St. at Large, 202; section 2931, Rev. St.) In the case of their importations by the Pennsylvania and the Italy, the plaintiffs made no protest within 10 days after the ascertainment and liquidation of the duties exacted thereon, and as to their importation by the Queen, they made no appeal.

In their protest the plaintiffs claimed that duty at 50 per centum *ad valorem* was erroneous, and that the lawful duty was but 40 cents per gallon, as nitro-benzole is a non-enumerated article, and as such non-enumerated article is liable only to the highest rate of duty imposed upon either of its component parts, agreeably to the similitude clause of the act of August 30, 1842, (section 2499, Rev. St.)

May 8, 1879, the plaintiffs brought this suit to recover the difference between the amount of duties exacted at 50 per centum *ad valorem*, and the amount of duties that should, as they claimed, have been exacted at the rate of 40 cents per gallon. After issue was joined, and in 1880, the case was first tried. Upon that trial the plaintiffs proved facts which, under the decision in *Murphy v. Arnson*, (not this suit; see 96 U. S. 131,) established that the legal rate of duty on

¹ Reported by James H. Fish, Esq., New York.

their importations, under the act of 1862, was 40 cents per gallon. At the close of the plaintiffs' case, upon the motion of defendant's counsel, the court directed a verdict for the defendant on the ground that this suit was not commenced within six years after the cause of action upon which the same was brought accrued, as prescribed by the New York statute of limitations then in force, the defendant, besides other defenses, having so pleaded. The plaintiffs having sued out a writ of error, the United States supreme court, at the October term of 1883, reversed this decision and ordered a new trial. The opinion then rendered in this case at that time by that court, and the facts that appeared at the first trial, are reported in 109 U. S. 238; S. C. 3 Sup. Ct. Rep. 184.

At the second trial of this suit, had on the second and third days of December, 1884, on the close of the plaintiffs' case the facts above stated, before allusion was made to the defendant's motion on the first trial of this suit, all appeared in evidence; but no proof was made or offered in evidence by the plaintiffs to show, and it nowhere appeared, whether or not the secretary of the treasury had made a decision upon any of the plaintiffs' appeals from the decisions of the defendant as collector of customs. Thereupon counsel for defendant moved the court to direct a verdict for the defendant as to the plaintiffs' importation by the Queen, on the ground that the plaintiffs had made no appeal as required by law. To the granting of this motion the plaintiffs consented, and the court accordingly directed a verdict for the defendant as to that importation. The defendant's counsel also moved the court to direct a verdict for the defendant as to the plaintiffs' importation by the Pennsylvania and Italy, on the ground that no protest had been made in case of either of these importations within 10 days after the ascertainment and liquidation of duties thereon, as required by law. The court thereupon directed a verdict for the defendant as to these importations. The defendant's counsel then moved the court to direct a verdict for the defendant as to each of the other importations mentioned in their bill of particulars in this suit, on the ground that, to entitle the plaintiffs to recover after an appeal has been taken to the secretary of the treasury from the decision of the collector, as to the rate or amount of duties, the plaintiff must show either (1) that they have paid the duties before the decision of the secretary was made, and brought their suit within 90 days after such decision; or (2) that they have paid the duties after such decision, and brought their suit within 90 days after the payment thereof; or (3) that 90 days have elapsed after their appeal to the secretary, and no decision has been made, and that they have brought their suit after the expiration of such 90 days. This motion the court for the time being overruled.

The defendant's counsel then offered in evidence the decision of the secretary upon each of the appeals in the case of the last-mentioned importations. To this offer the plaintiffs' counsel objected on

the ground—*First*. That no such defense was pleaded. Being a statute of limitations, it must be pleaded. *Second*. The papers which purport to be such decisions of the secretary of the treasury were not communicated to the plaintiffs.

Lewis Sanders and *George N. Sanders*, for plaintiffs, cited section 14, Act of June 30, 1864; 13 St. at Large, 202, (section 2931, Rev. St. ;) and *Arnson v. Murphy*, 109 U. S. 238; S. C. 3 Sup. Ct. Rep. 184.

Thomas Greenwood and *Samuel B. Clarke*, for defendant, cited *Arthur v. Unkart*, 96 U. S. 118, and *Chung Yune v. Schurtleff*, 10 FED. REP. 239.

COXE, J., (*orally*.) The proposition comes back to the question which I hoped might be avoided in the case, namely, whether or not this provision of the statute is a limitation or a condition precedent; in other words, whether the burden is upon the plaintiffs to prove that the conditions of the statute have been fulfilled, or upon the defendant to prove that they have not been. I have reached a conclusion favorable to the defendant with regret, because this appears to be a meritorious case. But without the statute the plaintiffs have no standing in court. It is strictly a statutory proceeding, which they are required to follow, and, as I read the statute, there are three conditions to be fulfilled before the action can be maintained—*First*, a protest within 10 days; *second*, an appeal within 30 days; and, *third*, the action must be brought within 90 days after an adverse decision by the secretary of the treasury; or, if there has been no decision, the plaintiffs must prove that fact and that the action was commenced after 90 days from the appeal. I see no way to separate these conditions. It was evidently the intention of congress that dissatisfied parties should pursue their remedy before the department as far as possible. Therefore I must hold that it is incumbent upon the plaintiffs, as a condition precedent to their recovery, to prove, *first*, that they protested; *second*, that they appealed; and, *third*, that the action was commenced at a time permitted by the statute.

Plaintiffs' Counsel. Of course I object to your honor's decision, and take an exception on the part of the plaintiffs.

It does not appear that there was any decision.

The Court. To maintain your case you must show affirmatively that there was no decision.

Plaintiffs' Counsel. To that we except.

Defendant's Counsel. Are we to understand now that the plaintiffs are going on with their case?

Plaintiffs' Counsel. Yes; I call Mr. Bernard Arnson.

Bernard Arnson, being duly sworn and examined as a witness for the plaintiffs, testifies:

Question. You are one of the plaintiffs in the suit? *Answer*. Yes, sir. *Q*. Did you ever receive any notice, prior to the commencement of the suit, of the

decision on your appeals from the decision of the collector of the port on the importations involved in this action—notice of the secretary of the treasury's decisions?

Defendant's Counsel. We object to that on the ground that it is immaterial whether the decision was received or not.

The Court. I think the objection is well taken. It is not incumbent upon the secretary to communicate his decision.

Plaintiffs' counsel excepts.

Upon the application of defendant's counsel to direct a verdict in favor of the defendant, the court said:

Gentlemen of the Jury: Upon the question of law in this case, there being no question of fact, the court has decided that this action is a statutory one, and the statutory conditions have not been performed by the plaintiffs; you will therefore render a verdict in favor of the defendant.

Under the directions of the court the jury so found.

THE PURISSIMA CONCEPCION.¹

UNITED STATES *v.* THE PURISSIMA CONCEPCION.¹

(*Circuit Court, E. D. Louisiana. June, 1885.*)

CUSTOMS DUTIES—FORFEITURE—ACT OF JUNE 22, 1874.

Under section 16 of the act of congress approved June 22, 1874, (Supp. Rev. St. p. 80,) in order to adjudge a forfeiture or a penalty, the court or jury must find that the act charged was committed with an *actual intention* to defraud the *United States*.

Appeal from District Court.

J. W. Gurley, Asst. Dist. Atty., for the Government.

John D. Rouse and *Wm. Grant*, for claimants.

PARDEE, J. That the seized goods were not placed by the master on his sworn manifest, and were concealed on the ship, and the master did offer money to the seizing officers, not only justifies the seizure, but makes a strong *prima facie* case for the government in demanding the penalty against the ship, and the condemnation of the goods. The claimant meets this *prima facie* case with the defense that the goods were not brought to this port for sale, use, or consumption in the United States, but were goods belonging to the owner, in transit to Spain, and that they were not omitted from the manifest nor concealed with any intent to defraud the United States. His

¹ Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

proof largely consists of a letter written by the owner to the master, directing the purchase in Havana of the goods, and giving instructions how to bring them into Spain, and of the testimony of the master, taken under commission.

The government has moved to suppress both the letter and commission. The letter is objected to because it is not a sworn statement, because there was no opportunity for cross-examination, and because a party cannot make evidence for himself. The commission is objected to because the evidence of the master therein conflicts directly with the sworn statements of the same master in the manifest. The history of the letter shows that it was written by the owner to the master long prior to the purchase even of the seized goods, when use of it as evidence could not have been contemplated, and it was turned over at the time of the seizure to show the intention of the master in the premises. As a fact in the history of the case, it would seem admissible to have such effect as properly entitled to in connection with the other circumstances in the case. The objection to the commission goes to its effect rather than to its admissibility. The oath attached to the manifest, and taken by the master, was the formal oath prescribed by the statute. The manifest seems to have been made out in English and Spanish, but the oath seems only to have been taken in English. It is only by considering that the master understood no English, and that the oath was taken carelessly and negligently, and in short was a "custom-house oath," that any credence can be given to the master's evidence taken under the commission; as the two are diametrically opposed. And the same suspicion must attach to the evidence of the master, relating to the circumstances under which he offered money to the seizing officers. However, taking the evidence as the whole of it strikes my mind, the following appears to be the true inwardness of the case.

The Purísima Concepcion was in Havana, destined to come to New Orleans in ballast, there to take a cargo of staves to Spain. The owner, living in Seville, desired to import from Cuba some tobacco, probably without paying duties or charges to the Spanish government, and he, therefore, by letter directed the master how to obtain the means, and make the purchase, concealing from the merchants the object, and how to conceal the tobacco under the staves so as to have no trouble in entering the Spanish port, using this language: "I need not tell you that on your arrival at Benanza you bring the above under the staves better than in the cabin, the secret in which has been denounced," etc. The master made the purchase as directed, and concealed the tobacco in the cabin to enter New Orleans, undoubtedly intending to again hide it under the staves when the cargo should be taken aboard. The master omitted the tobacco from the manifest in New Orleans, not from ignorance of the requirements of our customs regulations, for he placed other goods in transit thereon, but because he did not desire trouble to himself here in bonding and accounting

for the tobacco, nor to embarrass himself in his ultimate intention of smuggling the tobacco into Spain. On the goods being found by the inspectors of customs, he offered money to get himself out of trouble, without any particular care whether it was received as a bribe or as duties. These I think to be the real facts of the case as developed by the proof.

Under such a showing it would seem there ought to be no trouble in condemning the goods as forfeited, and condemning the ship for the statutory penalty equal to the value of the goods. See section 2809, Rev. St., which provides that where goods are brought in the United States in any vessel from any foreign port, which shall not be included or described in the manifest, the master shall be liable to a penalty equal to the value of the goods, and the goods so omitted, when belonging to the master, officers, or crew of the vessel, shall be forfeited. But there is trouble. Section 16 of an act of congress approved June 22, 1874, (see Supp. Rev. St. 80,) provides as follows:

"That in all actions, suits, and proceedings in any court of the United States now pending, or hereafter commenced or prosecuted, to enforce or declare the forfeiture of any goods, wares, or merchandise, or to recover the value thereof, or any other sum alleged to be forfeited by reason of any violation of the provisions of the customs revenue laws, or any such provisions, in which action, suit, or proceeding an issue or issues of fact shall have been joined, it shall be the duty of the court, on the trial thereof, to submit to the jury, as a distinct and separate proposition, whether the alleged acts were done with an actual intention to defraud the United States, and to require upon such proposition a special finding by such jury; or, if such issues be tried by the court without a jury, it shall be the duty of the court to pass upon and decide such proposition as a distinct and separate finding of fact. And in such cases, unless intent to defraud shall be so found, no fine, penalty, or forfeiture shall be imposed."

Under this section, in order to adjudge the forfeiture and the penalty in this present case, the court must find that the master omitted the goods from the manifest with an *actual intention* to defraud the United States. This actual intention to defraud the United States does not appear from the evidence,—the contrary seems more probable,—so that while I condemn the conduct of the owner and of the master, and somehow feel that there is a failure of justice, yet I am compelled, as was the learned judge of the district court, to give judgment against the United States, and in favor of the claimant, who, under the peculiar law aforesaid, is allowed to come into court with not the cleanest hands, and compel a judgment in his favor.

The judgment and findings of the district court are affirmed.

UNITED STATES v. GRISWOLD.

*(District Court, D. Oregon. June 10, 1885.)***FALSE CLAIMS AGAINST UNITED STATES—ACTION UNDER SECTIONS 3490-3494, REV. ST.**

An action brought by a private prosecutor under sections 3490-3494, Rev. St., to recover damages and forfeiture for a violation of section 5438, Rev. St., is what was known at common law as a "popular" or *qui tam* action, and is under the sole and exclusive control of said prosecutor, subject to the restriction on his right to discontinue the same, contained in section 3491, Rev. St., and his interest or share in any judgment obtained therein is his absolute private property, and the United States cannot compromise, remit, or release the same by pardon or otherwise.

Motion for leave to enter satisfaction of judgment. The opinion states the facts.

James F. Watson, Dist. Atty., for the United States.

H. Y. Thompson, for defendant.

James K. Kelly, for prosecutor.

DEADY, J. By section 3469, Rev. St., it is provided as follows:

"Upon a report by a district attorney, or any special attorney or agent having charge of any claim in favor of the United States, showing in detail the condition of such claim, and the terms upon which the same may be compromised, and recommending that it be compromised on the terms so offered, and upon the recommendation of the solicitor of the treasury, the secretary of the treasury is authorized to compromise such claim accordingly."

The district attorney now applies for leave, under this section, to enter satisfaction of the judgment in this case in pursuance of an alleged compromise by the secretary of the treasury of the sum or debt remaining due thereon, to-wit, \$23,576, for the sum of \$100.

It appears from the petition that on May 27, 1877, the United States, by B. F. Dowell, commenced an action in this court against William C. Griswold, under sections 3490-3494, Rev. St., for certain forfeitures and damages, on account of the violation of section 5438 of said statutes, in knowingly making, presenting, and obtaining payment from the treasury of the United States, in January, 1874, of certain false claims, commonly called "The Jesse Robinson Claims;" that thereafter, on July 30, 1879, a judgment was duly entered in said cause in favor of the United States and against the said Griswold for the sum of \$35,228, together with costs and disbursements, amounting to \$2,875.60; that divers sums have since been collected by execution and applied on said judgment, but there remains still due and owing thereon the sum of \$23,576; that on November 22, 1884, the secretary of the treasury, on the report and recommendation of the district attorney and the solicitor of the treasury, compromised said claim for \$100, and the release of Griswold's interest in certain property situate in Salem, Oregon, and known as "The Agricultural Works;" that said Griswold has paid said sum of money and executed said release to the United States; and that the solicitor of

the treasury, in a correspondence between himself and the district attorney, copies of which are annexed to the petition, has directed the latter officer to take the necessary steps to carry said compromise into effect. In his letter of November 22, 1884, the solicitor of the treasury says:

"It may be proper to state that I entertained serious doubts as to my authority to compromise such a claim or judgment, and accordingly the secretary of the treasury submitted the matter to the solicitor general. That officer determined the question in favor of the jurisdiction of this office, but added: 'Even if this conclusion was somewhat uncertain, I might still give the above advice, seeing that if it be mistaken the prosecutor may have relief by proceedings in court, whereas, if the advice was to the contrary and mistaken, Griswold could have no means of correcting it that occurs to me.' In order that any rights that Mr. Dowell may suppose he possesses may be fully protected, and, *if possible, adjudicated*, you are hereby directed, before taking the necessary steps to carry this compromise into effect, to *formally* notify him of your intention to do so, giving *him ample time to appear* in court, and make such objection thereto as he may determine his interests require, as I do not desire that Mr. Dowell shall be so situated by your action, or by that of this office, that he can hereafter successfully set up any claim for damages or otherwise, either in court or before congress."

In pursuance of this direction, the prosecutor, B. F. Dowell, was notified of this application, and appeared and answered the petition, and was heard by himself and counsel in opposition thereto. By his answer the prosecutor objects to the entry of satisfaction, alleging that he was not consulted concerning the alleged compromise; that the action in which the judgment was given was a *qui tam* one; and that the one-half of said judgment belongs to him, and the United States has no power or authority to compromise his share thereof without his consent. The prosecutor also alleges in his answer that the compromise ought not to be made for the further reason that Griswold has claims on the government of considerable value, specifying them in detail, and a lot in Salem, Oregon, that should be applied on the judgment, and concludes by saying that he has offered and now offers to take one-third of the balance due for the whole judgment. The amount received on this judgment, except a trifling sum, was not made on executions issued thereon, but on a sale by a master of property theretofore fraudulently assigned by the judgment debtor to his wife, in pursuance of a decree of the circuit court in a suit conducted by the prosecutor to subject the same to the payment thereof, after tedious and costly litigation. *U. S. v. Griswold*, 7 Sawy. 311; S. C. 8 FED. REP. 557.

The property spoken of as "The Agricultural Works" was mortgaged by the judgment debtor to his attorneys and others after the action was commenced, and before judgment therein, and the amount now due on said mortgages is probably more than the property is worth or will sell for. *U. S. v. Griswold*, 7 Sawy. 296.¹ But the interest of

¹S. C. 8 FED. REP. 496.

said debtor in said property is the legal interest as owner and mortgagor, and is therefore bound by the lien of the judgment from the date thereof; and, if it is of any value, can be sold on execution, subject to the mortgages, and the proceeds of sale applied on the judgment. This being so, the release of Griswold's interest in this property is an idle thing—a mere make-believe—that neither inconveniences him nor benefits the United States. Therefore, the only consideration for this compromise by which Griswold is to be absolutely released and discharged from the payment of a judgment against him of \$23,576, for and on account of money fraudulently obtained from the United States treasury, is this paltry sum of \$100. And, further, the only reason given for this extraordinary favor, not to an unfortunate, but to a fraudulent, debtor, is that he has no visible property, and it will save the trifling trouble and expense of issuing an execution on this judgment once in five years, for the purpose of keeping it in force. In view of these facts, the transaction might more properly be characterized as a remission or pardon than a compromise. However, I suppose the right of the United States to release the defendant from this judgment, rather than the justice or policy of the act, as between it and Griswold, is the real question now before this court. And, *first*, what is the nature of the action authorized and regulated by sections 3490–3494, Rev. St., and what is the relation of Dowell to the same, and the nature of his interest in the judgment given against the defendant therein?

Section 3490, Rev. St., provides that if any person, not in the army or navy of the United States, “shall do or commit any of the acts prohibited” by section 5438 of said statutes,—that is, among other things, knowingly make or present for payment any false claim against the United States,—he shall forfeit and pay to the same the sum of \$2,000, and double the damages that the United States may sustain by reason thereof, together with the costs of suit, which forfeiture and damages shall be sued for in one action.

Section 3491 gives the district court of the district where the offender may be found, jurisdiction of the action, and adds:

“Such suit may be brought and carried on by any person, as well for himself as the United States. The same shall be at the sole cost and charge of such person, and shall be in the name of the United States, but shall not be withdrawn or discontinued without the consent, in writing, of the judge of the court and the district attorney.”

Section 3492 makes it the duty of the district attorney to be diligent in looking after and prosecuting such cases; and section 3493 enacts that—

“The person bringing said suit and prosecuting it to final judgment shall be entitled to receive one-half of the amount of such forfeiture, as well as one-half of the amount of the damages he shall recover and collect; and the other half thereof shall belong to and be paid over to the United States; and such person shall be entitled to receive to his own use all costs the court may award against the defendant, to be allowed and taxed according to any pro-

vision of law or rule of court in force, or that shall be in force, in suits between private parties in said court."

At common law an action thus authorized to be "brought and carried on" by any person, "as well for himself as the United States," was called a "popular" action, because given to the people in general; and when the penalty, as in this case, was given in part to the prosecutor and the remainder to the king or other public use, it was called a *qui tam* action, because the plaintiff therein was described as one who sues for the king as well as for himself,—*qui tam pro domino rege, quam pro se ipso in hac parte sequitur*. The action might be maintained in any case where a statute imposed a penalty for the commission or omission of a certain act, and gave the same, in whole or in part, to any one who would sue for it; and it was brought in the name of the person prosecuting it, and was exclusively under his control. 3 Bl. Comm. 160; 1 Bac. Abr. 73; *U. S. v. Griswold*, 5 Sawy. 25; *Bush v. U. S.* 8 Sawy. 327; S. C. 13 Fed. Rep. 625.

The fact that the statute in this case requires the action to be brought in the name of the United States, and provides that it shall not be discontinued without the consent of the judge and district attorney, does not change its character in this respect. These are mere restrictions on the mode of exercising the right to bring and maintain the action, and do not affect any substantial interest of the prosecutor in the proceeding or the fruit of it. Indeed, although this action was brought, at common law, in the name of the prosecutor, it was always set forth that it was also brought for the benefit of the king or other public use, as well as himself; and while the position of the parties is reversed here, and the action is brought in the name of the United States, it is brought for the benefit of the prosecutor as well as the government.

The provision concerning the discontinuance of the action is intended to prevent abuse of it, and is evidently borrowed from 18 Eliz. c. 5, which prohibits a plaintiff in such an action from compounding or compromising the same without the consent of the court. 1 Bac. Abr. 84. By virtue of the statute prescribing the forfeiture and damages recovered in this case, and authorizing any one to sue for them who would, the defendant, Griswold, became bound to pay the same to the prosecutor herein, the one-half for himself and the other half for the use of the United States. The law implied a contract to that effect, and the judgment obtained thereon is so far the private property of the prosecutor, and cannot be released or satisfied without his consent, any more than if it had been obtained in a private action on the bond of the defendant. 3 Bl. Comm. 159. For, although the king might, by a pardon of the offender, bar or prevent a popular action before it was commenced, he could not, by this or any other means known to the law, interfere with its prosecution after it was commenced, or release or dispose of the prosecutor's interest in the judgment therein. 6 Bac. Abr. 134; 4 Bl. Comm. 399; Whart. Crim. Pl.

§ 528; 1 Bish. Crim. Law, §§ 909, 911; *U. S. v. Lancaster*, 4 Wash. C. C. 64; *Shoop v. Com.* 3 Pa. St. 126; *U. S. v. Harris*, 1 Abb. (U. S.) 110; *Ex parte Garland*, 4 Wall. 381; 2 Hawk. P. C. c. 37, §§ 34, 54.

In *Ex parte Garland*, Mr. Justice FIELD, in delivering the opinion of the court, when speaking of the effect and operation of a pardon, says: "There is only this limitation to its operation: it does not restore offices forfeited, or property or interests vested in others, in consequence of the conviction and judgment." And if the pardon of the offender would not release him from the obligation and effect of this judgment, so far as the prosecutor's interest therein is concerned, much less can the secretary of the treasury compromise it away under section 3469, Rev. St. By its terms this section is confined to claims in favor of or debts due the United States. But the share or interest of the prosecutor in this judgment is a debt due him from the defendant therein,—a claim in his favor and not that of the United States,—and is beyond and outside of the purpose and purview of the statute.

The case of *U. S. v. Morris*, 10 Wheat. 246, cited by counsel for the judgment debtor, is not in point. In that case, and others like it, arising under acts relating to customs and navigation, the statute under which the customs officers claimed an interest in the forfeiture did not give them any absolute right therein until the same was reduced to money and paid to the collector, who was then required to pay a moiety of the same into the treasury, and divide the remainder among the customs officers and informer, if there was one. The action was commenced and carried on by and in the name of the United States, and might have been discontinued at its pleasure. Besides, the act of March 3, 1797, (1 St. 506, section 5292, Rev. St.) then in force, gave the secretary of the treasury full power to remit any forfeiture occurring under such acts without willful negligence or intentional fraud. The court held that the power of remission could be exercised by the secretary after judgment of condemnation and before the payment of the proceeds to the collector.

The *Confiscation Cases*, 7 Wall. 454, also cited by counsel for the judgment debtor, only go to the point that an action commenced by the United States under the confiscation act of August 6, 1861, may be discontinued by it without the consent of the informer. But the statute under which Dowell brought this action gave him one-half of the forfeiture and damages recovered therein absolutely and unconditionally, and for a very good reason. A forfeiture cannot occur under section 5438, Rev. St., without the party incurring the same being guilty of both fraudulent intent and conduct, while a violation of the customs and navigation laws, involving a forfeiture or penalty, may and often does occur without fraudulent intent or even willful negligence. In such case it is provided that the secretary of the treasury may remit forfeitures or penalties incurred without moral turpitude at any time before the same are paid to the collector, and all persons

who contribute to the prosecution with the expectation of sharing in the result do so subject to the exercise of this power. But in this case there is no reason, founded either in the justice or expediency of the case, why the government should reserve to itself the power to remit the forfeiture or damages given to the prosecutor as an inducement and reward for bringing and maintaining the action at his own costs and charges. The statute is a remedial one. It is intended to protect the treasury against the hungry and unscrupulous host that encompasses it on every side, and should be construed accordingly. It was passed upon the theory, based on experience as old as modern civilization, that one of the least expensive and most effective means of preventing frauds on the treasury is to make the perpetrators of them liable to actions by private persons acting, if you please, under the strong stimulus of personal ill will or the hope of gain. Prosecutions conducted by such means compare with the ordinary methods as the enterprising privateer does to the slow-going public vessel. But if the United States could, by pardoning the offender, or remitting the penalty, or compromising the claim, deprive the prosecutor of his reward after he had earned it, the statute would be a nullity; for no one would be foolish enough to incur the trouble and expense, or even the ill will, incident to the prosecution of an action for any such forfeiture and damages, subject to the right of the treasury, on *ex parte* statements and personal solicitation, to remit the same or compromise his judgment after it was obtained. Take this case for example. There were three jury trials and one hearing on error, in the first of which the jury stood eight to three for the plaintiff, and in the other two there were verdicts for the plaintiff for the sum of \$35,228 each, on the defendant's written admission that he had obtained not less than \$16,614 from the treasury on false and fictitious vouchers, and satisfactory proof that he did so knowingly. As this court said, in *U. S. v. Griswold*, 7 Sawy. 309, S. C. 8 FED. REP. 496: "The preparation and trial of the case covered a wide field of inquiry and controversy, extending over a period of nearly a quarter of a century, and reaching from the Atlantic to the Pacific." The defendant paid his counsel over \$10,000 for their services, and when the prosecutor obtained judgment on the verdict his taxable costs and disbursements amounted to \$2,821.60. Then followed a suit in equity to cancel a fraudulent conveyance by the judgment debtor of property to his wife. This cost time and money, and the final decree setting aside the conveyance and directing the property to be sold, and the proceeds applied on the judgment, was not entered until August 12, 1881, more than four years from the commencement of the action; and even then the department of justice, at the instance of the defendant, assumed to delay the sale of the property from time to time, so that the money on it was not realized until February, 1883. And now, to release the defendant from this judgment, and arbitrarily deprive the prosecutor of his share of this indebtedness, would, as was said by his

counsel on the argument, be "a shocking injustice." But I do not find that the law will allow it to be done. My conclusion is that the United States has no power over the prosecutor's share of this judgment, or right to release or compromise it in any way. It is his private property, and exclusively under his control.

The application must be denied, and it is so ordered.

HEWITT and others v. PENNSYLVANIA STEEL CO.

(Circuit Court, E. D. Pennsylvania. May 26, 1885.)

PATENTS FOR INVENTION—EXPIRATION OF PATENT—NEW PARTIES.

On January 15, 1882, complainants filed their original bill, averring infringement of their patent, and praying for an injunction and accounting, and, after several amendments, on October 4, 1882, the heirs at law of one of the patentees were made parties. The patent expired on July 23, 1882. *Held* that, as the court could not have acquired jurisdiction until October 4, 1882, when all the parties in interest were brought in, and the patent had expired before that time, the bill should be dismissed.

In Equity.

Strawbridge & Taylor and Benjamin F. Thurston, for complainants.
Wayne McVeigh and Joseph C. Frailey, for defendant.

BUTLER, J. On the fifteenth of January, 1882, the original bill was filed. The complainants were Abram S. Hewitt and Edward Cooper, both of New York, and the defendants were the Pennsylvania Steel Company, Samuel M. Felton, Eben F. Barker, Henry C. Spackman, Charlemagne Tower, Edmund Smith, William Matthews, and William M. Spackman, all of the city of Philadelphia; Luther S. Bent, of Steelton, Pennsylvania, and Francis Thompson, of Boston, Massachusetts. The bill set forth, in the usual form,—

First, the grant and issue of certain letters patent of the United States, numbered 72,061, and dated December 10, 1867, to Emile Martin and Pierre E. Martin, both of Paris, France, for an alleged "new and useful improved process for refining and converting cast-iron into cast-steel, and other combinations of iron and carbon," by which letters patent there was secured to them, their heirs, executors, administrators, or assigns, for the term of 17 years from the tenth day of December, 1867, the full and exclusive right of making, using, and vending the said invention or discovery, throughout the United States and the territories thereof; *second*, the surrender of said letters patent No. 72,061, by said Emile and Pierre E. Martin, and the grant and issue to them thereupon of reissued letters patent No. 3,096, and dated August 25, 1868, for the same invention "for the residue of said term of seventeen years;" and, *third*, that "your orators further show unto your Honors that on or about the thirteenth day of May, 1875, the said Pierre E. Martin and George Martin, *l'administrateur delegue de la succession de* Mr. Emile Martin, deceased, by an assignment in writing of that date, sold, assigned, and transferred unto Abram S. Hewitt and Edward Cooper, your orators, the whole right, title, and interest in and to said letters patent and invention.

which assignment was duly recorded in the patent-office of the United States, as by said assignment, or a duly-authenticated copy thereof, and the certificate of such recording thereto affixed, ready in court to be produced, with fully and at large appear. And your orators further show that your orators have extensively applied the said process to practical use, and have been, and, but for the infringement hereinafter complained of, would still be, in the undisturbed possession, use, and enjoyment of the exclusive privileges secured by the said letters patent, and in receipt of the profits of the same."

It is next charged that the defendants have infringed the patented improvement, "the exclusive right and privilege to make, use, and vend which, throughout the United States and the territories thereof, is thus by law vested in your orators." The relief prayed comprises injunctions, preliminary and perpetual, an account of profits, and, in addition thereto, an assessment of damages, in right of the complainants' title as set forth.

On the sixteenth of February, 1882, complainants' counsel filed an amendment, bringing in the name of Pierre E. Martin as a plaintiff, and making other changes in the bill. On the fourth of March, 1882, the plaintiff again amended by bringing in Pierre Blaise, George Martin, and others, "heirs at law of Emile Martin, deceased." On the sixth of March, 1882, another amendment (which need not be more particularly referred to at this time) was made. On the twenty-third of June, 1882, the defendants filed a demurrer to the bill, as defective for want of proper parties. October 2, 1882, this demurrer was argued, and the following order made:

Now, this second of October, 1882, this cause coming on to be heard on the demurrer filed by the defendant to the complainants' bill as amended, and counsel for the respective parties having been heard thereupon, and the same having been considered by the court, it is adjudged, ordered, and decreed that said demurrer be and the same is hereby sustained, with leave to the complainants to amend their bill by making the administrator of Emile Martin a party complainant, if they shall be so advised.

On the fourth of October, 1882, the bill was again amended as follows: *First*, by inserting after the words "republic and," in line 25, page 1, of said bill, "Abram S. Hewitt, above named, in his capacity as administrator upon the estate of Emile Martin, deceased;" and, *second*, by inserting after line 20, page 6:

And your orators further represent that the above-named heirs at law of the said Emile Martin, deceased, afterwards made application to the register for the probate of wills and granting letters of administration in and for the city and county of Philadelphia, in the commonwealth of Pennsylvania, and within the Eastern district thereof, for letters of administration to be granted on the estate of the said Emile Martin, *alias* Marie Francois Emile Martin, within the said city and county, to Abram S. Hewitt; and such proceedings were had that afterwards, to-wit, on the twentieth day of July, A. D. 1882, letters of administration upon the said estate, goods and chattels, rights and credits, which were of the said Emile Martin, were by said register granted and committed to Abram S. Hewitt, who has duly accepted said trust, and has qualified himself according to law, whereby there has devolved upon the said Abram S. Hewitt the right, title, and interest which the said Emile Martin had at the time of his decease in and to said before-mentioned letters

patent, and he holds the legal title to the same (being one undivided half of said letters patent) in trust for the said heirs at law of the said Emile Martin, deceased, and hereby appears and makes himself a party complainant in this bill of complaint.

To the bill as thus finally amended the defendants filed an answer on November 16, 1882.

Has the court jurisdiction? Two propositions involved in this inquiry need no argument, and scarcely require citation of authority. *First*, that courts of equity can exercise jurisdiction in patent causes only where the circumstances call for the peculiar forms or character of relief which these courts administer. Ordinarily the relief required is that afforded by the writ of injunction. Where, therefore, the circumstances do not call for the services of this writ, the jurisdiction of equity does not ordinarily apply. *Root v. Railway*, 105 U. S. 189; *Hayward v. Andrews*, 106 U. S. 675; S. C. 1 Sup. Ct. Rep. 544. *Second*, that to sustain such a suit the entire right in the patent must be represented. *Gayler v. Wilder*, 10 How. 494; *Blanchard v. Eldridge*, 1 Wall. Jr. 339.

The patent in the case before us expired on the twenty-eighth of July, 1882. This is not only shown by the proofs, but was admitted on the argument. The original bill was filed in January preceding. At this time, therefore, (January,) if the proper parties were before the court, the plaintiff had a case calling for the services of an injunction, and the court consequently had jurisdiction. As we have seen, several changes were made in the parties between the time of filing the bill and the expiration of the patent, the last bringing in the heirs at law of Emile Martin, deceased. In this state of the record, could the plaintiffs have had a *décree*? Were the proper parties in court? It seems quite plain that these questions must receive negative answers. The right of Pierre E. Martin (consisting of one-half interest in the patent) alone was represented. No one of the several persons who had sought to do so, had any authority to bring in or intermeddle with the remaining half which had belonged to Emile Martin. It is not pretended that the attempted transfer of this interest to Hewitt and Cooper had any effect. It is clear that the interest did not descend to Emile's heirs, and that they had no authority whatever respecting it. It was personal property, and passed to the administrator, to be administered as all other personality of the deceased. This is so fully settled by authority as to dispense with discussion. *Shaw Valve Co. v. City of New Bedford*, 19 FED. REP. 753; *Bradley v. Dull*, 19 FED. REP. 913. It was not until the following October, several months after the patent had expired, that the interest of Emile Martin was brought in. Up to this period, therefore, no case was presented, and the defendant, in the light of subsequent developments, was entitled to a dismissal of the bill. It may be assumed that, had the court been aware of the facts now ascertained, the amendment would not have been allowed. Upon

what valid ground should the administrator have been permitted to come into equity, at a time when he was entitled to no equitable relief, by attaching himself to a suit previously and improperly commenced? He could not get in by means of a new bill. The only remedies he required were those afforded by law. And upon what just ground could Pierre Martin, and those who with him claimed to own the other half, ask to have the administrator brought in? They had ceased to be entitled to any form of equitable relief. The only remedies they could then invoke are those afforded by the law. The object, apparently, was to deprive the defendants of trial by jury in an action at law,—a right to which they were clearly entitled at the time. In *Allison v. Herring*, 8 Law J. Eq. (N. S.) 223, the court refused leave to amend under circumstances very similar to those of this case. The amendment here was properly allowed in view of the facts disclosed at the time. To avoid injustice, however, the filing of the amendment should now be treated as the commencement of the suit. This view finds ample support in authority. Such an amendment, made under such circumstances, bears no resemblance to ordinary amendments which are held to relate back to the time of filing the bill. They present, in effect at least, a new case, involving different parties. In *Miller's Heirs v. McIntyre*, 6 Pet. 63, the court so treated an amendment by which an additional defendant had been brought in after the statute of limitations had run against the plaintiff. In principle this case cannot be distinguished from the one before us. True, the party there brought in was a defendant, while here he is a plaintiff. This difference, however, is immaterial. The injustice of depriving the defendant in the former case of the bar of the statute, by tacking him on to a suit previously commenced, is not plainer than that of depriving the defendants here of their right to trial at law, and compelling them to appear and litigate in a court whose jurisdiction can only be made to cover the case by allowing the administrator to attach himself to the bill, as an original party, after the right to sue in equity had been lost. It is not necessary to enlarge on this subject.

Treating the suit as commenced when the amendment was filed in October, as we must, it is clear that the court has no jurisdiction, and the bill must be dismissed.

BRUSH and others v. NAUGATUCK R. Co. and others.

*(Circuit Court, D. Connecticut. July 10, 1885.)***PATENTS FOR INVENTION—FORMER ADJUDICATION AS TO PRIORITY OF INVENTION.**

A contest between two patentees as to priority of invention, and a judgment that the junior patentee was or was not the first inventor of the thing patented to each, would be an adjudication affecting the title of the junior patentee; but an adjudication that the senior patentee was not the first inventor of the thing claimed in his patent, which was not the thing claimed by the junior patentee, does not enlarge nor affect the estate of the latter, and is not a bar to a subsequent suit by the senior patentee against a licensee of the junior patentee, whose license was taken after the commencement of the first suit, and with notice thereof, although the junior patentee cannot make the thing which was the subject of his invention without using the claimed invention of the senior patentee.

In Equity.*Causten Browne and E. N. Dickerson, for plaintiffs.**Edmund Wetmore, for defendants.*

SHIPMAN, J. In the suit of the present plaintiffs against Condit and others, before the circuit court for the Southern district of New York, for the infringement of the Brush patent by the manufacture of electric lamps, made under subsequent patents known as the Weston patents, it was decided that the combination which was the subject of the elder patent had been anticipated in the Hayes lamp, and the bill was dismissed. The Brush patent and the Weston patents are for different inventions.

The plea of the Naugatuck Railroad Company, in this case, avers that the electric lamps used by said defendant were manufactured by the United States Electric Lighting Company, and are identical in construction with the electric lamps made and sold by Condit, and which were the subject of the suit in the Southern district of New York; that the defense of that suit was solely conducted and controlled by said Electric Lighting company; that when that suit was commenced Edward Weston had applications pending for letters patent on electric lamps, which applications were for the benefit of said Lighting company, and on which applications letters patent were granted, and became the property of that company pending the Condit suit; that, pending that suit, the Naugatuck Railroad Company took a license from said company, with knowledge of complainant's claim that the use of the lamps so licensed under the Weston patent was an infringement of the Brush patent; that said defendant's lamps are made under the Weston patents, and that the invention patented by one of them cannot be made without using the invention described and claimed in the Brush patent.

Upon these facts, the defendant says that the Electric Lighting company was the real defendant in *Brush v. Condit*; that the Naugatuck Railroad Company is privy in estate with its licensor; and pleads the

judgment for the defendant in the former suit as a bar to the present suit. The plea has been set down for hearing. It is admitted that the Electric Lighting company, the owner of the Weston patents, was the real defendant in the *Condit Case*, and that the Naugatuck Railroad Company, becoming the licensee of said Lighting company pending said suit, and with the knowledge of the complainant's claim, is privy in estate with the Lighting company, and that a judgment in the former suit, which determined the title to the estate of the said company, or some right or liability attaching to said title, would be conclusive as an estoppel.

The plaintiff says that the Brush invention and the Weston inventions, as claimed in the respective patents, not being alike, an adjudication that the invention of the elder patent had been anticipated by a third person is a judgment which did not determine either the title of the Lighting company to the junior patents, or any liability attaching to such title. The defendant says that, so far as the application of the doctrine of *res adjudicata* is concerned, there is no difference between an adjudication affecting a right to use the property to which it relates and the title to that property; and that "the grant of a patent confers the exclusive right of property, subject to prior grants, and the question whether such prior grants limit the enjoyment of the property is a question which directly affects it, so that an adjudication in regard to it affects any one who is privy in ownership;" and that Brush's contention in the *Condit Case* was that he had "a prior valid grant, the existence of which would prevent Weston from using his subsequent grant except under Brush's license;" and thus the litigation vitally affected the extent and manner in which Weston's property was to be enjoyed, and therefore related to the property as much as a question which related to the ownership.

In this case neither the extent of the grant to Weston, nor any liability attaching to his title was in issue. The title to the inventions which were the subject of his patents, or their scope, was not in dispute. The contest was not between the patents of the two inventors, except in popular phrase, but was whether anybody had a right to make and use the Brush combination of clamp, core, and coil, a right which the plaintiffs insisted was theirs exclusively, and the defendants contended was open to the public. A contest between two patentees as to priority of invention, and a judgment that the junior patentee was or was not the first inventor of the thing patented to each, would be an adjudication affecting the title of the junior patentee; but an adjudication that the senior patentee was not the first inventor of the thing claimed in his patent, which was not the thing claimed by the junior patentee, does not enlarge nor affect the estate of the latter.

But it is urged, and it is the strength of the defendant's argument, that Weston cannot make his lamp without using the Brush clamp; and thus that the adjudication in the *Condit Case*, which threw the

claimed combination open to the public, affected the extent of Weston's enjoyment of his property, and therefore related to the property as much as if it affected his title. It is true that the adjudication will, if hereafter sustained, affect his enjoyment of his property, in the sense that it will relieve him from the alleged liability or obligation to pay royalty to the plaintiffs; but the defect in the defendant's argument seems to me to consist in insisting that the relations to each other of grants of exclusive rights in different inventions by different letters patent are analogous in all respects to the relations to each other of grants of right in a piece of land by different deeds.

The inventor's estate in letters patent is his exclusive right to practice his own inventions for the time limited by the statute. The subsequent inventor who has taken a patent for a different invention is no more subject to the grant to the senior patentee than he would have been if he had not taken a patent. There cannot properly be said to be a burden or easement upon the junior patentee's estate, although there is a prohibition against the use by the public of the senior patentee's exclusive right. There is no implied condition that Weston's grant shall be subject to prior valid grants, for the grant does not touch upon the territory which had been patented by anybody else. In other words, the fact that, after the Condit suit was commenced, the Electric Lighting company obtained patents for the devices which characterize the Weston lamps does not give to the adjudication that the Brush patent was invalid, by reason of prior anticipation by a third person, any different position or force from that which it would have had if the Weston patent had never been issued, because these patents do not relate to the invention which was included in the Brush patent. Weston's freedom from the claim of Brush for royalty was, to use the language of the plaintiffs' counsel, not obtained "in his capacity as patentee, not by way of enlargement of his rights as patentee, not as an adjudication or in favor of his estate as patentee, so as to make a case of 'privity of estate' in behalf of his licensees."

The cases of *Ingersoll v. Jewett*, 16 Blatchf. C. C. 378, and *Pennington v. Hunt*, 20 FED. REP. 195, do not sustain the plea. In the first case *Ingersoll*, as owner of the Heath patent, had sued Turner, a licensee under Topham's patent for the same invention, for infringement of the Heath patent. Topham assumed the defense of the suit. The question of priority of invention as between Heath and Topham was the one at issue, and was decided in Topham's favor. His title to his invention, as between *Ingersoll* and himself, was the subject which was adjudicated. *Ingersoll* then sued *Jewett*, another licensee of Topham, for making the same invention, and it was held that if *Jewett* had become a licensee after judgment in the Turner suit he would have been privy in estate with Topham, and the former judgment would have been conclusive as an estoppel.

In the case of *Pennington v. Hunt*, Hunt sued Pennington upon

the Clark patent, having bought it from King, the unsuccessful defendant in the previous suit of *Pennington v. King* upon the Pennington patent, in which case King's defense was that the Pennington invention had been previously patented to Clark. The court sustained the validity of the Pennington patent as against the Clark patent, and thus the validity or the scope of the latter patent was directly in issue. Hunt having bought the Clark patent from King after the adjudication, with knowledge of the controversy, was held to be privy in estate with his assignor, and to be bound by the judgment. The difference between these two cases and the one at bar is that in each of the cited cases the validity or the scope of the patent which belonged to the defendant in the original suit was directly in issue, and was adjudicated upon.

The plea of William D. Bishop, which sets up non-infringement, is within the adverse criticism of the court upon a similar plea in *Sharp v. Reissner*, 9 FED. REP. 445.

Both pleas are overruled.

AMERICAN DIAMOND ROCK BORING CO. v. SHELDONS and another.

SAME v. SUTHERLAND FALLS MARBLE Co. and others.

SAME v. GILSON and others.

(Circuit Court, D. Vermont. July 13, 1885.)

PATENTS FOR INVENTIONS—REHEARING ON CONDITION TESTIMONY TAKEN BE USED.

Motion for rehearing granted, on condition that in case there should be a decree in the cause for an accounting, the testimony already taken before the master shall stand for use in the case as if taken by the parties respectively upon such new accounting.

In Equity. S. C. 2 FED REP. 353.

E. G. Thompson, for plaintiff.

E. T. Rice and *Aldace F. Walker*, for defendants.

WHEELER, J. These causes are pending for the purposes of an accounting before a master, pursuant to an interlocutory decree made upon hearing in chief. 17 Blatchf. 208, 303. They have now been heard upon motion for a rehearing on the merits. The decision was made largely upon the authority of, and following, *American Diamond Rock Bor. Co. v. Sullivan Machine Co.* 14 Blatchf. 119, upon the same patent. The change in what were understood to be the principles of law governing reissuing patents since these decisions has been found to be sufficient to change that made in the former case. *American Diamond Drill Co. v. Sullivan Machine Co.* 21 FED. REP. 74. That affords sufficient ground for granting a rehearing to

review the decision made in this case, upon which the decree for an accounting rests. *Coon v. Wilson*, 118 U. S. 268; S. C. 5 Sup. Ct. Rep. 537. Still, the expenses of taking testimony before the master should not be lost, in case it can, in any event, be of use in the case. The same decree may be made again upon rehearing or an appeal. What the result may be cannot be foretold with certainty; therefore it seems proper that the rehearing should be granted without prejudice, so far as may be, to the proceedings before the master. Therefore the motion is to be granted, upon the express condition and order that in case there shall be a decree in the cause for an accounting, the testimony already taken before the master shall stand for use before the same or any other master in the cause, as if taken by the parties, respectively, upon such new accounting.

Motion granted, but without prejudice to the right to use the testimony already taken before the master on any accounting in the cause.

THE THOMAS FLETCHER, (on the Appeal of James Gibb Ross.)¹

(Circuit Court, S. D. Georgia. November, 1884.)

1. MARITIME LIENS—BOTTOMRY BONDS.

A bottomry bond should have a preference to be paid out of the proceeds of a vessel, superior to those holding maritime liens for supplies and repairs, if the evidence shows that prior to its execution the owner of the vessel was notified to consent to the bond, or to raise the necessary funds by other means. *The Julia Blake*, 16 Blatchf. 472, followed.

2. SAME—SUPPLIES.

To constitute maritime liens for supplies, they must have been furnished on the credit of the vessel, and in some other than her home port.

3. SAME—HOME PORT.

The enrollment of a vessel makes only a *prima facie* case as to the port of her enrollment being her home port, which may be overcome by evidence as to the residence of her owner. The statute (Rev. St. § 4141) provides that the home port of a vessel "shall be deemed to be that at or nearest to which the owner usually resides," and that seems to contemplate that a ship-owner may reside in different places; but the residence to determine the place of enrollment (or home port) is to be the usual residence, and no person can have more than one such residence. Business men in this country may have residences and business places scattered over the whole of our great territory, but, as a matter of fact, they cannot have more than one usual residence.

Admiralty Appeal.

Richards & Heyward, for appellant.

Garrard & Meldrim, for appellees.

PARDEE, J. The bark *Thomas Fletcher* having been sold by decree of the district court, and the proceeds of sale partitioned among the various libelants and intervenors, James Gibb Ross, a mortgage

¹ Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

creditor of said bark, appeals. The pertinent facts are about as follows: Pendergast lived at Plainfield, in the state of New Jersey, and had a business place in the city of New York. He was the owner of the bark Thomas Fletcher, which he caused to be enrolled in the port of New York, although Perth Amboy was the nearest port having a custom-house. The libelants, Richard Poillon, George Bell, Willett & Hamlin, and McCaldin Bros., furnished supplies and materials for repairs to the Fletcher in the port of New York, for which they respectively claim a maritime lien. Richard Poillon and George Bell each furnished supplies on the order of Pendergast and the master; each now swearing that the supplies were furnished on the credit of and charged to the vessel, and that they knew that Pendergast resided at Plainfield, New Jersey. In further proof that the supplies were credited to the ship, it appears that, within a few days after furnishing, each filed a lien against the Fletcher under the lien laws of the state of New York.

The supplies furnished by Willett & Hamlin were at the request of the owner, Pendergast, on the credit of the ship, as sworn by libelants' agents. The supplies furnished by McCaldin Bros. were furnished on the order of Pendergast, and whether the ship was credited does not appear. It does not appear that either firm knew of Pendergast's residence. Nor does it appear that any of the libelants knew that Pendergast had a place of business in New York city. The libel of James Gibb Ross, assignee, is on a bottomry bond, executed in Falmouth, England, in favor of W. H. Ross & Co., and the only point made against it is that the evidence does not show that prior to its execution the owner, Pendergast, was notified, as he might have been, to consent to the bond, or to raise the necessary funds by other means. This being a contest among creditors for priority, and the owner, Pendergast, not appearing, it is claimed that, although Pendergast is bound, the contesting libelants are not bound by the bond. The only evidence bearing on the point of notice to Pendergast is that of libelant himself, who, in testifying of Pendergast's attempting to borrow money from him, says:

"The repairs done at Falmouth on the Thomas Fletcher were not done on the strength of my credit with W. H. Ross & Co. The repairs were made, and the money to pay for them raised on bottomry, by the master of the vessel, before W. H. Ross & Co. received notice from me that I was willing to advance the money. I was in communication with Pendergast at the time the Thomas Fletcher was at Falmouth. At that time he was in New York city. Part of the time I was in New York, and part of the time I was in Quebec. Pendergast wished to raise money for the Thomas Fletcher's repairs, and asked me to advance the funds. I was not disposed to do so, as I considered that the vessel already owed me all she was worth. I advised W. H. Ross & Co. that Pendergast was not able to pay or raise the money. Pendergast afterwards asked me again to advance funds, and offered me as security the order for \$3,000 of the Fairy Belle's freight. It was then that I advised W. H. Ross & Co. that I was willing they should advance funds to pay for the Fletcher's repairs, and charge same to my account; but, as I have already

stated, the money to pay for the repairs had been raised on bottomry before W. H. Ross & Co. received my letter."

If it is deemed material to show that the owner was communicated with before the bottomry bond was given, (see *The Julia Blake*, 16 Blatchf. 472 *et seq.*.) then it appears from the above-quoted evidence that he had notice, and was unable to raise funds in time to meet the necessity. James Gibb Ross also intervenes in this case, to claim proceeds of sale of the Fletcher as the holder of a mortgage for the sum of \$10,000, which mortgage purports to have been executed by Pendergast of Plainfield, New Jersey, sole owner of the Fletcher, and was recorded in the office of the collector where the Fletcher was enrolled, November 30, 1880.

It seems clear, in ranking these claims, that the bottomry bond should be recognized and given priority. If the demands of the various libelants for supplies and repairs are maritime liens, they should rank next. If not maritime liens, they should be rejected entirely, for they are not shown nor claimed to be domestic liens. To constitute them maritime liens, the supplies must have been furnished on the credit of the ship, and in some other than the home port of the ship. See *The Lottawanna*, 21 Wall. 559; *Stephenson v. The Francis*, 21 FED. REP. 715, and the numerous cases there cited.

From the evidence submitted, it is apparent that, of these materialmen, Poillon, Bell, and Willett & Hamlin gave credit to the ship. The evidence is not as strong as it might perhaps have been made; but, uncontradicted, it is sufficient. The supplies furnished by McCaldin Bros. seem to have been on the naked order of Pendergast, owner, then present. As to what port is the home port of an American ship, there arise many very difficult questions. When the residence of the owner is in the same state as the nearest port to such residence, and there is no other port in the state, there is no particular trouble in ascertaining the exclusive home port, provided the ship is enrolled at the proper port; but, if all these circumstances do not concur, the home port of a ship is a matter of uncertainty, under the authorities, the weight of authority being in favor of considering all the ports of the state in which the owner resides as home ports. See *The Albany*, 4 Dill. 439, and cases there cited. In the present case, the question is whether the port of New York was, at the time the supplies were furnished, a home port of the Fletcher.

It is conceded that the enrollment of the Fletcher in New York makes only a *prima facie* case as to that being her home port. That *prima facie* case seems to be overcome by the positive evidence that Pendergast lived in New Jersey, and that Perth Amboy was the proper place for his ship to be enrolled. But then it is contended (see *The Albany*, *supra*) that as Pendergast had a continuous business place in New York, where he was nearly always to be found during business hours, that New York constituted his residence, in the sense of section 4141, Rev. St., relating to enrollment.

Without reviewing the authorities cited to maintain this proposition, I do not think it necessary to go further in this case than the language of the statute itself, which is: "which port shall be deemed to be that at or nearest to which the owner * * * usually resides." For certain commercial purposes a person's usual place of business may be taken for his residence, not because he resides there, but because he may, or ought to be found there; and the statute referred to seems to contemplate that a ship-owner may reside in different places, for the residence to determine the place of enrollment is to be the usual residence, and no person can have more than one such residence. Pendergast may have had a residence in New York at his business place, but it was not his usual residence. His usual residence was at Plainfield, New Jersey, where he kept his family, and where he lived continuously from 1878 to 1884, perhaps going to New York city the morning of every business day, and returning to his home at night. Business men in this country may have residences and business places scattered over the whole of our great territory, but I cannot see how, as a matter of fact, they can have more than one *usual* residence. At all events, I am clearly of the opinion that, under the evidence in this case, Pendergast's *usual* residence was at Plainfield, New Jersey, and not in the city of New York. In reaching this conclusion I do not hold that Pendergast, by his conduct, may not be estopped on the matter of residence; and this might be a very important question in this case if any of the libelants herein were adjudged to have, not maritime liens, but domestic liens under the laws of New York.

The conclusions on the whole case are that a decree should be entered recognizing the bottomry bond as being first entitled to be paid out of the proceeds of the sale of the bark Thomas Fletcher; that the demands of Richard Poillon, of George Bell, and of Willett & Hamlin be recognized as maritime liens, and ordered to be next paid—*pro rata*, if necessary—out of said proceeds; and that thereafter the claims of James Gibb Ross, under his mortgage, be next allowed and paid; any balance of said proceeds to remain in the registry of the court. The demand of McCaldin Bros. to be adjudged no lien, and to be dismissed. The costs incurred on the libel of McCaldin Bros., in the district court, to be paid by said McCaldin Bros. All the other costs of the district court to be paid from the funds in the hands of the court. The costs of this court, including transcript, to be paid out of the fund, if any remain, after satisfying in full the demands of Poillon, Bell, and Willett & Hamlin; otherwise to be divided (if nothing remain after satisfying such demands) between James Gibb Ross, who shall pay three-fourths, and McCaldin Bros., who shall pay one-fourth.

THE ALBERTO.¹FORSTALL and others v. THE ALBERTO.¹

(Circuit Court, E. D. Louisiana. June 12, 1885.)

1. ADMIRALTY JURISDICTION—MARITIME CONTRACTS—CHARTER-PARTY—ADMIRALTY LIEN.

A charter-party is a maritime contract, and within the admiralty jurisdiction. It is well settled since *Insurance Co. v. Dunham*, 11 Wall. 1, that all contracts having reference to maritime service, maritime transactions, or maritime casualties, are maritime contracts, and within the admiralty jurisdiction of the courts of the United States. Whether the jurisdiction is *in rem* or *in personam* depends upon whether the contract imports a lien on the ship.

2. ESTOPPEL.

When the terms of an offer by cablegram were ambiguous, and misunderstood by the parties receiving and accepting the same, to the knowledge of the party making the offer, it was the duty of the latter to have at once given notice by cablegram of the misunderstanding, and to protest against the acceptance as made, and their failure to do so estopped them from denying the contract as made from such acceptance of their offer. They were silent when equity required them to speak.

Admiralty Appeal. Libel for advances. Cross-libel for damages for non-execution of charter-party.

Henry Denis, for libelants.

Thomas J. Semmes and *J. Carroll Payne*, for claimants.

PARDEE, J. The libelants are ship-brokers in New Orleans, who for some years have corresponded with a firm of ship-brokers in Bridgetown, Barbadoes, by the name of Da Costa & Co. On the fifth of November, 1883, the Austrian bark *Alberto* was in Barbadoes, and her master, being desirous of a cargo direct for Trieste, negotiated with said firm of Da Costa & Co., who thereupon, on said fifth day of November, sent the following cablegram to libelant, to-wit: "Can you use one vessel of 500 to 550 tons—Austrian bark *Alberto*, Trieste, direct?" This cablegram was received in New Orleans at 3:40 p. m. of the same day. At what time it came to the libelants does not appear, but on the same day the libelants, answering, sent the following cablegram: "7/3d., 7/16d. and 5% cotton. Must be of the highest class." Meaning thereby, 7s. 3d. for oil, 7s. 16d. and 5% primage for cotton. At what time this offer reached Da Costa & Co. does not appear, but they sent in reply this cable: "Offer accepted; the vessel leaves to-morrow to load cotton-seed oil, for Europe, at 7/3d."

This dispatch was received in New Orleans at 2:19 p. m. of the sixth November. Exactly what time the libelants received it, does not appear; they made no answer by cablegram or otherwise. In the meantime Da Costa & Co., on the part of libelants, entered into a charter-party with the bark *Alberto*, under which the libelants were to furnish said vessel a full and complete cargo of cotton-seed oil for

¹ Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

Trieste, freight at 7s. 3d. per round barrel. The charter-party also stipulated that the libelants should advance cash for the necessary disbursements at New Orleans at $2\frac{1}{2}\%$ commission, and insurance. The master of the Alberto waited 48 hours at Barbadoes for a dispatch from libelants, but, receiving none, sailed under the charter for New Orleans, where she arrived on the morning of the twenty-sixth November. On the morning of the twenty-seventh the master reported to libelants. As to what was said between the parties at this time, the evidence is conflicting.

Taking the libelants' version as the true one, the libelants then notified the master of the Alberto that Da Costa & Co. had exceeded their instructions; that their cable to Da Costa & Co. quoted them freight on oil and cotton, and their intention was, and the cable so expressed it, that they, libelants, were to be at liberty to load the ship with oil or cotton, or both, at their option, and that, consequently, they could not recognize the charter signed by Da Costa as binding. They also told the master that they were perfectly prepared to carry out the offer they had made, and load a ship with a cargo of oil and cotton to Trieste; but they would not guaranty, and they could not guaranty, a full cargo of oil for the ship. The master said the vessel was unsuited for loading cotton, and he would not take cotton; that he wanted a full cargo of oil. The libelants told the master that if he wished they would try and get him a full cargo of oil, if he would allow them to go into the market and offer the ship. After some discussion, the libelants' chartering clerk, on the captain's say so, offered the ship for a full cargo of oil; then the libelants entered the ship in the custom-house, paid the tonnage dues, and made other disbursements for the ship, as sued for in the libel.

The master of the Alberto, however, did not understand the libelants' position with regard to the charter-party, for he proceeded to unload his vessel of ballast, and on the third day of December, 1883, he served on the libelants the following letter and notice:

"Messrs. Forstall, Clayton & Co.—GENTLEMEN: Please take notice that my vessel, the Austrian bark Alberto, chartered by you as per charter-party dated Bridgetown, the sixth of November, 1883, is ready to receive cargo at post 35, Third district, and that her lay days will commence to count to-morrow morning, the fourth instant.

"Yours, truly,

"ANDREA GRAGUEZ, Captain of the Aust. bark Alberto."

This notice seems to have cleared up the cloudy contracting atmosphere, for from this time on there seems to have been no more misunderstandings between the parties. The libelants discovered that the master of the Alberto insisted upon the charter-party as valid and binding; the captain discovered that the libelants repudiated the charter, and did not intend to be bound by it.

Immediately the libelants brought their libel, seizing the ship for advances made. The owners of the Alberto responded with a cross-

libel for damages for non-execution of charter-party. The amount of advances claimed in the libel is not disputed, nor is the rule of damages followed in the district court on the demands of the cross-libel disputed. The questions presented in this court are (1) whether the court has jurisdiction of the demands presented in the cross-libel; and (2) whether the libelants are bound for the damages resulting from their failure to comply with the obligations of the charter-party entered into on their behalf by Da Costa & Co.

1. The exception to the jurisdiction is on two grounds: that the cause of action is not the same, and that the alleged charter-party was only a preliminary contract (if a contract at all) of which the admiralty has no jurisdiction. A charter-party is a maritime contract, and within the admiralty jurisdiction. The cross-libellant alleges a charter-party, and claims damages for failure to comply with its stipulations. If there was no charter-party there was no contract, and cross-libellant has no case. The position of libelants is that there were preliminary negotiations looking to a contract, but no contract, because Da Costa & Co. had exceeded their instructions. If the charter-party as made bound the libelants, it was no preliminary contract. But, as I understand the question of jurisdiction, it is well settled, since *Insurance Co. v. Dunham*, 11 Wall. 1, that all contracts having reference to maritime service, maritime transactions, or maritime casualties, are maritime contracts, and within the admiralty jurisdiction of the courts of the United States. And see *Maury v. Culliford*, 10 FED. REP. 388. Whether the jurisdiction is *in rem* or *in personam* depends upon whether the contract imports a lien on the ship; and from this fact there has been some little confusion among practitioners in the admiralty courts on the question of jurisdiction. Most of the authorities cited in support of the exception in this case were cases where jurisdiction *in rem* was in dispute.

2. On the merits of the case the finding should be for the cross-libellant. The meaning of the three dispatches that passed between Da Costa & Co. and the libelants is to be found, if possible, from the dispatches themselves. No unexpressed intentions nor understandings of the parties sending these dispatches should be allowed to defeat the plain meaning of the dispatches themselves. *Locke v. S. C. & P. R. Co.* 46 Iowa, 109; *Merriam v. Pine City Lumber Co.* 23 Minn. 314; Civil Code La. arts. 1946 *et seq.* The second dispatch, being the reply sent by libelants to Da Costa & Co., is clear and unambiguous in offering to freight the Alberto with oil or cotton, and justified the immediate acceptance of the offer for a cargo of oil. I cannot agree with libelants that they retained an option to furnish a cargo of either oil or cotton, or both. On the contrary, I am inclined to the opinion that the option was on the other side, and that on the acceptance of the Alberto's master the obligation of the libelants to furnish a cargo of oil was fixed and certain. But it is not necessary to go so far in this case. Let it be conceded that the offer was as libel-

ants claim, the option being theirs, then it is clear that the terms of the offer were ambiguous, and were misunderstood by the parties in Barbadoes. In this state of the case it was the clear duty of libelants to have at once by cable notified the parties in Barbadoes that the offer was misunderstood, and have protested against the acceptance as made. Libelants were fully notified that the parties were acting, and that the vessel was about starting on a voyage, under a misapprehension arising from the terms of their own telegram. They should have spoken out without delay, and their failure to do so, their silence in the matter, estopped them when the *Alberto* reached New Orleans, and estops them now, from denying the contract. They were silent when equity required them to speak. And it is no answer to say that they supposed that as it takes a cablegram 18 to 24 hours to be received at Barbadoes from New Orleans, and as the cablegram of acceptance stated that the "vessel leaves to-morrow," there was not time to cable an answer before the vessel should leave Barbadoes. No matter when the vessel was to leave, or whether she had left, libelants should have dispatched to Da Costa & Co. immediately. Any other view of it would leave libelants with the advantage of ratifying or denying until the vessel should reach New Orleans. If freights advanced in the mean time, they could ratify; if freights went down, they could deny. In other words, for 20 odd days the ship would be bound, but the libelants free.

But the fact is, as appears from the evidence, a cablegram could be sent and an answer received between New Orleans and Barbadoes inside of 24 hours. From the fact that the acceptance was in answer to a dispatch of theirs sent on the evening of the 5th, the libelants should have known (as was the fact) that the acceptance was sent on the 6th, the day they received it, and that there was ample time to answer and have their answer received before the *Alberto* sailed from Barbadoes. This view of the case is well supported by authority:

"Equitable estoppel is the effect of the voluntary conduct of a party, whereby he is absolutely precluded, both at law and in equity, from asserting rights which might have otherwise existed, either of property, of contract, or of remedy, as against another person who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who, on his part, acquires some corresponding right, either of property, of contract, or of remedy." Pom. Eq. Jur. § 804 and note.

See, also, Id. § 805, where silence is recognized as conduct to work an estoppel, as well as language and acts. See, further, 2 Pars. Cont. 499; Story, Ag. § 74; title 4, c. 2, § 2, Civil Code La.; *Commercial Bank v. New Orleans*, 17 La. Ann. 190; Kerr, Fraud & Mis. 409; Bigelow, Estop. 502, in relation to *Hope v. Lawrence*, 50 Barb. 258; *Gregg v. Wells*, 10 Adol. & E. 90; *Cornish v. Abington*, 4 Hurl. & N. 549; Benj. Sales, 39; Pollock, Cont. 420; *Leather Cloth Co. v. Hieronimus*, L. R. 10 Q. B. 140.

I think it is clear that libelants are equitably estopped from denying the charter-party. As to a waiver on the part of the master of the *Alberto* by his consenting to let libelants put his ship in the market for cargo, it is clear, as we have found in the statement of the case, the parties never really understood each other correctly until notice of readiness of the *Alberto* under the charter-party was served on libelants. Up to that time the master seems never to have had an idea but that he was getting along nicely under the charter. There was no waiver. Let a decree be entered for claimant and cross-libellant the same as in the district court, and for all costs of this court.

THE JOHN M. CHAMBERS.¹

BELT and others v. GUMBEL.¹

(Circuit Court, E. D. Louisiana. April, 1884.)

1. GENERAL AVERAGE.

A general average bond will not be invalidated when the evidence in the case does not show satisfactorily that there was either ignorance or error on the part of the signers; and when it shows that they have availed themselves of the bond to obtain their goods and their money from the insurance company, and shows no satisfactory reasons to the contrary, they cannot evade its obligations.

2. COLLISION—EVIDENCE.

As between two witnesses to a collision, each on one of the colliding boats, one of whom was on the roof of his boat where he could have known what was going on, while the other was in the hold of one of the barges in tow of his boat, the court considers the testimony of the former as the most reliable; but, no other testimony being offered, the showing made by both is unsatisfactory, and leaves the court in ignorance as to the fault of the collision.

Admiralty Appeal.

E. H. Farrar, for libelants.

M. M. Cohen, for defendant.

PARDEE, J. It seems that in November, 1882, the steam-boat *John M. Chambers*, coming out of the Attakapas, bound for New Orleans, with a cargo of produce for various consignees, collided with the tug *Lowry* and barges in the Mississippi river, about 100 miles from the city, whereby the *Chambers* was sunk; that thereafter her master and crew raised and partially repaired her, and saved her cargo, and in so doing incurred large expenses, which expenses were claimed as proper for general average. The goods consigned to respondent were delivered on an average bond in the following terms, to-wit:

"Whereas, the steam-boat *John M. Chambers*, P. E. Burke, master, on a voyage from St. Martinsville, Bayou Teche, for New Orleans, met with an accident about 108 miles above this city, and sunk in about seven feet of water, on the twelfth day of November, 1882, and was compelled to employ as-

¹Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

sistance to save the boat and cargo; and the said boat, having been successfully raised and partially repaired, has completed her trip to New Orleans, whereby sundry expenses and charges have arisen, and various sacrifices have been made, which are the subject of general average, and should be borne by the property at risk as a common charge in contribution.

"Now, be it known, that we, the undersigned shippers, agents, consignees, or attorneys of certain consignees, owners, or insurers of the cargo of the said steam-boat John M. Chambers, in consideration of the premises, and in further consideration of the arrival and landing of our several parcels of merchandise, have agreed, and do hereby severally promise and agree, each for himself, and not one for another, that we will forthwith furnish to the adjuster all necessary data in connection with our respective interests; and, in the event of our failure to do so, he is hereby authorized and empowered to estimate the contributing value of our goods, and our claims for loss and damage, at our risk and cost; and that we will pay to the owners of the said steam-boat, or their authorized agents, whatsoever sums may be found due from us, respectively, for our respective proportions of such expenses, charges, and sacrifices as have accrued in consequence of the disaster aforesaid, such payment to be made whenever and so soon as the average shall have been adjusted according to law, and the usages of this port, by Edward Ivy, average adjuster; and when his adjustment shall have been approved by the 'average committee' of the New Orleans board of underwriters, it shall be deemed *prima facie* correct, and be binding on us.

"Dated at New Orleans on the twentieth day of November, 1882."

As provided in said bond, the adjustment was made by Ivy, adjuster, and the contribution of respondent was ascertained to be \$495.60. When the adjustment was presented for approval to the average committee of the board of underwriters of the city of New Orleans, said committee rejected and disapproved the same, because it was not a case of inevitable collision, and that the party in fault must pay all the damages. Thereupon the parties entered into the following agreement:

"Whereas, certain parties, to-wit, A. J. Forstall, Gidiere, Day & Co., Ben Gerson & Son, S. Gumbel, L. Lacasagne, E. Malle & Co., Rykoski & Manade, Schwartz & Feitel, G. W. Sentell & Co., and Tertron & Pugh, did, on November 20, 1882, sign an average bond to the owners of the John M. Chambers;

"And whereas, the average under said bond has been adjusted by Edward Ivy, Esq., the person therein named;

"And whereas, the signers of said bond do not contest, so far as form is concerned, and assuming a foundation to exist to base the adjustment on, the correctness of said adjustment, or the amount found against each of them, but contend that the collision by which the accident mentioned in said bond happened was the result of the fault and negligence of the officers of said steamer Chambers, and that they are not liable for any sum whatsoever on said adjustment and on said bond;

"And whereas ten suits against each of said signers would be productive of much costs;

"It is hereby agreed between E. H. Farrar, attorney of said owners, and M. M. Cohen and H. N. Ogden, attorneys of said signers, that one suit shall be brought against S. Gumbel, one of said signers, in the district court of the United States for the Eastern district of Louisiana, on said bond, for the amount found due by them on said adjustment, to-wit, \$495.60, and that the final result of said suit thereon, or on appeal, as the losing party shall elect,

shall be decisive of the rights of said owners as against all the other signers of said average bond.

"It is expressly understood that this agreement is made for the sole purpose of saving a multiplicity of suits, and of limiting the suit to be brought to the only questions at issue between the parties, *i. e.*, the issue of fault *vel non* on the part of the owners of said steamer John M. Chambers; and as to the said issue, neither party to this agreement is to be understood as making any admissions, or waiving any rights, or impairing any privileges of defense, at this time or otherwise; defendants contending that this is not a case of general average, and plaintiffs reserving specially the right to object to the raising of any such issue, or any issue of fault *vel non*, at this time and in this suit, and defendants insisting that they have a right to raise such issue, or any issue of fault *vel non*, at this time and in this suit.

[Signed]

"E. H. FARRAR, Atty. owners Jno. M. Chambers.

"M. M. COHEN,

"H. N. OGDEN,

"Of Counsel for Defts.

"*New Orleans, May 3, 1883.*"

The respondent admits the regularity and correctness of the adjustment, but alleges that he signed the bond in error and ignorance of the facts and circumstances of the case; that the adjustment was not approved by the average committee of the board of underwriters; that the collision by which the expenses set forth in the adjustment were incurred was occasioned by the fault, mismanagement, and carelessness of the employes of libelants; and that the case was not one in which he was liable for general average.

The evidence in the case does not show satisfactorily that there was either ignorance or error sufficient to invalidate the average bond. The whole evidence on the subject is embodied in the following question to and answer of the party who signed it:

"*Question.* If the Chambers was in fault, and then you were advised by a lawyer that you would not be liable to contribute, because of the fault of the collision, then the bond was signed by you in error, you believing that you were liable? *Answer.* Yes, sir. I saw so many others signing it that I signed it. If I was to have been the first one to have signed it, I would have hesitated and asked questions about it, but seeing the other names I signed it. We sign these bonds as a matter of course, as one of the forms to get our goods, and on that we get paid for them by the insurance companies. It is one of the forms we think we have to go through to get our money. It was a good while after we had signed the bond,—some considerable time,—Mr. Coleman, the president of the Mechanics' & Traders' Insurance Company, informed me that they were taking our case against the Chambers as a test case; that there was some boat at fault; and they contended that all this average business was signed in error, and they were making our case a test case."

The agreement of the parties waived the approval of the "average committee."

As to the fault of the Chambers in causing the collision, there is only the testimony of the respective mates of the Chambers and Lowry, each for his own boat. The pilot of the Chambers having died, and the pilot of the Lowry being absent, their testimony was not avail-

able. As between the two mates the more reliable is the testimony of the mate of the Chambers, as at the critical time he was on the roof of his boat, where he could have known what was going on, while the mate of the Lowry was, when the danger signals were given, in the hold of one of the barges in tow. But the showing made by both is unsatisfactory, and leaves the court in ignorance as to the fault of the collision.

The respondent having failed to invalidate the bond by showing that it was given in ignorance and error, and having waived the approval of the "average committee" by agreement, and having failed to show that the sacrifices and expenses incurred resulted from the fault of the libelants, it would seem clear that the libelant is entitled to recover. The respondent has availed himself of the bond to obtain his goods, and, as appears by the evidence, his money from the insurance company, and, having so availed himself of it, he shows no satisfactory reason for evading its obligations.

A decree similar in terms to that of the district court will therefore be entered in the case.

THE GALILEO.

THE EDGAR BAXTER.

(District Court, S. D. New York. June 22, 1885.)

1. COLLISION—SIGNALS—DELAY IN OBSERVING—STEAMER IN FAULT.

A vessel's delay in maneuvering in accordance with her own signals is at her own risk.

2. SAME—CASE STATED—MISCALCULATION BY PILOT.

The steamer G., coming in from sea, stopped off quarantine, and got headed somewhat down and across the channel. Afterwards, when she was backing and filling, in order to turn around, the tug E. B., with the bark H. & T., under sail in tow, on a hawser of 60 fathoms, was seen coming down the channel, their course lying somewhat astern of the steamer. When about 400 yards apart, the steamer, which was then heading S. E., with her engines backing, gave a signal of one whistle, to which the tug replied with one. The steamer at once stopped her engines, but did not at once order them full speed ahead. The tug observing that the steamer was moving astern, when about 150 or 200 yards off, blew several cautionary blasts, to which the steamer again replied with one whistle. The tug and bark ported. The steamer's engines were then ordered full speed ahead, but not in time to prevent her backing enough to come between the tug and bark and striking the hawser. The hawser was cast off; the bark starboarded and struck the steamer a glancing blow abreast of the bridge. *Held*, that the steamer was solely in fault for delay in ordering her engines "full speed ahead" in accordance with her own signal; and that miscalculation by her pilot was the cause of the collision.

3. SAME—RULE 21—RISK OF COLLISION, WHEN ARISES—SLOWING IMMATERIAL.

A vessel is not required, under rule 21, to slacken speed, or stop and back, until the situation involves some apparent risk of collision. No such risk was, in this case, to be reasonably apprehended when the tug's course lay astern of the steamer, and the latter's signal indicated that she would move ahead to the eastward, and the tug had a right to rely on the steamer's doing so until it was

too late for the bark to avoid collision. The burden of proof is on the tug that fails to slow, to prove it immaterial. *Held* so proved in this case.

4. SAME—DUTY OF VESSEL.

A vessel is not bound to use more than ordinary nautical skill and judgment in avoiding the consequences of another vessel's fault.

In Admiralty.

Owen & Gray, for the *Edgar Baxter*.

Hill, Wing & Shoudy and *H. Putnam*, for the *Heinrich and Tonio*.

Foster & Thomson, for the *Galileo*.

BROWN, J. The above cross-libels were filed by the owners of the German bark *Heinrich and Tonio*, and the steam-ship *Galileo*, to recover their respective damages, arising from a collision near quarantine, off Staten island, about 10 o'clock A. M., on April 5, 1885. The *Galileo*, which is about 350 feet long and of 2,900 tons burden, had come in from sea, and had been visited by the health officer at quarantine, and was about to proceed on her way up the bay. The tide was flood. While waiting she had got headed across, and somewhat down, the channel, and had begun moving her engines back and forth so as to turn about and head up the bay on her proper course. At about this time the bark *Heinrich and Tonio* was proceeding out to sea, in tow of the tug *Edgar Baxter*, on a hawser about 60 fathoms long. The wind was from the westward, and the bark had all her lower sails set. She was coming down about the center of the channel, perhaps a little to the westward, and heading on her proper course about S. by E. Each was observed by the other a half a mile or upwards distant. When about 400 yards apart the steamer, which was in charge of a Sandy Hook pilot, gave to the tug a signal of one whistle. At that time her engines were moving slow astern to stop her previous forward motion, and were probably carrying her slowly astern towards the Staten island shore. The tug immediately replied with one whistle, and ported her wheel. The pilot of the steamer did not hear the reply, but saw the puff of steam from the steam-whistle, and understood it as assenting answer. The bark, which was also in charge of a Sandy Hook pilot, likewise ported and followed the tug, veering one or two points to the westward. Observing that the steamer was moving astern, the pilot of the tug shortly after gave several blasts of his steam-whistle, which were answered by the steamer with another signal of one whistle. The steamer continued to move astern until the tug had passed her, when she struck the tug's hawser, and came between the bark and the tug. The hawser was thereupon cast off from the bark, and her helm was put hard a-starboard, under which her bows swung from one to three points to port, until she came into collision with the steamer, striking her a glancing blow on the port side, and injuring both vessels, for which the owners of the bark claim \$7,000, and the owners of the steamer \$2,000.

As to the facts of the case, there are less contradictions than usually arise in cases of this character. The chief differences relate to

the position of the steamer; whether she was lying directly across the channel,—that is, nearly east and west,—or whether she was heading much more to the southward, as several of her witnesses state. On this point my judgment is that the weight of evidence shows that about the time of the collision the steamer was not heading more to the southward than south-east, and probably somewhat less than that.

Repeated consideration of the testimony and of all the circumstances, which are somewhat peculiar, has satisfied me that the steamer must be held solely to blame for this collision. She was not in the situation of a steamer visibly at rest; she had control of her own movements. She was under some embarrassment, it is true, in not having sufficient width of channel-way to turn around in, without backing and filling. The channel, however, was altogether nearly a mile and a half broad, and the steamer had over half a mile of unobstructed space to the eastward of her, in which she could maneuver by going forward and back, as might be necessary. She was in charge of a pilot who was familiar with the bay; she had the choice of her own maneuvers, and exercised her choice, giving a signal which meant that she would go to starboard. Neither the tug nor the bark did anything to thwart her moving to starboard, in accordance with this signal. On the contrary, they both did what under the inspector's rules was proper for them to do, if not strictly obligatory, namely, they ported and moved to the westward as far as the presence of other vessels coming up would admit. As the steamer, according to her own testimony, was moving astern under a slow engine, at the time she gave her first signal, she had the tug upon her own starboard hand, having reference to her own line of motion; and, in that respect, would be bound to keep out of the way of the tug under statutory rule 19. But, without regard to this circumstance, considering the fact that the pilot of the tug understood the circumstances of the steamer,—that she had been stopped at quarantine, and was endeavoring to turn around so as to go up the bay,—it would have been a manifest and gross error of the tug, after the steamer's signal of one whistle, to have starboarded her wheel and attempted to go to port. That would apparently have tended directly to embarrass and thwart the steamer's movement out of the way to starboard, despite her signal that she was herself going to the eastward.

The evidence satisfies me clearly that the real cause of the collision was miscalculation on the part of the pilot of the steamer, either as to the amount of stern-way that she had acquired, or as regards the time it would take her engines, when put full speed ahead, to overcome her stern-way. The pilot states that as soon as he gave his first whistle the engines then backing were ordered to be stopped, and that they were put full speed ahead almost immediately afterwards: that is, as soon as he could walk some 20 feet to the place of the indicator and give the order. Several of the steamer's witnesses also say that the steamer's stern-way was stopped at the time of the collision,

and that she had not moved astern more than half a length after her first signal. Numerous other witnesses estimate that she went astern at least two or three lengths. Other evidence shows that the steamer's testimony on this point cannot be accepted as accurate. The engineer and the pilot do not agree that the order "full speed ahead" was given at once after the order to stop backing. The engineer says that under the previous order of half speed astern, the engines had been going astern some two or three minutes, as near as he can remember; that it was about the same length of time between the order to stop and the order to go full speed ahead; that under the last order the engines had been going ahead a very short time—about a minute and a half; and that they had been stopped again some 10 or 20 seconds at the time of the collision.

It is not probable that these estimates of time are accurate, but the proportions of the different intervals may be nearly correct. They indicate that the order "full speed ahead" was not given at once after the order to stop backing. And the quarter-master, to some extent, confirms the engineer, and the above conclusions. As the tug and bark were making about six knots, the time between the first signal and the collision was probably about two minutes only. But there can be no doubt that the steamer did make considerable stern-way between her first signal and the collision; for the weight of evidence is clearly to the effect that when the first signals were exchanged, and when the tug was some 400 yards away, the steamer was from one to two points on the tug's port bow, and, though the tug and bark both ported, the steamer ran back astern so far as to come between the tug and bark before the collision. It is not at all probable that this would have happened had the steamer, when the first signal was given, been going almost "imperceptibly astern," as the answer alleges; nor would it have happened if the engines had been put full speed ahead for nearly the whole interval of two minutes. Besides this, the answer alleges that "the Galileo's first whistle was given when the tug was about 300 yards away; and, when the tug was about 150 yards away, the latter blew several short, sharp whistles, and was seen by those on board the Galileo to fall off about a point to starboard; *thereupon the engines of the Galileo were put ahead, her helm being still hard a-port.*" From this allegation, which, in the diversity of evidence, must be held of great weight, agreeing, as it does, with the other probabilities of the case, it must be held that the steamer delayed considerably in putting her engines full speed ahead, and that this order was not given until the tug had covered half the distance that was between them when the first signals were given. The steamer's delay in acting upon her own signal was plainly at her own risk. There is no excuse for the steamer's not checking her stern-way at once. There was no necessity for her to continue to go astern after her signal was given that she would go to starboard. No explanation is offered for the delay. The pilot denies that there was

any delay. But the proof is to the contrary, and I cannot imagine any other cause of this delay than misjudgment by the pilot as to the time required to get headway on the steamer. So far as I can see, the collision must be ascribed solely to his want of promptness in going ahead, and to his negligence in not reversing his engines at once, so as to proceed ahead to starboard in accordance with his own signal. This was the direct cause of the collision, and for this the steamer is answerable.

2. The arguments of the able counsel for the steamer have not satisfied me that any fault can be justly ascribed to the tug or to the bark. The weight of evidence is that their course, as they came down the bay, lay a little to the westward of the steamer, and that they had the latter when a quarter or a half a mile off one or two points on their port hand. Though they understood that the steamer had been stopping at quarantine, and was turning around to come up the bay, there was no reason to suppose that the steamer, having the whole easterly half of the channel unobstructed, over a half mile in width, would back so far to the westward as to cross the line of the tug's course, and thus interfere with them. The signal of one whistle given by the steamer was, under the circumstances, a positive agreement that she would not do so, but would go ahead to the eastward. The tug immediately replied with an assenting signal, and ported, as did the bark also; and that, so far, was their whole duty. Had the steamer gone ahead at once, as she in effect promised, no collision would have occurred. When, after this, the steamer was seen to be still going astern, several blasts by the tug were given as cautionary signals. The reply of one whistle again given by the steamer was a renewed assurance that she would go to the eastward, and was equivalent to saying that she could take care of herself.

Under the circumstances it is clear that there was no misunderstanding by the two pilots in regard to the course or the intention of the other, so as to make rule 3 of the inspector's rules applicable. The pilot of the tug could not tell, and could not judge with any certainty, how long the steamer could safely back, or how quickly she could, on reversal, stop her stern-way and get headway. He had a right to rely upon her repeated signals, and upon her reversing in time to stop before reaching the line of his course. He went as far to the westward as the presence of the Cyclops and her tow would permit. The only remaining thing that he could have done was to slow. But it is clear that he had no reason at first to slow, because his course at that time lay astern of the steamer, and there was no reason to suppose that the steamer would not go ahead in accordance with her own signal. When this signal was given there was, in my judgment, plenty of time and opportunity for the steamer to have proceeded ahead, entirely out of the way, in accordance with her signal. In that situation, with the steamer bearing to the eastward, and with the signal from her that she would move off to the eastward, and the

tug's course at that time lying astern of the steamer, there was not at that time, apparently, any risk of collision, and the twenty-first rule, requiring the tug to slow, was not applicable. *The Free State*, 91 U. S. 200. Afterwards, when the tug gave several blasts of her whistles, as a cautionary signal to the steamer, because she was seen to be still moving astern, when the tug was, probably, not more than 500 or 600 feet distant, and the bark some 350 feet farther off, there must be deemed to have arisen a case contemplated by the twenty-first rule of the statute, section 4233. There was then risk of collision from the nearer approach of the two steamers, and the fact that the steamer's stern-way was not yet checked. Rule 21 made it the duty of the tug in this case to slacken her speed, or, if necessary, stop and reverse. In not observing this rule, but in keeping on at full speed instead, the burden of proof is upon the tug, in order to clear herself from fault, to satisfy the court beyond reasonable doubt that at the time when this risk of collision was first apparent, slackening speed or stopping would have made no difference.

I think the circumstances afford a complete justification of the tug in this instance, and that she has sustained the burden of proof that is upon her in this respect. Having the bark upon a hawser, she could not control her movements as she could have done if the bark had been lashed alongside. The bark had all her lower sails set; the breeze was fresh from the westward, and the tug's power contributed probably less than the bark's sails to her forward motion. The tug could not safely back and let her hawser drift loose in the tide; she would thereby have lost all control over the bark; and if backing had been necessary she would have been obliged to cast off the hawser at once. The two vessels could not properly proceed together unless the hawser was kept taut. No slackening of speed or stopping and backing by the tug, as the result shows, would have been sufficient to enable the bark to go astern of the steamer. Nothing that the bark could do, short of casting off considerably earlier than was done, and going to the eastward under a starboard wheel, and under sail alone, would have avoided this collision. Could the tug or the bark have foreseen that the steamer would be so tardy in checking her stern-way, this might doubtless have been done. But that course would have been directly opposite to the express indications of the steamer's repeated signals, and obviously at the risk of those who attempted it. Neither the bark nor the tug could foresee or anticipate such delay in the steamer's checking her stern-way. So long as avoidance of the collision by any effort of the tug or the bark was possible, there was not a moment when they had not a right to expect that the steamer's signal would be effectually observed on her own part. To hold the bark or the tug responsible for not having cast off the hawser, and for not proceeding to the eastward under sail alone, contrary to the indications of the steamer's whistles, would be imposing upon them a most uncommon and unreasonable requirement, in the uncer-

tainties of the situation as it actually existed, and as it appeared at the time. When a vessel is clearly chargeable with the primary fault leading to a collision, she cannot make the other vessel answerable as for contributory negligence merely because the latter could not foresee the extent to which such fault would be continued; or because she did not take extraordinary means to avoid its consequences. The tug was bound only to the use of ordinary nautical skill; and she had a right to rely upon the steamer's observing her own signals. *The City of Hartford*, 11 Blatchf. 72.

In this case I think the tug and bark were not deficient in either ordinary skill or judgment, and that the steamer alone was in fault. In the first case the libellant is entitled to judgment, with costs against the *Galileo*; as against the *Edgar Baxter* the libel is dismissed; and in the second the libel is dismissed, with costs.

THE JOHN W. CANNON.¹

MCCAN and another v. THE JOHN W. CANNON, (D. C. McCAN & SON, Intervenor.)¹

(Circuit Court, E. D. Louisiana. June 13, 1885.)

1. PROMISSORY NOTES—MORTGAGE OF VESSEL.

Holders of a promissory note taken by them long after maturity, take it subject to all equities existing between the original parties; and, when the note was dishonored long prior to the date of sale of the vessel (upon which it was secured by mortgage) to the claimants, so far as the mortgage right is concerned no agreements or conduct between the original parties, subsequent to the sale, can bind the claimants.

2. PLEDGE—CIVIL CODE LA. ART. 3142.

By article 3142 of the Civil Code of Louisiana, a debtor may give in pledge whatever belongs to him, but cannot pledge any further right than he has himself; but article 3145 of the same Code permits a person to pledge the property of another with the express or tacit consent of the owner.

Admiralty Appeal.

John D. Rouse and William Grant, for libellants and intervenors.

John H. Kennard, W. W. Howe, and S. S. Prentiss, for claimants.

PARDEE, J. The original libel in this case is for \$1,787.93 for repairs and supplies, and is not contested. The intervening libel is to recover the amount of a certain promissory note made by John W. Cannon on the eighteenth of November, 1879, for the sum of \$2,500, payable to the order of said John W. Cannon, six months after the date thereof, with 8 per cent. per annum interest from maturity until paid; the same being indorsed and delivered in blank, and secured by mortgage on the steam-boat *John W Cannon*.

¹ Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

Intervenors allege that said note was duly transferred to them for value; that they are subrogated in law to the mortgage security; and that the note remains unpaid in principal and interest.

The answer to the intervention admits the making of the note and mortgage, but denies the consideration, the recording, the transferring for value to intervenor, and the subrogation. The answer avers the purchase by claimant from the late John W. Cannon of said steam-boat John W. Cannon, on the first day of October, 1881, and the due enrollment of the bill of sale at the home port of the vessel; that the note sued on is one of a series of notes secured by mortgage made by the late John W. Cannon in November, 1879, and delivered to George Moorman, an employee, for the sole purpose of raising money for the use of the boats mortgaged, and of securing the obligations of said Cannon in his steam-boat business; that said Moorman had the custody of said notes as such employe for use as aforesaid; that the recital of indebtedness in the mortgage was purely formal, according to custom in Louisiana; that in fact said Cannon owed said Moorman nothing; that said Moorman gave to said Cannon, December 23, 1879, a counter-letter stating the facts, and that he (Moorman) had advanced nothing on said notes, but only held them as collateral; that after the maturity of the note sued on, in the year 1882, Moorman had, without authority, given the note to intervenors to secure a personal debt of his own, not inuring to the benefit of Cannon nor the mortgaged boat; that the intervenors had knowledge of the facts; that the note sued on had been issued by said Cannon, and afterwards taken up and extinguished, and that the claimant has a right to plead all equities against said mortgage claim.

The undisputed facts in the case are that in the fall of 1879 John W. Cannon was the owner of the steam-boat Cannon, and at least seven-eighths owner of the steam-boat Lee, and was engaged in running them both in the carrying trade on the Mississippi; that on November 1, 1879, Capt. Cannon employed George Moorman for a period of two years as general manager at New Orleans of the said steam-boats, at a salary of \$10,000 per year,—\$5,000 thereof to be paid in cash, and \$5,000 to be paid in an interest to the extent of \$2,500 in each of said steam-boats; that Moorman continued for the two years in the employ of Capt. Cannon, under said contract, and received therefor the amount to be paid in cash, to-wit, \$5,000 per year, and subsequently collected the \$2,500 per year interest in the Lee by transferring mortgage notes on the Lee, held under the same terms and contract as the present note; that on the eighteenth of November 1879, Capt. Cannon executed and delivered to Moorman notes in various sums, due at various dates, to the amount of \$25,000, among which was the present one, and secured \$10,000 of them by mortgage on the Lee, and \$15,000 of them, including the present one, by mortgage on the Cannon, in which latter mortgage Cannon declared that he was justly and truly indebted to Moorman in the full

sum of \$15,000, represented by certain notes, describing them; that the mortgage on the Cannon was duly recorded in New Orleans, November 19, 1879, and in Louisville, Kentucky, June 17, 1881; that December 23, 1879, said Moorman delivered to Capt. Cannon a document or counter-letter in the terms following:

"December 23, 1879.

"The within mortgage notes of \$25,000, given by Capt. Jno. W. Cannon, are simply held by me as collateral for any sum of money he may owe me, and for security for the payment of the paper on which my name is put as drawer, indorser, or acceptor for Capt. Cannon. I have not advanced Cannon any money on the notes; they are only held as stated."

—That October 1, 1881, Capt. Cannon sold the steam-boat Cannon to the claimant, giving deed duly recorded, and possession; that January 28, 1882, George Moorman, for value, gave his note at 90 days for \$2,500, to intervenors, and secured the same by pledge of mortgage note on steamer Cannon for \$2,500, (the one in present suit,) which note of Moorman was afterwards, with same collateral, extended to October 15, 1882; and that Capt. John W. Cannon died April 19, 1882.

The evidence in the case, consisting of letters of Cannon to Moorman, and letters from Moorman to Cannon, accounts from Capt. Cannon's books made up by Moorman, and Moorman's testimony, do not show any indebtedness from Cannon to Moorman, October 1, 1881, or afterwards, that would, under the terms of the counter-letter, show any interest in the said \$2,500 note on the part of Moorman, or any right of his to pledge it or retain it, unless such right and interest existed on account of the indebtedness from Cannon to Moorman for that part of the salary of Moorman which was to be paid by a \$2,500 per year interest in the Cannon.

I take it to be clear that as intervenors took the note in controversy long after it had matured, they took it subject to all equities existing between the original parties; and further, as the note was dishonored long prior to the first of October, 1881, the date of sale to claimant, so far as the mortgage right is concerned, no agreements or conduct between the original parties subsequent to the sale can bind the claimant; so that, if intervenors have any rights on the Cannon, they only have Moorman's rights as they existed on the first day of October, 1881. Indeed, the claimant denies that if Moorman held the note as simple security he had a right to repledge it; relying upon article 3142 of Civil Code of Louisiana, to the effect that a debtor may give in pledge whatever belongs to him, but cannot pledge any further right than he has himself.

On this point it is unnecessary to decide further than to refer to article 3145 of the Civil Code of Louisiana, which permits a person to pledge the property of another with the express or tacit consent of the owner, and to the fact that in the evidence of Moorman it is expressly stated that Capt. Cannon consented to Moorman's right to repledge;

so that if it is found that Moorman had a right to hold the note as security, he had an undisputed right to repledge it, at least to the extent of his interest. The question for decision in the case is then reduced to this: Taking the parties as they stood on October 1, 1881, had Moorman on that day, under his contract with Capt. Cannon, a right to hold, and was he then holding, the present note in pledge to secure the \$2,500 per year interest Cannon was to pay him in the steamer Cannon towards his year's salary as manager? If he then had such right, and was then so holding it, he had the right to repledge to intervenors, who now have the right to enforce payment in this suit, and otherwise the intervenors fail.

From the undisputed facts in the case it would seem that the contract of pledge of the mortgage notes between Capt. Cannon and Moorman was a verbal one. If, however, it is considered as having been reduced to writing in the counter-letter signed by Moorman, and heretofore given in full, then the contract is found to be ambiguous, and not only susceptible of but requiring explanation by evidence and the surrounding circumstances. The expression therein, "any sum of money he may owe me," may relate to an indebtedness accrued, or to an indebtedness to accrue. That it should be construed most favorably to Cannon, on the ground that it was Moorman's negligence that caused the obscurity, may be taken for granted. See article 1958, Civil Code La. Still the ambiguity may be explained by the surrounding circumstances and parol evidence of the parties, so far as obtainable. It does not appear from the evidence that, at the date of the notes, there was any indebtedness from Cannon to Moorman, except the indebtedness that had, up to that date, accrued on account of salary under the peculiar contract recited among the undisputed facts of this case, while there is evidence tending to show that at that time Moorman was indebted to Cannon in the sum of over \$2,000.

The letter itself shows that it was contemplated that indebtedness to accrue on account of Moorman's becoming a drawer, acceptor, or indorser of bills for account of Cannon, was to be secured by the mortgage notes held as collateral, all of which is specifically provided for in the letter; but it is nowhere suggested in the evidence that any other indebtedness from Cannon to Moorman was contemplated, except for moneys advanced, and that arising from unpaid salary. Moorman (called in the case as a witness for claimant) testifies positively that it was the understanding and agreement between him and Capt. Cannon that the mortgage notes were to be held by him to use as might be required as collateral to raise funds for the necessities of the steam-boat business of Capt. Cannon, to secure him in such cases as he might be on the paper of Capt. Cannon, and to secure him the sums that Capt. Cannon had agreed to pay him in an interest in the steam-boats as salary. And Moorman is corroborated by the fact that \$5,000 of the notes on the Lee were used by him in paying his \$5,000 interest in the Lee; and that such use was acqui-

esced in by Capt. Cannon; and by the further fact that, except such provision for paying and securing that part of Moorman's salary as was to be paid in "an interest in" the steam-boats, no provision for payment, nor payment, appears to have been made or contemplated.

On the other hand, it appears that in a diary kept by Moorman of Capt. Cannon's debts, running up to March, 1882, no mention is made of this claimed indebtedness to Moorman, nor of the mortgage notes. Moorman explains this by saying that, as both he and Capt. Cannon understood the condition of affairs between them, no such mention was considered necessary, and it was omitted by Cannon's direction. In two letters written by Moorman to Capt. Cannon on January 4 and 15, 1882, both of about the same purport, in relation to the condition of affairs, and the claims or demands of Moorman against Cannon, and where it would seem Moorman was called on to be explicit, he again uses ambiguous language to describe in what right he held the \$25,000 mortgage notes: "And to secure me for any amount you might owe me for money advanced, or otherwise." These letters were written after the sale of the Cannon, and just before Moorman pledged the present note to intervenors. It is further to be noticed that Moorman's claim that the contract was that he should hold any of the mortgage notes to secure him the payment of the interest to be paid him in the steam-boats, on account of salary, is inconsistent, not only with the fact that nowhere in the letters that he gave Capt. Cannon—which were given to show in what capacity and under what circumstances he held possession of the notes—does he state specifically any such contract, but also with the fact conceded by him—iterated and reiterated in the letters—that he was holding the notes to pledge at any time for the purpose of raising such funds as the necessities of Capt. Cannon's steam-boat business might require.

All these matters bear strongly against the right of Moorman to hold the note as claimed; and yet, after considering all the circumstances, inferences, inconsistencies, and evidence bearing against the intervenors, with a decided bias in that direction, from the nature of the case, I am unable to make them overcome the positive evidence of Moorman, corroborated as he is by circumstances on his side. Were Moorman impeached or flatly contradicted by witnesses, or by any fact in the case, I could find for the claimant; but, unimpeached and uncontradicted by the testimony, and standing before the court (as proctors undisputably declared) as a man of character and good repute, his testimony must give the case to the intervenors. And it is so ordered.

THE MARY ELIZABETH.¹RUSSELL v. THE MARY ELIZABETH.¹JACKSON v. SAME.¹

(Circuit Court, S. D. Alabama. June. 1885.)

PILOT'S LIEN FOR WAGES.

Where a steam-boat is engaged in a regular trade, making short and frequent trips, and a pilot is always necessary, in fact required by the laws of the United States, it is to the interest of the boat and the pilots that contracts shall be made for stated terms of reasonable duration, and as such contracts are lawful, both parties should be bound thereby, and if the boat is bound a lien necessarily results. *The Wanderer*, 20 FED. REP. 655, followed.

Admiralty Appeal.

L. H. Faith and *W. S. McKinstry*, for libelants.

G. W. Duskin, U. S. Atty., for claimants.

PARDEE, J. These suits are brought to enforce a lien on contracts made by the master of said steam-boat *Mary Elizabeth* with the respective libelants to serve as pilots on the said boat for fixed terms of four and six months. Services were rendered under the contracts for over half of the fixed periods, when the owner discharged the libelants, with full payment to the time of discharge. The libelants demand compensation for the balance of the term for which they were respectively hired.

A pilot, being a person employed in the navigation of a vessel, is deemed a seaman, and his claim for wages is within the admiralty jurisdiction. See *Cohen*, Adm. 28, 234; *U. S. v. Thompson*, 1 Sumn. 170.

Pilots employed on steam-boats making regular trips on navigable rivers form a part of the crew. "The master being the person to whom the owners have intrusted the navigation of the ship, and some other powers in relation to it, he has power to make certain contracts, which it is not material here to enumerate, but among which is included that of hiring the other mariners. * * * In general, however, the master is left to hire the seamen at his own discretion, both at home and abroad; and unless the owner interferes, the engagements entered into by the master, within the scope of his agency, bind the owner to a performance." *Curt. Mer. Seam.* 15, 16.

The present cases show that the owner of the *Mary Elizabeth*, contemplating running his boat for the season in the Tom Bigbee river, employed T. J. Butler as master, and authorized and instructed him to employ pilots, and that, in pursuance of such instructions, Butler, as master, contracted with the libelants for the fixed terms aforesaid.

¹ Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

The owner, though frequently present when the Mary Elizabeth was in port, according to his own evidence, made no inquiry as to the length of term for which the pilots were engaged, but paid the wages stipulated until he withdrew the boat from the Tom Bigbee river trade.

Under these circumstances I think it is clear that if there is any doubt as to whether the contracts made by the master with the libelants were within the scope of his agency and authority, and binding on the owners, there can be no doubt that the owner ratified the contract by silence and apparent acquiescence. The agency to contract with the libelants actually existed under the law of the case and the direction of the owner. It was therefore the owner's duty, being present, to have informed himself of the terms and conditions of the contract. Where an agency actually exists, the mere acquiescence of the principal may well give rise to the presumption of an intentional ratification of the act. Story, Ag. (4th Ed.) 256. It would not be equity to allow the principal to stand by and make no inquiries, and then avail himself of the contract made in his behalf, and, after part performance, repudiate the contract as one made without authority.

In the case of Jackson there is evidence to show that the owner and present claimant was fully informed before the rendition of any services of the terms of the contract, and further that he expressly ratified it at a later day; but as the evidence on these points is conflicting, I base my decision on the ground that the owner was silent when he should have spoken. In the case of *The Wanderer*, 20 FED. REP. 655, decided by Circuit Judge Woods, (Justice BRADLEY concurring,) it was said:

"The case made by the libel is an action by a seaman to recover his wages. The libelant had made a contract of service for one year. He performed part of the contract, and was ready and willing to perform the residue, but was prevented by the master of the vessel, who discharged him without cause. He sues to recover the balance due on his salary for the year. If he performed his duty while in the service of the vessel, and was ready and willing to perform it for the residue of his engagement, and was discharged without due cause, and was unjustifiably prevented from completing his contract, his rights are the same as if he had completed it. He is entitled to his wages for the whole year, and was entitled to sue for them on his discharge. He has been paid a part of his wages and sues for the balance. In the case of a contract for an ordinary seaman's wages, the lien should not, perhaps, be extended beyond a single voyage, as that is the usual time for which his engagement is made. But the case of a purser stands somewhat on a different footing. His connection with the vessel is generally more permanent than that of a common seaman. He represents to some extent the owners, and his qualifications are of such a character that a competent purser cannot usually be employed for a single trip. We therefore do not think an engagement of a purser for a year an unreasonable one, and such an engagement we think would be binding on the boat."

The Wanderer is a case directly in point with regard both to the contract and to the lien claimed in the present cases. Where a steam-boat is engaged in a regular trade, making short and frequent

trips, where a pilot is always necessary, in fact required by the laws of the United States, it is to the interest of the boat and the pilots that contracts shall be made for stated terms of reasonable duration, and, as such contracts are lawful, it would seem that both parties should be bound thereby; and if the boat is bound a lien necessarily results. To deny a lien for the enforcement of a contract beyond the voyages actually made, would be, in most instances, to bind one party to the contract, and not the other.

Decrees should be entered in both cases for the libelants.

THE G. F. BROWN.

NEW JERSEY DRY DOCK & TRANSP. CO. *v.* THE G. F. BROWN.

LORD *v.* SAME.

L'HOMMEDIEU *v.* SAME.

HARTFORD & NEW YORK TRANSP. CO. *v.* SAME.

PALMER and another *v.* SAME.

(*District Court, D. Connecticut. March 18, 1885.*)

MARITIME LIENS—PRIORITY OF LIENS—DISTRIBUTION OF FUND IN COURT—WAGES—REPAIRS AND MATERIALS—TOWAGE—SALVAGE.

The J. W. Tucker, 20 FED. REP. 129, *The Grape Shot*, 22 FED. REP. 123, and *The Arctic*, Id. 126, followed as to the priority of the various liens in this case.

In Admiralty.

Wilcox, Adams & Macklin, for the Dry Dock Co. and the Hartford & N. Y. Transp. Co.

N. R. Hart, for George Lord, Jr.

Charles Murray, for L'Hommedieu and Palmer & Duff.

SHIPMAN, J. The proctors in these cases have presented the questions in regard to the apportionment of the fund in court among the lienors upon the facts as they are shown in the libels and the accompanying papers, without any other proofs.

The G. F. Brown appears to have been a small coasting schooner, owned in Connecticut, and making short and frequent trips which could hardly be called voyages. George Lord, Jr., was hired as mate of said vessel for an indefinite time at \$25 per month, and on January 7, 1885, there was due to him, as such mate, for two months and 18 days' services previous thereto, the sum of \$56.15.

In September, 1884, Palmer & Duff, of Greenwich, Connecticut, furnished, at said Greenwich, materials and repairs upon said vessel,

for which \$123.91 are now due, but never, so far as appears from their libel, filed a certificate of lien in any town clerk's office as required by the Connecticut statute in regard to liens upon vessels. Said statute provides as follows: "No such claim" (for materials furnished, or services rendered in the construction or repairs of a vessel) "shall remain a lien on such vessel or its appurtenances more than ten days after the person performing such services, or furnishing such materials, has ceased so to do, unless he shall sign and lodge with the town clerk of the town where such vessel was so constructed or repaired a certificate in writing," describing, among other things, the vessel and the amount claimed as a lien thereon.

On December 6, 1884, while said schooner was lying at Elizabethport, New Jersey, laden with a cargo for Stamford, Connecticut, she was damaged, and was repaired by the Dry Dock & Transportation Company, whose bill for said repairs, wholly unpaid, is \$686.87. On December 27, 1884, and as soon as the repairs were finished, she started for Stamford, and, at the request of her captain, was towed by the steam-tug Ceres from Elizabethport to the bay of New York, for which service \$20 is due to Samuel L'Hommedieu and another, owners of the tug. She then proceeded to Stamford, where she was libeled on December 29, 1884, by the Dry Dock & Transportation Company. Subsequently she was libeled by the various parties before mentioned, and by the Hartford & New York Transportation Company, which claimed salvage, but which makes no claim to the fund in court. Default having been made upon the return of the first process, the amount due to the libellant was ascertained, and the vessel was sold for \$775, a sum less than the debt and costs of the Dry Dock Company. An assigned claim for seaman's wages has also been filed in court.

The questions in the case have been, in substance, the subject of careful consideration by Judge Addison BROWN in *The J. W. Tucker*, 20 FED. REP. 129; *The Grapeshot*, 22 FED. REP. 123, and *The Arctic*, Id. 126, and his conclusions, so far as they relate to the facts in the case, are followed.

Let the fund in court be divided as follows: (1) By the payment of the bill of costs, as taxed, of the Dry Dock & Transportation Company. (2) By the payment to George Lord, Jr., of his wages, \$56.15, and so much of his costs as are disbursements. (3) The remaining part of the fund should be divided *pro rata* between the Dry Dock & Transportation Company, whose bill amounts to \$686.86, and Samuel L'Hommedieu, to whose bill of \$20 so much of the costs as are disbursements should be added.

Palmer & Duff have neither a maritime nor a statutory lien, so far as is disclosed by the papers now in the case. *The Albany*, 4 Dill. 439; *The Arctic*, cited *supra*.

MERCARTNEY v. CRITTENDEN and others.

(Circuit Court, D. California. July 28, 1885.)

EQUITY PRACTICE—DOCKET FEE—REV. ST. § 824—FINAL HEARING.

To constitute "a final hearing in equity or admiralty," within the meaning of section 824, Rev. St., there must be a hearing of the cause on its merits; that is, a submission of it to the court, in such shape as the parties choose to give it, with a view to a determination whether the plaintiff or libellant has made out the case stated by him in his bill or libel, on the ground for the permanent relief which his pleading seeks, on such proof as the parties place before the court, be the case one of *pro confesso* on bill, or libel and answer, or pleadings alone, or pleadings and proofs. *Wooster v. Handy*, 23 FED. REP. 50, followed.

In Equity. Appeal from clerk's taxation of costs.

D. T. Sullivan, for complainant.

J. L. Crittenden, for defendants.

SAWYER, C. J. The bill was filed September 4, 1884. Demurrer filed December 9, 1884. The demurrer having been argued and submitted, it was overruled on March 2, 1885, and leave given to answer upon payment of the usual costs. On April 4th the defendants answered fully to the merits. On May 1, 1885, the court dismissed the bill without prejudice, without looking into it, on the voluntary application of the complainant, the defendants not appearing, and not being present. The question is whether defendants are entitled to the docket fee taxable under section 824, Rev. St. on a "final hearing" in equity. The clerk allowed the item in pursuance as he construed the decision and ruling in the circuit court for the Eastern district of Tennessee in *Goodyear v. Sawyer*, 17 FED. REP. 3. But all the cases, including *Goodyear v. Sawyer*, were fully reviewed by Mr. Justice BLATCHFORD, of the supreme court, on the circuit, in *Wooster v. Handy*, 23 FED. REP. 50; and the ruling in *Goodyear v. Sawyer*, on this point, was overruled. The rule deduced from the cases, and adopted by Mr. Justice BLATCHFORD, "is that to constitute a 'final hearing in equity or admiralty,' within the meaning of section 824, there must be a hearing of the cause on its merits; that is, a submission of it to the court in such shape as the parties choose to give it, with a view to a determination whether the plaintiff or libellant has made out the case stated by him in bill or libel as the ground for the permanent relief which his pleading seeks, on such proofs as the parties place before the court, be the case one of *pro confesso* on bill, or libel and answer, or pleadings alone, or pleadings and proofs. Nor does it detract from the force of this conclusion that what is called an interlocutory decree, as distinguished from a final decree, is often entered as the result of a decision on a final hearing."

I shall adopt this conclusion as better supported by authority, as well as reason, as to the proper construction of the provision of section 824 in question. There was no replication in this case, and it was not at issue. There was no question of law submitted for con-

sideration and determination by the court. The complainant voluntarily, upon *ex parte* application, asked the court for leave to dismiss the bill, and the court granted the order without looking into the pleadings, or deciding any point of law or fact. Had there been a final decree entered upon the ruling on the demurrer, without further pleadings, the hearing on the demurrer might well have been regarded as a "final hearing," contemplated by the act. See *McLean v. Clarke*, 20 Reporter, 36; S. C. 23 FED. REP. 861. But the decree dismissing the bill was not a consequence of the decision on the demurrer. The item of \$20 solicitor's fee, charged on the bill of costs filed by defendants, must therefore be rejected; and it is so ordered.

BOSTWICK v. COVELL.

(Circuit Court, S. D. New York. July 17, 1885.)

EQUITY JURISDICTION—ADEQUATE REMEDY AT LAW—INJUNCTION—REV. ST. § 723.

Injunction to restrain defendant's action at law denied, complainant having a full and adequate defense in that action, within the meaning of Rev. St. § 723.

In Equity.

Chas. C. Beaman, for orator.

Wm. H. Arnoux, for defendant.

WHEELER, J. The defendant's action at law against the orator, the further prosecution of which is sought by this suit in equity to be restrained, is for the recovery of money alleged to be due upon a written contract entered into by these parties. The orator's counterclaim is for money alleged to have been overpaid upon the contract, and for money paid on account of the failure of the defendant to vindicate the patents which were the subject of the contract. Whether the orator has fully paid what is due upon the contract depends upon its legal construction and effect. If he has fully paid, it is inequitable for the defendant to demand more; but that consideration does not make the defense an equitable instead of a legal one. There is no ground of defense which, apparently, a court of law would be prevented by any limitation upon its powers or processes from giving full effect to. The orator appears to have as clear a field to defend himself in on the law side as on the equity side of this court. So of the orator's claims against the defendant. He might, perhaps, maintain this suit against the defendant if necessary to the defense of the suit which the defendant has brought in this court against him in this district, although the defendant is not an inhabitant of, nor found within, this district, otherwise than as he is found bringing his suit within this district. Rev. St. § 738. But his claims arise out of the legal construction and effect of the written contract, which the court

of law, after having construed, can enforce by a judgment in favor of the party to whom anything may be due, in as untrammelled a manner as a court of equity could decree its payment to him. The provision that if the patents are in part valid and in part invalid, "an equitable proportion" of the royalty, to be determined by arbitration in a prescribed mode, is to be paid, does not appear, on account of that form of expression, to involve relief in a court of equity, as distinguished from relief in a court of law, for either party. It seems to mean that a reasonable, just, and fair share of the royalty shall be apportioned to the valid part of the patents in that manner. This provision appears to be as fully within the scope of the powers of a court of law to be dealt with, as that of the powers of a court of equity. The remedy of the orator for the defendant's suit at law appears to be plain, adequate, and complete at law, within the meaning of section 723, Rev. St.

Motion for a preliminary injunction denied.

NORMAN and others v. PEPPER.

(Circuit Court, E. D. Arkansas. July 9, 1885.)

1. MORTGAGE—USURY—ENJOINING FORECLOSURE.

When a mortgage given to secure a usurious contract contains a power of sale, a court of equity will not, at the suit of the maker of the usurious contract, enjoin the foreclosure of the mortgage, by notice and sale, for the amount of the debt and legal interest.

2. SAME—STIPULATION TO SHIP COTTON TO FACTOR TO BE SOLD ON COMMISSION.

A stipulation, in a mortgage given to secure a pre-existing debt, drawing the highest conventional rate of interest, and containing no covenant for advances, that the mortgagor would ship the mortgagee, who was a cotton factor, 700 bales of cotton for sale on commission, and that the mortgagor would pay the mortgagee commissions at the rate of \$1.25 per bale on the 700 bales, whether shipped or not, is without consideration and void; and if the cotton is not shipped the factor cannot charge commissions for selling it.

3. SAME—QUESTION OF USURY NOT DECIDED.

The question whether this stipulation did not render the mortgage usurious is not decided, because its decision one way or the other would not affect the result in this case. The case distinguished from *Cockle v. Flack*, 93 U. S. 346.

4. FACTOR—FRAUD—FORFEITING COMMISSIONS.

A factor who is guilty of fraud in the conduct of his principal's business forfeits all claims to commissions.

In Equity.

Smoot & McRae and *E. C. Mitchell*, for plaintiffs.

Montgomery & Hamby and *B. B. Battle*, for defendant.

CALDWELL, J. This is a bill to enjoin the defendant from foreclosing a mortgage, under a power of sale contained therein, executed by the plaintiffs to secure an indebtedness from them to the defendant, amounting, as the defendant alleges, on the tenth of March, 1883, to

the sum of \$9,972.88. The grounds upon which the injunction is sought are (1) that the notes secured by the mortgage and the mortgage itself are usurious and void; (2) that, as cotton factor for the plaintiffs, the defendant rendered them accounts of sales which were false and fraudulent in respect to the weight, grade, and price of the plaintiffs' cotton, whereby they were defrauded out of large sums of money; (3) that the defendant failed to account for cotton consigned to him for sale; (4) that the defendant sold plaintiffs damaged, spoiled, and inferior goods, whereby their business was greatly damaged, and that he charged them for such goods the full price for sound goods of like character; (5) that the defendant charged the plaintiff with excessive and illegal commissions and interest.

The bill charges various other frauds on the defendant, which need not be particularly mentioned. Assuming, but not deciding, that the notes and mortgage are usurious, the plaintiffs cannot have the relief they seek, viz., a perpetual injunction against its foreclosure by notice and sale, without first paying or tendering the amount of the debt and legal interest. *Pickett v. Merchants' Nat. Bank*, 32 Ark. 346; *Spain v. Hamilton's Adm'r*, 1 Wall. 604; *Anthony v. Lawson*, 34 Ark. 628. But they are entitled to have the accounts purged of all illegal interest, commissions, and charges. On the twentieth of April, 1882, the plaintiff executed the mortgage in question to secure an existing indebtedness of \$9,581.40, evidenced by three promissory notes; and the mortgage contains this provision:

"And whereas, said Norman, Burns & Co. have also covenanted and agreed with said Charles G. Peper to consign to him during the coming cotton season—that is to say, between the date of this conveyance and the same date of the year 1883—at least seven hundred bales of cotton, to be sold by him, said Peper, for account of the said Norman, Burns & Co., from time to time, at the discretion of said Peper, and as he may deem it prudent and proper to make such sales; and whereas, the said Norman, Burns & Co. have also agreed with said Peper, for value received by them, that should they fail to ship and consign to him, during said season, the number of bales of cotton aforesaid, they will pay to him, said Peper, the sum of one dollar and twenty-five cents for every bale of cotton within said number of seven hundred bales which they may fail to ship and consign to him as aforesaid, and which sum of one dollar and twenty-five cents, it is agreed, shall be compensation to him, said Peper, for the commissions which will be lost to him by his not receiving such bales as may be then deficient in the consignment so to be made by said Norman, Burns & Co."

The plaintiffs did not ship the 700 bales of cotton, and the defendant charged them up with commissions at the rate of \$1.25 per bale, amounting to \$875, and now claims the same as a part of the mortgage indebtedness due him. About a year previous to the execution of the mortgage of twentieth of April, 1882, the plaintiffs made an agreement like that contained in the mortgage of 1882, agreeing to ship a given number of bales of cotton to the defendant, and agreeing to pay \$1.25 commissions per bale on the difference between the number of bales they should actually ship and the number they had agreed

to ship. The commissions charged up under the last-named agreement on cotton not shipped or sold, and carried into the mortgage debt, amounted to \$523.75. These charges for commissions for selling cotton which was not sold are clearly illegal. The rule established by the case of *Cockle v. Flack*, 93 U. S. 346, does not apply. In the case at bar there was no agreement for a joint use of capital and personal service of the defendant based on a loan made at the time. The mortgages were given to secure debts previously contracted. There was no agreement for future advances. This existing indebtedness the plaintiffs were to pay, with interest at the rate of 10 per cent. per annum, the maximum conventional rate.

The additional agreement of the plaintiffs, contained in the mortgage and quoted above, to ship the defendant 700 bales of cotton, and to pay commissions at the rate of \$1.25 per bale on every bale of that number not shipped, was without consideration and void. Whether it renders the mortgage usurious is not decided, inasmuch as the decision of that question could not affect the decree to be rendered. Whether the agreement to pay these commissions is void for want of consideration or for usury, the result is the same in this case.

It is proved by two expert accountants, who examined the defendant's books as they stood at the date of the examination, that he received for a portion of the plaintiffs' cotton \$609.60 more than the account of sales rendered by the plaintiff show that he received for the same. In other words, he rendered accounts of sales of a portion of the plaintiffs' cotton showing he had sold it for \$609.60 less than he in fact received for it. The defendant's books, so far as they relate to the plaintiffs' accounts, are not complete. The witness says: "The journal refers specifically to pages 85, 86, and 87, copy-book of accounts of sales for the calculations of the interest and amounts. I find that pages 84 to 92, inclusive, of this copy-book are cleanly cut out, and no examination can be made of them." The information contained in the missing leaves was not contained in any of the other books or papers of the defendant. The experts were unable, therefore, to determine the difference, if any, in the prices for which the remainder of the cotton was sold and the prices at which it was accounted for. The method by which the defendant realized and retained more for the plaintiffs' cotton than he accounted for seems to have been quite systematic and uniform, and to have entered into all the sales of the plaintiffs' cotton, the history of which can be traced on the plaintiffs' books. It is but fair to assume that this uniform method obtained as to the cotton the sales of which cannot be fully traced on account of the mutilation of the defendant's books. On this assumption the plaintiffs are entitled to a credit for \$217.86 for the difference between the price received and the account of sales rendered on the cotton the facts relating to the sales of which were contained in the missing leaves. "Everything is presumed against the despoiler." The depositions of the experts were in the possession or subject to the

inspection of the defendant and his clerk for two weeks before the taking of depositions in St. Louis, the place of their residence, was closed, and one of them was examined, and both might have been, after said depositions were taken, but no attempt was made to explain or contradict the testimony of the experts on the points mentioned.

By his fraud and misconduct as factor for the plaintiffs the defendant has forfeited all claims to any commissions for conducting the business. *Fordyce v. Peper*, 16 FED. REP. 516. The commissions charged over and above those charges for cotton not sold are \$891 for cotton sold, and \$530.59 on purchases. The experts testify that the interest account is excessive in the sum of \$282.13.

Much proof was taken as to the character and quality of goods purchased by the defendant and shipped to plaintiffs. It is undoubtedly true that some of these goods were not merchantable, and that the defendant knew it, and that the plaintiffs suffered some loss by them. But their character and quality were known to the plaintiffs and made a matter of complaint before they gave their notes, and I am not inclined to open up a question of that kind after it has been deliberately settled by the parties with a full knowledge of all the facts. The defendant's claim must be reduced by the following amounts:

Commissions charged for selling cotton not sold,	-	-	\$875 00
“ “ “ “ “ “	-	-	523 75
Commissions for selling cotton,	-	-	891 00
Commissions on purchases,	-	-	530 59
Amounts received for cotton sold and not accounted for, \$609.60	-	-	
and \$217.88,	-	-	827 48
Excess of interest charged in account,	-	-	282 13
			<hr/>
			\$3,929 95

These sums, amounting in the aggregate to \$3,929.95, will be credited on the mortgage debt; the \$875 as of the date it is charged, and the balance as of the fifth of April, 1882, and as to these amounts the injunction will be made perpetual. As to the balance of the mortgage debt the injunction is dissolved. As the defendant's misconduct and fraud compelled the plaintiffs to bring this suit, and they have maintained their bill as to a material part of the relief sought, the defendant will be required to pay all costs.

FARMERS' LOAN & TRUST CO. v. OREGON & C. RY. CO. (No. 1,112.)*(Circuit Court, D. Oregon. August 3, 1885.)***1. "SUBJECT" OF AN ACT AND "MATTER PROPERLY CONNECTED THEREWITH"—TWO-COUNTY MORTGAGE TAX LAW VOID.**

The clause in section 3 of the act of October 26, 1882, (Sess. Laws, 65,) commonly called "The Mortgage Tax Law," which declares that all mortgages or other obligations whereby land in more than one county "is made security for the payment of a debt shall be void," is a "matter properly connected" with the "subject" of the act, and therefore not in contravention of section 20 of article 4 of the constitution of the state; and a mortgage executed by the defendant to plaintiff, as trustee of its road and property in several counties in Oregon, to secure the payment of certain bonds of the same date, in violation thereof, is void and of no effect.

2. CONSTRUCTION OF STATUTE.

A plain provision of a statute cannot be construed so as to exclude a particular case from its operation upon a surmise or conjecture, however probable, that the legislature did not actually contemplate, or consciously intend, its application thereto.

3. INSTALLMENT OF INTEREST, LIEN OF MORTGAGE MAY BE ENFORCED FOR.

When a debt, payable at a future day, with interest payable in the mean time at stated intervals, is secured by mortgage, and default is made in the payment of an installment of such interest, a suit in equity may be maintained to enforce the lien of such mortgage, so far as such installment is concerned, by a sale of so much of the mortgaged property as may be necessary to pay the same; but if such property cannot be sold in parcels without injury to the parties, or one of them, then the court may order the whole of it sold, free from the lien of the mortgage, and apply the proceeds on the whole debt according to its then value.

Suit to Enforce Mortgage Liens.

William B. Gilbert, for plaintiff.

Richard Williams and *James K. Kelly*, for defendant.

DEADY, J. This suit is brought by the Farmers' Loan & Trust Company, a corporation formed under the laws of New York, against the defendant, a corporation formed under the laws of Oregon, to enforce the lien of two certain mortgages on the property of the defendant, by a sale of the same, and to have the proceeds thereof applied on the several bonds secured thereby, according to their priority. The bill was filed on January 29, 1885, and states, among other things, that on June 1, 1881, the defendant executed and delivered to Henry Villard, Horace White, and Charles Edward Betherton, as trustees, a first mortgage on its property, consisting of about 306 miles of road, running through various counties in the Wallamet and Umpqua valleys, together with the rolling stock, land grants, telegraph lines, and everything pertaining thereto, with the franchise to operate the same, and the income and profits thereof, to secure the payment of certain bonds, with the interest thereon, about to be issued by the defendant, at the rate of not more than \$20,000 per mile of its road, then and to be constructed, for the purpose of completing the same to the California line; that said trustees accepted said trust, but thereafter, and from time to time, changes were duly made in said trustees, so that on July 7, 1883, the plaintiff became and now is the sole trustee thereof;

that the defendant issued and disposed of, under said mortgage, and of even date therewith, 9,020 bonds for the sum of \$1,000 each, amounting in all to \$9,020,000, payable on July 1, 1921, with interest at the rate of 6 per centum per annum, payable half yearly, on January and July 1st of each year,—all of which bonds are still outstanding and unpaid; that in and by said mortgage it was, among other things, stipulated and provided as follows: (1) That the defendant will keep its road in good order and repair; (2) that if any interest coupon on any of said bonds shall remain unpaid, after due presentation, for six months, and such default shall not be waived, then the defendant will pay the principal of said bonds; (3) that in case the defendant does not keep its road in good order and repair, or makes default in the payment of any interest coupon for six months, said trustees may take possession of said road and operate the same; and if it is considered necessary to take legal proceedings to "foreclose" said mortgage, or to obtain possession of said "premises," they shall be entitled to a receiver, to be nominated by themselves.

The bill also states that on May 28, 1883, the defendant, having ascertained that the sum of \$20,000 per mile would not be sufficient to complete its road, executed and delivered to the plaintiff, as trustee, a second mortgage upon all its property aforesaid, except so much of the land grant as pertained to the completed portions of the road, and subject only to the lien of the first mortgage aforesaid, to secure the payment of additional bonds, with the interest thereon, about to be issued by the defendant, at the rate of not more than \$10,000 per mile of its road then and to be constructed, for the purpose of completing the same as aforesaid; that the plaintiff accepted said trust, and thereafter, on November 5, 1883, said second mortgage was duly recorded in the office of the county clerk of Multnomah county, and also in the several offices of the county clerks of the other counties in which said property is situate; that the defendant issued and disposed of, under said mortgage, 2,610 of said bonds, dated April 1, 1883, for the sum of \$1,000 each, amounting in all to \$2,610,000, payable on April 1, 1933, with interest at 7 per centum per annum, payable half yearly, on April and October 1 of each year,—all of which bonds are still outstanding and unpaid; that in and by said second mortgage it was stipulated and provided as in said first mortgage, as above stated.

The bill then alleged that the defendant "has failed to keep said road, rolling stock, equipment, and premises in good order and repair, as required by said mortgage," and has failed to pay the interest falling due on the bonds secured by the first mortgage on January 1, 1885, amounting to \$275,000, and on the bonds secured by the second mortgage, on April 1, 1884, and all the interest accruing on either of said bonds since said respective dates; that the defendant is insolvent and wholly unable to pay its debts, and its property is "a very inadequate security" for the payment of the first mortgage

bonds; and that the premises cannot be sold in parcels without great injury to the interests of the beneficiaries in said trusts.

The defendant demurs to the bill, and for cause of demurrer shows: (1) That this suit is prematurely brought, because default in the payment of the coupons on the first mortgage bonds had not been made for six months prior to the filing of the bill herein. (2) The second mortgage is void, because made in violation of the provisions of section 3 of the act of October 20, 1882, commonly called the "Mortgage Tax Law," which provides: "All mortgages, deeds of trust, contracts, or other obligations hereafter executed, whereby land situated in more than one county in this state is made security for the payment of a debt, shall be void."

In answer to the demurrer to the second cause of suit counsel for the plaintiff maintains that the act of 1882, or this provision of it, is void, because in conflict with section 20 of article 4 of the constitution of the state, which declares: "Every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title." The act in question is found at page 64 of the Session Laws for 1882. The subject of the act is the taxation of money loaned on real property, and, as a means to this end, it provides that it shall be assessed as land in the county where the land is situate; and because it would be, or was deemed to be, inconvenient to administer the act in cases where money is loaned on land in two or more counties, it provides that thereafter a mortgage on land in more than one county shall be void; and this purpose is expressly mentioned in the title.

This act has been before the supreme court of this state on two occasions, (*Mumford v. Sewall*, 11 Or. 67, S. C. 4 Pac. Rep. 585, and *Crawford v. Linn Co.* Id. 482, S. C. 5 Pac. Rep. 738,) and in its principal purpose and feature held valid. True, this particular clause has not been considered by the court, but if the legislature has the power to tax money loaned on land in the county where the land lies, and as land, about which there is neither doubt nor question, it certainly has the power to provide, as a means to that end, that a mortgage shall not include land in more than one county, and if it does, it shall be void. Abstractly considered, the legislature has plenary power over the subject, and may prohibit mortgages on land altogether, and even prohibit and make void all contracts for the payment of money at a future day. But an act for such or any other purpose must not embrace more than one subject, nor include matters having no necessary connection therewith. *Cooley*, Const. Lim. 142.

What are "matters properly connected" with the "subject" of an act is a question sometimes difficult to determine. But certainly a provision declaring two-county mortgages void is sufficiently relevant and germane to an act providing for the taxation of money secured by a mortgage on land, particularly when, as a means to that end, such act limits all mortgages on real property to land in one county.

This sanction is a necessary or, at least, a convenient means of securing obedience to the declaration that mortgages shall only include land in one county. And the former is as much a proper matter to be connected with the latter as the provision common in registry acts, that an elder deed, not recorded within the time thereby limited, shall be postponed to a junior one so recorded. The provision is valid; and, tried by it, this mortgage is surely void.

On the argument it was suggested that this class of mortgages is not within the mischief which the law was intended to remedy, and that the legislature could not have consciously intended and actually contemplated including them in its enactment. As a matter of fact this may be so, for it is not likely that the members of the legislature in the passage of this act were moved by any desire to shift the burden of taxation, in the case of a railway mortgage, from the shoulders of the debtor to those of the creditor, as they certainly were in the case of mortgages generally. But I know of no principle of law or rule of construction that authorizes a court to limit or set aside the plain language of an act upon any such surmise or conjecture, however probable. The act declares that "all mortgages, deeds of trust, contracts, or other obligations hereafter executed, whereby land situate in more than one county in this state is made security for the payment of a debt, *shall be void.*" The language of the provision is plain and unambiguous. It speaks for itself, and there is no room for construction. The legislature must be intended to mean what it has plainly said. In such a case the court is not at liberty to look elsewhere than the act for a possible, or even probable, legislative intention. Cooley, Const. Lim. 55.

At the following session of 1885 this act was amended (Sess. Laws, 9) so as to take railway mortgages thereafter executed out of the operation of this clause, which is equivalent to a legislative declaration that it theretofore included them. The mortgage is void, and no right can be asserted under it. The holders of the bonds mentioned therein are simply unsecured creditors of the defendant, without any lien on its property, and must rely on their bonds, and the remedy which the law gives them thereon, to enforce the collection of their demands.

The objection made by the demurrer to the suit on the first mortgage bond is in abatement thereof. The demurrer assumes that the suit is brought to enforce the lien of the mortgage, or foreclose it, as it is inaccurately termed, for the whole debt secured thereby; and as this cannot be done on account of a default in the payment of interest until the lapse of six months thereafter, the demurrer, upon this theory of the case, is well taken. But the plaintiff, in his bill, does not claim that any portion of the debt secured by the mortgage is due, except the installment of interest payable on January 1, 1885, amounting in all to \$270,000. But it also appears from the bill that the property is an inadequate security for the payment of the first mortgage bonds,

and that the mortgaged property cannot be sold in parcels without great injury to the interests of the beneficiaries of the trust.

Where the interest on a debt secured by a mortgage is payable in yearly or half-yearly installments, and the principal at a future period, in the case of the non-payment of any such installment of interest, a suit may be maintained thereon, to so far enforce the lien of the mortgage; and if the sum due is not paid within a time limited by the decree of the court, sufficient of the property may be sold to pay the same. But if the property cannot be sold in parcels without injury to the parties, or one of them, the court may order the whole of it sold, free from the lien of the mortgage, and apply the proceeds on the whole debt, according to its then value. *Brinckerhoff v. Thallhimer*, 2 Johns. Ch. 486; *Meyer v. Graeber*, 19 Kan. 165; *Morgestern v. Klees*, 30 Ill. 422; *Chicago, etc., R. Co. v. Fosdick*, 106 U. S. 67; S. C. 1 Sup. Ct. Rep. 10; *Credit Co. v. Arkansas, etc., R. Co.* 15 FED. REP. 52; Jones, Mortg. §§ 1181, 1459, 1478. This rule of law is recognized by the Oregon Code of Civil Procedure concerning the enforcement or foreclosure of the lien of a mortgage. Section 417 provides:

"When a suit is commenced to foreclose a lien, by which a debt is secured, which debt is payable in installments either of interest or principal, and any of such installments is not then due, the court shall decree a foreclosure of the lien, and may also decree a sale of the property for the satisfaction of the whole of such debt, or so much thereof as may be necessary to satisfy the installment then due, with costs of suit; and in the latter case the decree of foreclosure as to the remainder of the property may be enforced by an order of sale, in whole or in part, whenever default shall be made in the payment of the installments not then due."

And a court of equity, without any such statutory provision, will retain jurisdiction of the case, and work out the same result. In fact, this and similar statutory provisions in other states is merely an affirmance or crystallization of a prior equity practice or procedure. This mortgage was made to secure the payment of the interest coupons, as well as the bonds to which they are attached. Each of such coupons is an installment of the debt secured by the mortgage, and judgment might be obtained thereon for the amount in an action at law; and the right to maintain a suit in equity to enforce the lien of the mortgage, as to such coupon, as soon as it becomes due, is equally clear. Of course, in this suit the allegation in the bill that the defendant has failed to keep the property in "good order and repair" is altogether immaterial. The remedy for such default is not a sale of the property, but to take or obtain possession of it, and put it in repair. Besides, if the matter was material, such a general and indefinite allegation of failure to keep the covenant concerning repairs would avail nothing.

The demurrer to the first cause of suit stated in the bill, and to so much thereof as relates to it, is overruled, and to the second one it is sustained.

FERGUSON and others v. DENT and others.

(Circuit Court, W. D. Tennessee. July 17, 1885.)

1. EQUITY—PRINCIPAL AND AGENT, DEALINGS BETWEEN—INADEQUACY OF PRICE—UNDUE INFLUENCE.

Where the relation of principal and agent existed between the parties to a contract for the sale of land, and it appeared that the price paid was grossly inadequate, a court of equity conclusively presumes undue influence and imposition, and will set aside a sale by the principal to the agent; but there were other circumstances abundantly proving the undue influence and imposition, in this particular case. And, in determining the question of inadequacy, the fact that the debts agreed to be paid, as part of the consideration, were settled for comparatively small sums, were paid almost wholly out of the property conveyed, and that no security for the debts or consideration to be paid the principal was given by the agent, demonstrates the inadequacy, and some undue influence and imposition, particularly when the largest part of the debts were those of the agent himself, for which the principal was only his surety.

2. SAME SUBJECT—ACQUIESCENCE—STALE DEMAND.

Where the agent went into possession under a fraudulent purchase from the principal, with whom he had an understanding that secrecy was to be observed, in aid of their purpose to defraud the creditors, and the contract was withheld from registration, and all the books and papers were kept by the agent, *held*, that there were no laches on the part of the principal or his heirs in bringing suit under the facts of this case.

3. IMMORAL CONTRACT—DIVISION OF FRAUDULENT PROFITS.

If two enter into a scheme to defraud their creditors, by concealing the property of one of them by various contrivances, and afterwards the owner of the property sells his interest to the other, on condition that he shall be paid a certain sum, and protected from the debts, the fraudulent character of the transaction will not avail the vendee as a defense against a bill to set aside the contract, as unconscionable, for inadequacy of price, and fraudulent imposition by undue influence.

4. BANKRUPTCY—ESTOPPEL BY OATH.

Where a bankrupt swore on his schedules that he owned no real estate at the time of filing the petition, neither he nor his heirs are estopped by that oath from asserting their claim to property fraudulently procured by his vendee.

5. SAME SUBJECT—FRAUDULENT PURCHASE FROM A BANKRUPT—EFFECT OF BANKRUPTCY—RIGHT TO FILE BILL.

The heirs at law of a bankrupt may file a bill to recover property fraudulently procured from him, and their recovery will inure to the assignee. But, in this case, the debts having been all settled, with insignificant exceptions, the heirs were allowed to recover for themselves, subject to the right of any creditor to proceed with the bankruptcy, if he should be entitled to do so.

6. INNOCENT PURCHASER—POSSESSION NOT ACCOMPANYING LEGAL TITLE.

If the possession of the land is severed from the legal title, the plea of innocent purchaser cannot be sustained as against the rightful owner. Where one was in possession, under circumstances charging him as trustee for the owner, but the legal title was in another holding for the benefit of the trustee, and not claiming for himself, *held*, that a mortgagee from the holder of the legal title to secure a loan to the trustee was not protected by his plea of innocent purchaser.

The ancestor of the plaintiffs was the owner of a large amount of real estate, estimated by the proof to be worth from \$75,000 to \$100,000. On May 14, 1869, he executed to the ancestor of defendants the following contract:

"EXHIBIT A TO ANSWER.

"This agreement, made this fourteenth day of May, 1869, by and between A. M. Ferguson, of the first part, and H. G. Dent, of the second part, all of the city of Memphis and state of Tennessee, witnesseth, that the said Ferguson, for the purposes and considerations hereinafter set forth, has this day bargained and sold to the said Dent all his right, title, and interest of, in, and to certain lots or parcels of land, situated, lying, and being in the city of Memphis and state of Tennessee, as per schedule thereof hereto annexed, and, for identification, signed by the parties hereto. That for said considerations he binds himself to make conveyance by quitclaim to said Dent, or to whomsoever he may direct, of said several pieces of property, on demand, excepting, however, one piece of property contained in the schedule hereto annexed, situated on the south-east corner of Beale and Hernando streets, to which he agrees to make a warranty deed to James E. Dillard, to whom said Dent has bargained the same for \$8,000, subject to certain judgment liens, which will be expressed on the face of said deed when it shall be executed. The consideration of this agreement is that the property hereby agreed to be conveyed is much incumbered by judgments, decrees, and deeds of trust, taxes, and assessments for grading and paving, to nearly, if not quite, its full value, as also shown in said schedule, and the only interest remaining to said Ferguson in the same is his equity of redemption. For this equity he is willing to take the sum of \$10,000, and allow the purchaser to make the best use he can of the property in paying off said incumbrances and making what he can out of the surplus. The further consideration of this agreement is, therefore, that the said H. G. Dent will pay the said A. M. Ferguson the sum of \$4,000 in cash in hand, and, by the conveyance to be made to James E. Dillard, will secure the payment of the further sum of \$6,000 to said Ferguson, making an aggregate of \$10,000, as agreed upon, and will dispose of the balance of said property to the best advantage to discharge the liens thereon, or otherwise discharge the same, and will have no recourse on said Ferguson in law or equity for any incumbrance or defect of title whatsoever on any of said pieces or parcels of land, but take the same at his own risk; and, inasmuch as the terms, conditions, and considerations of this agreement cannot be properly expressed in the several conveyances desired and contemplated by the parties, this instrument, and the schedule hereto annexed, are made for a more thorough and complete explanation and exposition of the same.

"In testimony whereof, the said A. M. Ferguson and H. G. Dent have hereunto set their hands the day and date first above written.

"A. M. FERGUSON. [Seal.]

"H. G. DENT. [Seal.]

"Attest: W. L. VAN DYKE.

"C. W. FRAZER."

"DESCRIPTION OF THE PROPERTY AND THE INCUMBRANCES THEREON.

"Part lot No. 1, block No. 46, beginning at a point on the south side of Beale street, 110 feet east from Hernando street, running thence eastwardly 166 feet, by a depth of 125 feet, to an alley.

"*Incumbrances on the Above-described Lot.*

"Trust deed, executed January 30, 1868, recorded in book No. 64, pages 406, 407, 408. H. G. Dent and A. M. Ferguson to John M. Carmack, trustee, part of lot No. 1, block No. (46) forty-six, beginning at a point on the south side of Beale street, 142 feet west of De Soto street, running thence westwardly 150 feet, by a depth of 125 feet, to an alley. Trust made to secure the payment of \$18,750 to Cochran & Co., Pettus & Co., Leonard Schoolfield & Co., and others.

"Trust deed, executed April 25, 1868, recorded in book No. 68, pages 355

and 356. A. M. Ferguson to W. H. Ennis, trustee, part of lot No. 1, block No. 46, beginning at a point on the south side of Beale street, 110 feet east from Hernando street, running thence eastwardly 40 feet, by a depth of 125 feet, to an alley. Trust made to secure the payment of \$2,111.75 to one Thomas Ford.

"Judgment in the circuit court of Shelby county, *E. McDevitt et al. v. A. M. Ferguson et al.*, rendered against defendants, June 13, 1860, for \$300.75, and April 2, 1861, for \$413.14, and costs; levied on and sold on the twenty-seventh day of April, 1869, part of lot No. 1, block 46, beginning at a stake on the south line of Beale street, 150 feet east from Hernando street, thence east with the south line of Beale street 126 feet, by a depth of 125 feet, to an alley.

"*Henry Laird v. R. B. Miller, Joseph Pinn, and A. M. Ferguson*, judgment of condemnation, June 29, 1868, for \$492.31, and costs; levied on and sold on the eighteenth day of September, 1868.

"Part of lot No. 1, in block 46, beginning at a point on the south side of Beale street, 110 feet east from Hernando street, running thence eastwardly 40 feet, by a depth of 125 feet, to an alley; part of lot 1, in block 46, beginning at the intersection of Hernando street with the south side of Beale street, running thence eastwardly 70 feet, by a depth of 65.

"Incumbrances on the Above-described Lot.

"Judgment in the law court of Memphis, *Thomas B. Wilkerson v. R. B. Miller, Joseph Pinn, and A. M. Ferguson*, rendered against defendants, October 20, 1868, for \$519.50 and costs; levied on.

"Part of lot No. 1, block No. 46, beginning at a point on the south side of Beale street, 60 feet east from Hernando street, running thence eastwardly 10 feet, by a depth of 125 feet. Part of lot 1, in block 46, beginning at a point on the east side of De Soto street, 135 feet south from Beale street, running thence southwardly 107 feet, by a depth 209 feet.

"Incumbrance on the Above-described Lot.

"Trust deed, executed March 11, 1862, recorded in book No. 53, part first, pages 488, 489, and 490. A. M. Ferguson to Samuel Coward, trustee, part of lot No. 1, block 46, beginning at a point on the west side of De Soto street, 135 feet south from Beale street, running thence southwardly 107 feet, by a depth of 209 feet. Trust made to secure payment of \$3,000 to one William Coward. Trust deed executed February 22, 1868, recorded in book No. 64, pages 473 and 474. A. M. Ferguson to Eugene Mageveny, trustee.

"Part of lot No. 1, block 46, beginning at a point on the west side of De Soto street, 135 feet south from Beale street, running thence southwardly 30 feet, by a depth of 150 feet. Trust made to secure the payment of \$1,600 to one Patrick O'Toole.

"Trust deed, executed August 10, 1868, recorded in book No. 67, pages 562 and 563. A. M. Ferguson to W. L. Van Dyke, trustee, part lot No. 1, block 46, beginning at a point on the west side of De Soto street, 135 feet south from Beale street, running thence southwardly 107 feet, by a depth of 209 feet. Trust made to secure the payment of \$1,059.30 to one William Crook.

"Lot No. 2, in block No. 25, beginning at a point on the south side of Beale street, 50 feet east from Shelby street, running thence eastwardly 50 feet, by a depth of 110 feet.

"Incumbrances on the Above-described Lot.

"Judgment in the chancery court of Memphis rendered vs. H. G. Dent and A. M. Ferguson, March 19, 1868, for \$7,306.62 and costs, levied on and sold on the eighteenth of September, 1868. Lot No. 2, block No. 25, beginning at a point on the south side of Beale street, 50 feet east from Shelby street, running thence eastwardly 50 feet, by a depth of 100 feet.

"Part of lot No. 3, block 25, beginning at a point on the south side of Beale street, 100 feet east from Shelby street, running thence eastwardly 34 feet, by a depth of 120 feet.

"W. B. Greenlaw & Bro. retain lien on part of lot No. 3, block 25, for \$3,400 purchase money, which is still unpaid, together with the interest thereon.

"Part of lot 2, in block No. 51, beginning at a point on the east side of De Soto street, adjoining the south line of engine-house lot, running thence southwardly 10 feet, by a depth of 150 feet.

"Part of lot 2, block No. 51, beginning at a point 150 feet from the east side of De Soto street, and at the north-east corner of the engine-house lot, running thence eastwardly 98 feet, by a depth of 104 feet, on a parallel line with De Soto street.

"Part of lot No. 3, in block No. 51, beginning at a point 150 feet from the east side of De Soto street, and at the south line of lot No. 2, running thence southwardly 60 feet, by a depth of 150 feet.

"Part of lot No. 3, in block No. 51, beginning at a point 200 feet from the east side of De Soto street, and 60 feet south from the south line of lot No. 2, running thence southwardly 40 feet, by a depth of 100 feet.

"Incumbrances on the Above-described Lot.

"Trust deed, executed February 24, 1869, recorded in book No. 70, pages 434 and 435. A. M. Ferguson to W. D. Beard, part of lot, in block No. 62, beginning at a point 120 feet from the east side of De Soto street, and on the south line of an alley, running thence eastwardly 28 feet, by a depth of 160 feet. Trust made to secure the payment of \$660.25 to one Eliza S. Valentine.

State and county tax,	-	-	-	\$1,350 00
City tax, forty-first corporate year, ending January 1, 1869,	-	-	-	1,352 34
Assessment for Nicholson pavement,	-	-	-	6,998 04

"A. M. FERGUSON.	[Seal.]
"H. G. DENT."	[Seal.]

Subsequently the following papers, relating to the contract, also passed between the parties:

"Whereas, on the fourteenth of May, 1869, H. G. Dent and A. M. Ferguson entered into an agreement of purchase and sale, by which said Dent purchased the equity of said Ferguson in all his real estate in Shelby county for the sum of \$10,000, \$4,000 of which was to be paid in cash and \$6,000 in notes; now, the said Dent, having handed over said notes, but not being able to pay said cash, has this day instructed deeds to be made to W. L. Van Dyke of real estate, and has placed in the hands of said Van Dyke, to be held by said Van Dyke by way of security for the payment of said \$4,000,—\$2,600 to be paid on or before the first day of November, 1869,—and has authorized the said Van Dyke, in case he does not so pay, to sell said real estate or collateral, or so much thereof as will realize said several sums as herein agreed to be paid; and the said Ferguson has this day executed a power of attorney to said Van Dyke, in which he authorizes him to make quitclaim deeds to any of the

property described in said agreement of the fourteenth of May, when called on so to do by said Dent; and has also acknowledged the receipt of said sum of \$4,000, which sum has not been paid, and it is understood that the proceeds of any of said property which the said Dent may sell are to be at once paid over to said Van Dyke, as agent of said Ferguson, until the said sum of \$4,000 shall have been fully paid up, when the said Dent is to have all of said Ferguson's interest in said property, and in no case is the said Van Dyke to make deeds as authorized, unless, as before stated, for the benefit of said Ferguson, until said \$4,000 shall have been paid; the said sum to be paid, with interest at the rate of 6 per cent. per annum. Upon the payment of said \$10,000 it is understood and agreed that the same shall be a full and final settlement of all the matters of account and debt, of whatsoever character or date, existing between said Dent and Ferguson.

"Since the foregoing was written, the said Dent has paid said Ferguson the sum of \$1,400 on said debt, the receipt of which is here acknowledged by said Ferguson.

A. M. FERGUSON.

"August 23, 1869.

H. G. DENT.

"Attest: C. W. FRAZER.

"W. L. VAN DYKE,

"Since the foregoing agreement was signed, it has been agreed that said Dent shall execute his promissory note of this date for the said sum of \$2,600, payable to the order of said Dent on the first of November, 1869, and indorsed by said Dent in blank; and it is agreed that the holder of said notes shall have the same rights under said agreement as said Ferguson, and the conditions as to sales and payments, and that said Van Dyke shall regard his wishes in the premises.

"August 24, 1869.

H. G. DENT.

"Whereas, on the fourteenth day of May, 1869, A. M. Ferguson and H. G. Dent entered into articles of agreement of purchase and sale, by which said Dent purchased the equitable interest of said Ferguson in certain property in the city of Memphis and state of Tennessee, as described in schedule annexed to articles of agreement above referred to, and said Dent not being able to pay all the cash as per terms of agreement, afterwards, to-wit, on the twenty-third day of August, 1869, said parties made another agreement in writing, by which said Dent agreed to and did deposit with W. L. Van Dyke the title to two pieces of real estate, situated in the county of Shelby and state of Tennessee, one lot on Elliott street, in block No. 16, in Butler's subdivision, and parts of lots Nos. 9 and 10, Borland's subdivision, to be held by him as collateral to secure the payment of a certain note mentioned in said last agreement, dated August 23, 1869, signed by said Dent, and made payable to his order, and by him indorsed for the sum of \$2,600, due and payable on the — day of November, 1869; and whereas, on the — day of January, 1870, at the request of the undersigned, the said W. L. Van Dyke made and executed a warranty deed to one Ralph Hicks to the lot on Elliot street, in which he acknowledged the receipt of \$2,000: This is therefore to certify that said W. L. Van Dyke did not receive the \$2,000 above referred to in cash, but instead thereof received the transfer and assignment of two certain notes, dated Memphis, July 23, 1859, signed by Orville B. Early and Martha J. Early, payable to order of J. F. Hicks for the sum of \$750 each; the first one payable twelve months after date, the other one payable twenty-four months after date. Said notes were given for the purchase of the following-described lots of land, situated in the city of Memphis and state of Tennessee, being lot No. 3, in block No. 9, in the Butler division of the city of Memphis, and a vendor's lien retained on said lot to secure the payment of the above-described notes, and on the twenty-ninth day of October, 1860, a bill was filed in the chancery court of Memphis by *James Franklin Hicks and his wife,*

Sarah C. Hicks, v. Oreville R. Early and wife, Martha J. Early, to enforce said lien, and the cause is still pending in said court. The above-described notes and vendor's lien are to be held by said W. L. Van Dyke in lieu of the aforementioned collateral security.

"In testimony whereof, I have hereunto set my hand and seal this twenty-eighth day of June, 1870.

H. G. DENT. [Seal.]

"Attest: F. L. SIMS.

"J. D. WOODARD."

The plaintiffs averred in their bill that this contract was never intended to be a real sale of the property, but was only a contrivance to deceive the creditors of both Ferguson and Dent, and protect it from their clutches; that the first of the above documents was in possession of one Van Dyke, a partner of Dent's, to be used for that purpose, if required; and that the others were in Ferguson's possession for the same purpose; or else that the first paper was held by Van Dyke as an *escrow*, to be delivered only on compliance with the terms of sale; that when Van Dyke died Dent fraudulently represented to a woman in charge of his effects that he was, as surviving partner, entitled to his papers, and thus procured possession of this contract and other papers belonging to Ferguson; that, subsequently, when Ferguson died, by like fraudulent representations as to requiring some lumber bills, he procured from colored women, in charge of Ferguson's house, the other documents above mentioned, and additional papers belonging to Ferguson, and that he then set up a claim to the ownership of the property under this contract. The bill further averred that Dent was, and had been for a great many years, the agent of Ferguson in the management of this property, and possessed an undue and controlling influence over him, by which he imposed upon him to sell his property for a grossly inadequate price that had never been paid. The answer denied these allegations, including the agency, and claimed title under the above contract, setting out at length the hopeless condition of Ferguson's affairs and the fairness and justice of this contract as between them, and showing how Dent had protected and saved the property from the creditors. It also set up the acquiescence of Ferguson and the lapse of time before his death as a defense, and that Ferguson had filed his petition in bankruptcy, stating under oath that he did not own any real estate, and relied on that proceeding as an estoppel and as showing an outstanding title in another than the plaintiffs. Frazer claimed to hold the property in his name only for Dent's benefit, except that he was to have it as security for his fees and advances to Dent. He had been the attorney of Dent and Ferguson in the transactions mentioned in the bill.

The Building & Loan Association loaned money to Frazer, taking a mortgage; but the loan was really for the benefit of Dent, who was in actual possession of the premises at the time, claiming them as his own as between him and Frazer. Trezevant claimed to hold under Dillard by deed absolute, but intended to be only a mortgage

to secure his advances and fees. Dillard held under a deed and other claims of title, but solely for the benefit of Dent, who was thus concealing the property in the name of others. There were certain parcels of the property not included in the contract above mentioned, the title to which was held in the name of Buchanan and others, for Dent, and which passed out of Ferguson by a decree of sale under the Mifflerton bill, filed by a creditor to uncover this property, and subject it to his judgment. After decree there was an assignment of the debt to one Walker, for Dent, and then a sale under the decree to Buchanan for Dent, at nominal sums aggregating \$44.

The Logwood transaction was a sale by Logwood & Co. of a stock of dry goods to Dent for \$60,000, in part payment for which Dent executed his notes amounting to \$50,000, on which Ferguson became his indorser. Creditors of Logwood & Co., and of the firm from which Logwood & Co. had purchased these goods, attacked the sale to Dent as fraudulent, attaching both the goods and the notes. Replevy bonds were executed for the goods by Dent, Ferguson becoming his surety on some of the bonds, and signing the others as principal, he being sued as a partner of Dent. The goods were managed and sold by Dent. He and Ferguson executed a mortgage on most of this property and on one lot belonging to Dent, (not a part of the Ferguson property,) to secure \$18,750 to Carmack, trustee for certain of the attaching creditors above mentioned,—an amount agreed to be paid in compromise of their claims. Various parties, mostly Dent's relatives, or those having an understanding with him, purchased under this trust, but Dent became the owner by purchase from them. Ferguson died in 1880, Dent in 1881, and this bill was filed December 10, 1881. The other facts are sufficiently stated in the opinion. The case was heard by the circuit justice, the district judge sitting with him. The record was ordered to be printed, and contains, with the briefs, about 1,000 pages of printed matter, but the opinion can be understood with the above statement of facts.

T. B. Edgington, (Ferguson & Ferguson with him,) for complainants.

C. W. Frazer, G. G. Dent, Poston & Poston, and H. T. Ellett, for defendants.

L. W. Finlay, for defendant Frazer.

Clapp & Beard, for defendant B. & L. Association.

Wright & Folkes, for defendant Trezevant.

MATTHEWS, Justice. In this case I am of opinion, after much careful consideration, that the equity of the case is with the complainants, and that they are entitled to a decree as prayed for, against all the defendants. The defense rests entirely upon the agreement and conveyance of May 14, 1869, between A. M. Ferguson and H. G. Dent, Exhibit A to the answer. In reference to that I assume that the execution and delivery are sufficiently proven. I also assume that the agreement was *bona fide* as respects third persons, cred-

itors of Ferguson, nothing to the contrary being set up as a defense in the pleadings. I find, however, that at and previous to the time of its execution the relation between Ferguson and Dent was of a confidential and fiduciary character, such as to require in such a transaction between them the utmost fairness and good faith, and to forbid Dent's acquiring the title to Ferguson's property except upon terms of a full and adequate consideration, actually paid or perfectly secured. I also find that the transaction in question lacks these essential qualifications to support it. It is unnecessary for me to rehearse in detail the circumstances clearly proven or admitted which require this conclusion. This has been done in the views prepared by Judge HAMMOND, which I have examined and scrutinized, and which I agree with and adopt.

I do not think there is ground for contending that complainants are deprived of their right to relief by laches or lapse of time. I think, on the contrary, they have shown due diligence in the prosecution of their claims. Neither do I attach any importance to the defense of an estoppel, supposed to arise upon the proceedings in bankruptcy on the part of Ferguson. It is not an estoppel, for it lacks mutuality. It is at most but an admission of the validity of the agreement of May 14, 1869, and of no avail to counteract the inference which the law itself draws from the circumstances of its execution. There will be, accordingly, a decree for the complainants, as directed by the district judge, including an order allowing, in the costs to be taxed, the amount of compensation payable for by the master.

MEMORANDUM OF JUDGE HAMMOND'S VIEWS SUBMITTED TO MR. JUSTICE MATTHEWS AT HIS REQUEST.

Dealing at Arm's Length.

Taking the most favorable view possible for the defendants, and their earliest theory to be true, that "these were all legitimate business transactions, both parties treating with each other at arm's length," (Record, p. 19,) and it is doubtful if a court of equity would not rescind, on the combined grounds upon which the case of *Eyre v. Potter*, 15 How. 42, and *Allore v. Jewell*, 94 U. S. 506, were respectively decided, the one in favor of the contract and the other against it. That "unconscionableness or inadequacy which demonstrates some gross imposition or some undue influence, and which shocks the conscience, and amounts in itself to conclusive and decisive evidence of fraud," adverted to by the court in the former case, and which under the circumstances it did not find to exist there, is abundantly proven here. And that mental weakness, not amounting to absolute disqualification to make a contract, but arising from age, sickness, or any other cause,—in this case from the harassment of debts, and an oppressive use of them for selfish purposes by the grantee,—which renders a person easily influenced by others to enter, without independent advice, into unfair contracts, and which induced the court in the latter case to set aside a contract for an inadequate consideration, is substantially proven here.

The very suggestions of fact and argument addressed, through the answers, proof, and briefs of counsel, to us, in support of the contract, were largely presented to Ferguson to induce him to make it. But they are so entirely

fallacious, extravagant, and selfish, so entirely without any adequate benefit to Ferguson for the surrender of his property to Dent, that it is inconceivable how any sane man could accept them; and that he did, is of itself conclusive evidence of weakness of mind and gross imposition, or some undue influence, even if these were not otherwise established by the proof. Those suggestions proceed upon the intolerably self-complacent assumption that it was better for Ferguson that Dent should take his property without paying anything of comparative value for it than that it should go to pay Ferguson's debts, and that it is more fair and just that Dent should have the benefit of his shrewd, cunning, and superb management of the property than that Ferguson should have that benefit upon payment of a fair and reasonable compensation for his services.

I am now speaking of the transaction without reference to any fiduciary or other relation between the parties, but as made "at arm's length," one man with another. Dent says to Ferguson: "You have," we will say, without regard to precision of fact, "one hundred thousand dollars' worth of property, and owe two hundred thousand dollars of debts, which will sweep it out of existence. You cannot extricate it; I can. I am not willing to do this for the ordinary compensation of an agent, however ample that may be, but will give you ten thousand dollars cash, (or its equivalent,) take the property, assume the debts, and rely on whatever I can make, by settling with creditors, for my compensation." To that Ferguson agrees. Now this is the fairest possible statement of the defendants' case, as they would present it; and if Dent had done this,—viz., had appropriated the property to the payment of Ferguson's debts, or had paid them from other means, to such an extent that the amount paid creditors, added to the amount paid Ferguson, constituted a fair price for the property,—there could have been no possible objection to the transaction. And, in determining what was a fair price, the court would not be very particular to scrutinize the amount of profit by limiting it to ordinary, though abundantly ample, compensation, as upon a *quantum meruit* for the work done, but would allow a large margin in the way of speculative profit. But if he succeeded in so manipulating the business as to defeat the creditors altogether, they getting nothing, and he \$100,000 worth of property for \$10,000, would any court of equity sustain the contract on a bill to rescind it? Or would the case be much better if he succeeded in discharging the debts for, let us say, to be liberal in the estimate, \$15,000, so that he got the property for \$25,000? I think not. The inadequacy would be so shocking that the court would say there was some imposition or undue influence; some concealment of hopes, expectations, or facts; some coercion of alarming threats or extravagant prophesy of exaggerated danger impending, sufficient to influence a presumably weak mind, and it would look to the proof for some indication of these things in the facts of the case. Nor would they be wanting here. Dent had been an agent in control of Ferguson's business, although not such (on the theory we are now considering) at the time of the contract. Ferguson was a man somewhat advanced in years, of lower social position than Dent, living and dying in a somewhat degraded life,—“among niggers,” as one of the defendants' counsel expressed it at the bar; a man of little education; away from his kindred; and, so far as this record shows, associating mostly with persons incapable of advising, or, like Van Dyke and Gale and Smith and others, connected with Dent in some capacity. Dent had been connected with him from early youth, possessing his confidence, and for some reason Ferguson had found it necessary to employ him as his agent and manager in full control of his business, manifestly Dent's superiority in management being the main cause; and there was constantly before him the harassing scourge of vexatious indebtedness to insolvency. These undisputed facts, and many others that might be included in the enumeration, go further to establish undue influence, or imposition and weakness of mind, as facts,

aside from any inference of the law from inadequacy itself, than the opinions of any number of witnesses *pro* and *con* as to their existence, with which this record is so unnecessarily burdened.

That the danger from the debts was exaggerated is plain, for the exaggeration is kept up in this record and in the arguments of counsel, and constitutes the only defense in this case against the averment of inadequacy of price. And the fallacy of the position is in assuming that the sole test of the danger from the debts is a relative comparison of their aggregate with the value of the property. As between Ferguson and Dent, on the issues of this case now being examined, that is not the only test, but is really a somewhat subordinate element in determining the extent of the danger from the debts. When the purpose is to save the property from the creditors, no matter how large the debts, or what may be the value of the property, the real danger to be considered was the likelihood of the creditors finding the property; and the probability of escaping them altogether was an essential consideration for the parties. Up to May 14, 1869, Ferguson and Dent, or one of them,—no doubt mainly Dent,—had so successfully and skillfully deluded and eluded the creditors that there was no actual appropriation of any of the property to the satisfaction of debts, in the sense that the creditors had realized anything, and it was substantially intact in the hands of Ferguson.

It is true that there had been some small levies,—like those of Fitzgerald, Wilkerson, Hardin, and Stapleton, some of which were settled, or in process of settlement, and all of which were open to redemption,—and the Miffliton bill had been filed; but these were all so insignificant in amount in comparison with the value of Ferguson's property that the liens were not very serious, as one year's rent, or a little more, would, under proper management, have paid the whole of them. It is also true that the Claflin, Miller, Selby, and Apperson bills had been filed, and were proceeding, but were not in judgment; the Carnack deed of trust had been given; and there were also some other trust deeds for debts which, like the levies, were small compared to the total value of the property, and were therefore not a serious danger. If the property was worth \$100,000,—and here it is to be observed that the estimates of values of property in the proof have been generally confined to the property demanded by the bill, and do not include other property as to the value of which there is little or no proof, while in the estimates of debts there are included obligations secured by such other property,—at the date of the contract Ferguson could have paid every incumbrance mentioned in its schedule, including the Carnack deed of trust, and every one of the above levies or judgments, not included in that schedule, in full, and then had left nearly \$50,000 worth of property, for the debts do not aggregate more than, say, \$55,000.

What danger, then, in these induced him to transfer the property to Dent for \$10,000, and why should he prefer that the property should go to Dent than to the creditors? What advantage was there to him in a transaction that deprived him of, say, \$45,000, and his creditors of \$50,000, or so much as would appear a loss to them; when that amount was reduced by deducting whatever sum they agreed to take as settlement of the claims? The Claflin, Miller, Selby, and Apperson debts would, no doubt, have absorbed the balance above calculated for Ferguson; but the ease with which they were settled under the skillful manipulation of Dent, for insignificant sums, demonstrates how hopeless the situation seemed to the creditors; for the astounding fact in this record is that the creditors did not appropriate all this property to their debts, while in the hands of Ferguson, nor afterwards to Dent's debts while in his hands. That they did not, and were willing to settle for so small figures as they did, shows that they did not know the real facts, and that the concealment was almost perfect. Why did not Ferguson regard it in that light when he was negotiating with Dent for the contract of May 14, 1869?

As long as the situation of concealment which deluded the creditors lasted,

or could be kept up, Ferguson was in no great peril with the property held for his own benefit; and what could have been saved might have been saved for him, and at the worst to him it would only go to creditors, who, no doubt, would have made a better bargain with him than Dent did, and would very gladly have taken the property and left him more than \$10,000. They did make better bargains with Dent himself, and he could just as well have made them for Ferguson's benefit. But the trouble was Dent would not do this, and the real peril to Ferguson was in the loss of Dent's bargains, the abandonment of him to his fate, and his capacity to injure Ferguson by putting the creditors upon his track through a discovery of the real facts to them; or, if not actually thus aiding them, by leaving Ferguson to struggle as best he could with his own hopeless incapacity to manage the business; for he had not the capacity, and the fortune he possessed does not show to the contrary, for it was the product, not of his own skill in business, but of the natural increase in the value of real estate, purchased at an early day, in what afterwards became the heart of a growing city. This peril, no doubt, induced Ferguson to make the contract he did, but it is very certain that a court of equity would treat it as an imposition and an undue influence upon him, even when the parties are dealing "at arm's length." Moreover, this is not all, nor the true situation, still viewing the parties in the ordinary relation of buyer and seller, under no obligation to deal conscientiously with each other. Dent was himself insolvent, and without means to pay an indebtedness quite as large as Ferguson's, and the property was as much in peril in his hands as Ferguson's. He gave Ferguson no security whatever for the performance of his agreement. His assumption of the debts did not amount to anything, for outside of this very property purchased by him he is not shown to have had any means to make such assumption by him of any value. He did not even secure the \$10,000, and it has never been paid to this day. Ferguson acknowledges the payment of \$1,400, but he had previously acknowledged the payment of the \$4,000 cash when it had never been paid. The weight of the evidence, however, is that the \$1,400 was received; but this is all he is satisfactorily proven ever to have received. The \$2,600 secured by deposit of deeds with Van Dyke turned out to be no security, for it was exchanged for worthless notes on Early, collectible only by lawsuit, to enforce a lien, which was lost; and when the trade with Hicks for the Early notes was rescinded the land passed back into the Dents through a brother of Henry G. Dent, to whom they had been assigned for an indebtedness, which is asserted, but not proven in its particulars; and this is done and sought to be sustained upon the strength of a *pro confesso* by Ferguson in a bill asserting that the \$2,600 due him had been paid.

This is not satisfactory proof under the circumstances of this case, showing that Dent used and claimed, and now claims, under the contract, the right to use Ferguson's name in all lawsuits and other matters necessary to carry out the purposes of that contract. Besides, he was there sued only as administrator, and the parties are not the same (Thomas H. Dent being plaintiff in that case) as here, and, technically, the *pro confesso* does not bind plaintiffs in this suit, as it would not have bound Ferguson. The \$6,000 notes of Dillard were in no way secured. Dillard's name added nothing to Dent's obligation, and neither was of any pecuniary value. The provision that Ferguson would not make deeds until the contract was complied with by Dent was, as a security, of no value; it could not displace the liens of creditors already attached, nor any to be subsequently acquired, and, as against Ferguson's creditors, would have been of no avail. Besides, a subsequent agreement permitted Van Dyke to make the deeds, and there seems to be no reason for this, unless he would be more compliant to Dent than Ferguson, which the record shows from their relation to have been altogether probable, or unless Ferguson was so incapable of managing his affairs that he must have Van Dyke do it for him. If this be so, it is a fact to show how easily he was

liable to imposition and undue influence. Moreover, the instruments containing the contract and the pretended security not being registered, it is possible that the property became subject to the superadded peril of being liable for Dent's debts as well as Ferguson's. Against these perils Ferguson had no security for the \$10,000, certainly none passing from Dent, and his only chance to get that was to save it from the creditors out of the very property conveyed, just as Dent was to save what he could out of the same property for himself. What consideration, then, did Dent pay for Ferguson's property? Absolutely nothing, for he had no other security than the property itself, which was in peril, and this trade added to the peril and nothing to the security. It is manifest that, while in form a contract for the sale of property, it was really a gift of it to Dent, on a promise to save \$10,000 out of it for Ferguson, if the creditors could be circumvented, and no security for the promise except a reliance on the ability of Dent to circumvent the creditors. No man but a lunatic, an idiot, or one in the toils of a stronger man would make such a contract, and a court of equity cannot tolerate it, as the cases already cited show, and they could be multiplied in abundance.

The real contract was one to defraud the creditors of Ferguson and Dent out of this property, and it was calculated that this could be done on a basis of \$10,000 to Ferguson, to be realized out of the property itself, and all the balance to Dent, whatever that might be. But this was an unequal, unconscionable, and unfair division, particularly in view of actual results, in the accomplishment of which Dent has risked nothing but his time and labor. Ferguson has agreed to give too much for Dent's services in that behalf, and it is a gratuitous assumption of the answer "that plaintiff cannot reap the benefit of any fraud on the part of Ferguson with his creditors," and that "he got \$10,000 in good notes and money for his interest in the property involved." The answer says: "He not only concealed this consideration, but aided Dent to conceal his; in other words, good faith was kept between them throughout, and not the best of faith by either with their creditors." Record, 119.

One of the objects of the bill is to prevent the defendants from reaping the lion's share of the benefits of this confessed fraud, and the maxim, *in pari delicto potior est conditio defendantis*, so much invoked by the pleadings, and in argument of counsel, has no application whatever to a case like this. The supreme court has settled that in *Brooks v. Martin*, 2 Wall. 70, where a partnership was made to cheat the soldiers of the Mexican war out of their treasury scrip and bounty lands; and the court set aside an unconscionable sale, for an inadequate price, by one of the partners to the other of his share of the illegal profits. The principle is that where the fraud is executed, and is of a kind that reaches only individuals, and does not involve public policy, the courts will compel the guilty parties to divide the fruits of the fraud fairly. It is frequently applied. *Planters' Bank v. Union Bank*, 16 Wall. 483, 500. And see, also, cases cited *arguendo* in *Brooks v. Martin*, *supra*; *Pfeuffer v. Maltby*, 54 Tex. 454; *Hall v. Richardson*, 22 Hun, N. Y. 444.

Principal and Agent.

I have thus far considered the case on defendant's theory, that on May 14, 1869, the date of the contract Exhibit A, there was no fiduciary relation between the parties. It is not material here to consider whether Dent was afterwards agent for Ferguson or held the property as his own. The point of inquiry is the date of the contract and anterior thereto. Did Dent at that time hold, or had he recently before held, such fiduciary relation to Ferguson as to bring him within the familiar principle that one so situated must, in order to sustain any dealings about the subject-matter of the confidence, show the utmost good faith and a fair and adequate consideration for the contract? The fact that he did occupy such a relation admits of no argument on this record.

He had acquired such full management and control of Ferguson's property and business that he was substantially its master. The very fact that he exercised such full control shows that Ferguson could not have managed without such an agent, and demonstrates some infirmity or incapacity that made the agency necessary. It is the very case for the highest good faith and self-restraint from all temptation to make profit out of speculations with the principal. It is difficult to conceive a state of facts where the power and influence of the agent were greater than Dent had over Ferguson and his property, and on this subject the record speaks plainly enough to discredit as boldness any denial of the fact. And what has been already said shows that if the contract cannot be sustained as between men occupying no fiduciary relation, *a fortiori*, it cannot be under the stricter requirements which the law makes of one who holds such a relation of confidence as the proof shows Dent held towards Ferguson and this property at the time that contract was made.

Not only did he occupy this relation of trust towards Ferguson and the property he bought, but, as to most of the indebtedness so extravagantly paraded as a sufficient embarrassment of Ferguson to make the contract a fair bargain, he either held the absolute relation of principal debtor, in which Ferguson was only his surety, or else was so connected with the making of the debt as bound him, in all fairness, to do the utmost in his power, without compensation, to relieve Ferguson against it.

My analysis of the indebtedness mentioned in the schedule to Exhibit A, conceding that the whole of it affects the property claimed by the bill,—though it does not,—shows this state of facts: Total indebtedness, \$49,379.92. Of this the Nicholson pavement assessment of \$6,998.04 was not an incumbrance or a debt due by Ferguson, and, not having been paid by Dent, it should be deducted in considering the question of adequacy or inadequacy. If anybody was bound to know that the law would so declare, it was Dent, as well as Ferguson, for he was "full agent" in the management of this property. As between them, it should be deducted, which would make the entire indebtedness the sum of

	\$42,321 88
From this should be deducted the Carmack debt, in which Dent was principal debtor, and Ferguson his surety, (as will be shown <i>infra</i> ,)	\$18,750 00
And the Jones decree against Ferguson as Dent's surety on notes given by the latter for land purchased by him at chancery sale, -	7,306 52
	<hr/> 26,056 52
Balance, - - - -	\$16,265 36

This balance represents the total of Ferguson's own indebtedness, disconnected from Dent, and the full extent of his embarrassments, as shown by the incumbrances of the schedule to Exhibit A, upon which the defendants can rely with any show of justice in determining the fairness of the bargain made on May 14, 1869. Going outside the schedule we find the following incumbrances on the property involved in it, in addition to those enumerated therein:

The Stapleton judgment in the United States court on a com-	
promise note for - - - -	\$ 862 83
And the Hardin judgment, aggregating some - -	2,100 00
And the lien of the Miffleton bill, with costs, - -	409 35
	<hr/> \$3,372 18

The two former of these were Dent's own debts, for which Ferguson was surety; the latter was Ferguson's individual debt, which, added to the above

balance of \$16,265.86, increases his indebtedness to \$16,674.71. This, of course, does not include the Claffin, Selby, Miller, or Apperson debts, which will be hereafter treated with the Carmack indebtedness.

It is, however, necessary to somewhat further analyze Ferguson's indebtedness in its relation to the several pieces of property included in Exhibit A,—both those involved in the bill and those not so involved,—and to examine the proof with reference to their respective values. Counsel have strangely neglected to prove these values with any satisfaction, or how the various debts and incumbrances have been disposed of. Both sides seem to have abandoned some of the property to strangers to this record, and to have assumed that proof concerning it was immaterial, but which is important in the view we take of the case. There is, however, enough testimony to enable us reasonably to infer from it sufficient facts to dispose of the case. And, first, we will consider the values: Royster & Co., real-estate agents, estimate its rental value at \$590 per month at the time they certified it; Morrison fixes it at \$400 to \$450 per month when he collected rents, in the life-time of Ferguson and Dent, and Wheatley, the receiver, by actual results, finds the rental value to be \$240 a month. The two former include the Coward property in their estimates; it is not in the bill, and is not, therefore, included by Wheatley. None of them take into account the Greenlaw or ice-house property on Beale street, near Shelby. Hines, a partner of Dent's in the real-estate business at an early day, roughly estimates the property, in 1869, at \$100,000. Ford, who owns land in the same locality, values it, unimproved, at \$100 per front foot on Beale street in 1869. Parker, a real-estate dealer, without claiming to be accurate, puts it at \$75,000 in 1869, and the defendant George G. Dent estimates the property involved in the bill at \$29,500 at the time he testified.

Mr. Wheatley's testimony is more satisfactory than any of the others because given more in detail, but he is so loosely examined that there are some very important omissions. Analyzing his testimony, it gives the following as the value of the property scheduled in Exhibit A, though not all involved in the bill, viz.:

Frontage on Beale street, without improvements, 236 feet at	
\$100, - - - - -	\$23,600
Ferguson Hall improvements, valued at - - - - -	8,000
Improvements on McWilliams' lot, valued at - - - - -	3,500
Improvements on Barbour lot, valued at - - - - -	3,000
Coward lot, without improvements, valued at - - - - -	8,560
Hell's Half Acre, without improvements, valued at - - - - -	1,400
Greenlaw lot, without improvements, valued at - - - - -	6,720
Ten feet next to engine-house on De Soto street, valued at - - - - -	400
Improvements on Hell's Half Acre and Shirt-tail Bend, valued at - - - - -	3,000
	<hr/>
	\$58,180

(By a typographical error this last is printed in the record \$13,000.)

The above does not include the value of the improvements on the Coward property, which the other proof shows to have been considerable, or on the Greenlaw and Jobe lots, as to which there is no testimony, nor does it include the land in Shirt-tail bend, except the ten feet leading to it from De Soto street.

All the witnesses are misled by the fallacious assumption of examining counsel that the incumbrances on the property affect its value, and it is a fallacy running all through this case. What is important to know in an inquiry like this is the actual money value of the property, and then the character and extent of the incumbrances, from which inferences of fact develop themselves; or, if necessary, they may be supplemented by opinions of wit-

nesses. Unsatisfactory as it is, we think it a fair inference, from all the proof, that the property in Exhibit A was worth, May 14, 1869, not less than \$75,000. If, therefore, Dent had paid all Ferguson's own debts, dollar for dollar, and the cash payment stipulated in Exhibit A, the question of adequacy or inadequacy would stand thus:

Total value of property, -	-	-	-	-	\$75,000
Deduct Ferguson's debts, \$16,674, and said cash payment, \$10,000, -	-	-	-	-	26,674

Leaves as Dent's profit, the sum of - - - \$48,326

Or, taking Wheatley's estimate of \$58,180, with all its omissions, as the true value, and the profit made would only be reduced to \$31,506. Neither of these results will stand the test of that good faith in dealing, and that fair price which every agent must prove he has paid to his principal when he buys property from him. But when it is considered that the \$10,000 was not paid, or secured to be paid, according to the contract,—and ability or willingness to *now* pay is wholly immaterial to this inquiry,—and that the incumbrances were not paid or secured to be paid by Dent in any other way than by the appropriation of the property itself to their payment, the case does not stand even that well for the agent who desired to speculate with his principal's property in the business of defeating the creditors of both,—“the strict morality of which respondents say they are advised is not here involved,” (Record, p. 119,) which, if true, estops the defendants from relying upon any immorality in it, by invoking the defense of *in part delicto*.

But let us examine further these incumbrances of Ferguson's own debts, amounting to said sum of -	-	\$16,674 71
Which includes the Coward debt, amounting to \$3,000 00	\$3,000 00	
The O'Toole debt, (No. 2,) amounting to -	1,600 00	
The Crook indebtedness, amounting to -	1,059 30	
And the debt due Greenlaw, amounting to	3,400 00	9,059 30

Which leaves Ferguson's debts on property sued for at \$ 7,615 41

There should also be, of course, a corresponding reduction of the value of the property scheduled in Exhibit A, by deducting therefrom the value of the realty therein not claimed by the bill, and incumbered by the four debts just enumerated.

Taking Wheatley's estimate as above, -	-	\$58,180 00
Deduct the property on Beale St., near Shelby, -	\$6,720	
And the Coward lot on De Soto St., (107 ft.,) -	8,560	15,280 00

Leaves the value of the property claimed by bill, -	-	\$42,900 00
From which take the incumbrances of Ferguson's debts on it, -	-	7,615 41

It leaves, as Dent's profit in the transaction, -	-	\$35,284 59
Or assuming that he paid the \$10,000 according to contract, the profit would be -	-	\$25,284 59

The bill charges that the four debts last named were paid by Ferguson before May 14, 1869, or subsequently, out of the rents and profits. The answers say nothing of the O'Toole \$1,600 debt, and deny all knowledge of the Crook debt. There is no proof as to the payment of any of them, except that the Coward lot has been subjected by bill in chancery to the payment of the incumbrances upon it, by which it passed to Coward, was abandoned by defendants, and is not claimed in this suit. The burden being upon defendants to

show Dent's utmost good faith in dealing with his principal, and that a fair and reasonable price was paid by him for the property, it cannot, on this record, be assumed that he has paid any of these four debts, the first three of which were incumbrances upon the Coward lot, and the last upon the Green-law lot.

There is in the record a suggestion of suspicion that there should be some further elimination in the Ford transaction, (about which there is some confusion of boundaries and a too meager explanation that the trust deed was "closed out,") if the precise facts were known; and also as to the Miller & Pimm judgment incumbrances; for, in Frazer's agreement with Ferguson (Record, p. 675) it is mentioned that Ferguson has paid certain Miller & Pimm security debts, and the fact is that the Miller & Pimm property, which Ferguson held as security, passed first into Frazer and then into Dent; at least, they now enjoy the property. But while the burden is upon the defendants to show fairness, and in the absence of proof all intendments of the law are conclusive against an agent dealing with his principal, these last items have not been eliminated in arriving at the inadequacy just shown. Nor are the O'Toole lot (50x125 feet) at the corner of Beale and De Soto streets, and the lot (60x60 feet) on Hernando street in the rear and south of Ferguson hall included in the foregoing calculations, because, though demanded by the bill, they are not included in Exhibit A.

But inasmuch as there was no reasonable or adequate security passing from Dent to Ferguson for the payment either of the \$10,000 or the incumbrances, and as it was a speculation pure and simple in the property itself and in Dent's ability to save it from creditors, we should test this question of adequacy by actual results rather than by unperformed and unsecured promises of advantage.

The amount of profit as shown above made by Dent is	\$33,884 59
(\$35,284.59 less the \$1,400 actually paid Ferguson.)	
To which must be added the profit of Mifflerton bill,	299 35
(\$409.35 less the \$110.00 actually paid.)	
And the state and county taxes not paid in the sum of	1,350 00
Together with the city taxes for the forty-first corporate year,	1,352 84

Which swells his profit to the sum of - - \$36,886 28

The lien of the Mifflerton bill not having been scheduled in Exhibit A, and the taxes not having been paid by Dent, as we know, since they are now being paid by the receiver,—though one of the defendants testifies that some taxes were paid, but the amounts are not shown nor are the receipts produced,—the foregoing additions are made. This calculation is reached by crediting Dent with the payment of the Ford debt, which the defendants have not shown he paid. It appears in proof that the west three feet of the McWilliams lot were conveyed to Ford, and that between this narrow strip and his 40-foot lot is one of 16 feet front. I infer that Ford's debt was really paid by conveying to him the 19 feet east of his 40-foot lot. Ford says he paid the Laird and McDavitt incumbrances, and the above result is reached by allowing them as paid by Dent. The Ford, McDavitt, and Laird debts, all amounting to \$3,317.95, were, therefore, at most, all of Ferguson's debts that incumbered the 166x125 feet on Beale street, which Dent could have paid under the proof in this record, and leaves only the Carmack incumbrance upon it.

The only incumbrance upon the Ferguson Hall lot was the levy upon the east 10 feet of it of the Wilkerson judgment for \$519.50, in which Ferguson was surety; and while it is allowed Dent in the above amount, the probabilities are that Ferguson paid it in the transaction with Frazer concerning the Miller & Pimm securities. The Hell's Half Acre lot was incumbered by the Vollintine debt of \$660.27, which the bill says Ferguson paid. The answer

denies all knowledge of this, and as there is no proof, it is allowed above as though paid by Dent. The Coward and Greenlaw lots we have eliminated, and the "Shirt-tail Bend" property was unincumbered.

But let us look at this transaction in yet another view of the question of inadequacy. It being, though in form otherwise, a mere contract for speculation in a scheme to so manage Ferguson's property as to save it for both in fair proportions, according to the contribution of each, let us try it by the actual fruits of the venture, but under the law governing the dealings of an agent with his principal. Ferguson, as shown, put into the enterprise his property, worth, at the lowest estimate, over \$58,180, and agreed, as the defendants say in their answers, to do everything he could to further the object in view by allowing the use of his name in all necessary lawsuits, by the making of deeds, etc., and faithfully kept the contract. Dent put in, so far as we can see, only his services and skill in the business, and the success achieved shows that these were valuable. Now, Dent paid in the prosecution of the business the following sums, discarding all considerations growing out of the fact that the bulk of the debts were his own, in which he had involved Ferguson as his surety:

To Claflin, as defendants assert, but do not prove, -	\$ 2,000 00
(And the real amount is otherwise proven to be but \$1,000.)	
To Selby, \$500, and to Selby's lawyers, \$825, making in all -	1,825 00
It does not appear how the Pitser Miller claim was settled, though it was transferred to Fletcher, the surety on the replevin bond, and by him to Dent. By assuming it was settled in the same proportion as the others, the amount would be -	1,500 00
To Apperson, on his claim, the sum of -	500 00
To the claimants on the Carmack trust debts, in all, -	7,100 00
To Stapleton, (Ferguson being Dent's surety in this,) -	862 83
To Hardin, (Ferguson being Dent's surety in this.) -	2,100 00
To Miffleton, through Walker, the sum of -	110 00
To which add Ferguson's own debts, except taxes on the property demanded by the bill and in Exhibit A: the Ford debt, \$2,111.75; McDavitt judgments, \$300.75 and \$413.14; the Laird judgment, \$492.31; Wilkerson debt, \$519.50; and Vollentine, \$660.27, -	4,497 72
Making a grand total of -	\$19,995 55

And here it is to be remarked that Dent, the principal, while under a plain obligation, not only as principal, but also by the contract, Exhibit A, to protect Ferguson, his surety, against these debts, secured his own release from Apperson by coercing Ferguson, through importunity, at least, to consent to Dent's release without releasing himself. Nothing in this record shows more plainly how much Ferguson was under the domination of Dent, and how utterly unable he was to take care of himself, as against Dent, than this undisputed transaction about the Apperson release. It is worth more as evidence than the opinions of all the witnesses in the record.

Taking now the above estimated value of such of the property in Exhibit A as is claimed by the bill, or -	\$42,900 00
And deducting the above sum as paid, or -	19,995 55

And we have a balance of - \$22,904 45

—As the balance of Ferguson's interest when freed from all incumbrances (except unpaid taxes) on the property, May 14, 1869, in Exhibit A, now claimed

by the bill, and this sum represents the profits of the enterprise on this theory, and is certainly the most favorable calculation possible for the defendants on the subject of inadequacy. How would a court of equity divide this sum between these joint adventurers in the speculation of circumventing, not to say defrauding, the creditors who have been the victims, and for his part of which Dent's counsel apologised by saying that he did not wish to pay for the Logwood goods twice, when in fact he has not nearly paid for them even once, and altogether, on our too liberal estimate in his favor, only \$12,425, and all this with Ferguson's property, except the \$2,500 realized out of the Botanico-Medical College lot? But, passing all other considerations, how, as between principal and agent dealing thus, would the court apportion this profit of \$22,904.45? Certainly, Ferguson should have been paid one-half to make it anything like a full and fair deal between them, but we find him taking only \$10,000 in unsecured, unperformed, and to this day violated promises, on which nothing has been realized except a paltry \$1,400. This is not such a contract as an agent may make with his principal; and a court of equity cannot sustain it. To execute it now, if we would, by paying Ferguson the balance and interest after his share, which in all justice should have been paid promptly according to the contract, has been so unjustly withheld all these years, leaving the entire property in the enjoyment of Dent, would be inequitable. But that is not the question. Was it a fair advantage for the agent to take of his principal in a trade with him? I say not; and when it is considered that this agent took advantage of the power and influence he had over this evidently inferior man to involve him in the wild and disastrous speculation of the Logwood transaction (when he should have advised him against it and protected him from it) by inducing him to become his own accommodation surety for an amount nearly the value of his whole estate,—for this was originally his only attitude,—it is, to say the least of it, the boldest demand that was ever made in a court of equity, to ask it to consider the Claffin, Selby, Miller, Apperson, and Carmack debts (either as originally made or as closed out) as an element of calculation in determining the fairness of this division of the profits. The Hardin and Stapleton debts stand on no better footing, and the inadequacy of the division Dent induced Ferguson to make becomes appalling to a court of conscience when we strike these out of this calculation, and show that Ferguson sold his real interest, worth \$42,900, less incumbrances of \$4,613.72, or the sum of \$38,286.28, for \$1,400 cash, and unsecured and yet unexecuted promises to pay \$8,600 additional.

We deem it necessary, however, to treat somewhat more fully the alleged partnership relation between these parties, as the greatest inadequacy we have shown has been in large part reached by discarding the debts arising out of the partnership. The facts are that at the time of the Logwood purchase Ferguson was only a surety on the "Dent & Co." notes and on the Claffin replevy bond. Subsequently he appears as principal on the Miller and Selby replevy bonds, and his attitude does not clearly appear in the Apperson suit, though he seems to have been sued jointly with the other defendants, as a partner, perhaps. Logwood denies in his answer to the Pitser Miller bill that Ferguson was a partner of H. G. Dent & Co., and says he had no connection with the trade except as indorser of the notes. Dent also denies it in his answer, and says Ferguson "has an interest in said house, but that same was acquired long after the said purchase, to-wit, July 1, 1867." Ferguson says that "about July 1, 1867, at the instance of H. G. Dent, he went into the firm and became an equal partner with said Dent therein, hoping to realize something therefrom." Here it is to be noted that, as Dent was manager of Ferguson's business and especially of his litigation, the latter's statements should not be taken too strongly against him, as it was probably more the language of Dent than of Ferguson. Besides, it is a familiar principle that courts, in receiving admissions by pleading, regard the fact that they are couched in the language

of the attorney rather than of the client. Dent does not say Ferguson was a partner, but that "he acquired an interest in said house." Moreover, all the defendants in that case, including Dent, distinctly say: "The purchase was not made with a view of going into and continuing the business of a merchant, but that the same was made by him for the purpose of jobbing said goods off and trading them with other property, the one proving an inducement for the other." Again, Dent says: "This respondent admits that his co-defendant Ferguson is not a merchant, nor did he intend to become one by taking an interest in said goods, but relies upon this respondent for the management and disposition of the same."

Counsel on neither side have undertaken to prove specifically what this contract about the goods between Dent and Ferguson was, and we have no accurate knowledge about it; and, notwithstanding the broad language of Ferguson's answer above quoted, that of Dent implies, under the circumstances, not so much a contract of partnership as one for joint interest in the goods, which may be an entirely different thing. But if they were merchants regularly in business, which is carefully denied, it is a merely gratuitous assumption, in the absence of specific proof, to say that by becoming a partner Ferguson assumed any liability for the previously existing debts of the firm of "H. G. Dent & Co.," even as between the creditors and himself. It was not necessarily so, and in the absence of proof cannot be assumed; and yet that assumption is the main reliance of the defense here in seeking to charge Ferguson as a principal debtor with Dent on these claims, in determining the fairness of their bargain. When the Carmack notes for \$18,500 were given, Ferguson indorsed them as before, and did not become a joint maker, which is another circumstance against the notion of a partnership. Moreover, whatever Ferguson's technical relation to the creditors may have been, as between Dent and Ferguson, on the issues of this case, the former can have no sort of advantage of such relation. The case must be governed by his own attitude towards Ferguson and his own relations to that transaction. Now, by his own confession that Ferguson relied on him for the management and disposition of the goods, Dent brings himself again within the relation of agent to his principal; and it was so decided in *Brooks v. Martin*, 2 Wall. 70, for such was precisely the attitude of the partners in that case and the *gravamen* of the decision. In the first place, therefore, as the general agent and manager of all Ferguson's business, Dent was guilty of a gross breach of trust in selfishly involving his principal in such a disastrous liability as he assumed by indorsing the former's notes and becoming a surety upon the Claflin replevy bond in the ruinous Logwood speculation. In the next place, it was his highest duty, as Ferguson's agent generally, and as the manager of the Logwood goods, to apply them when attached, speedily and entirely to the exoneration of Ferguson; but there is no proof that he did anything of this kind, and the Arkansas lands inferentially supposed to have been purchased with their proceeds, and which belonged to the so-called partners, in some unexplained way passed, like almost everything Ferguson seemed to have owned, into Dent's sole ownership without being used to pay any of these debts.

Both these breaches of trust enter as a potential element into an inquiry as to the fairness of the contract between this agent and his principal, which we are asked to sustain. And, in themselves, the transactions out of which these debts arose show conclusively how completely Ferguson was in the power of Dent, and how readily he could be unduly influenced by him. If Dent could prevail upon Ferguson to do such things, there is no wonder that he could induce him to make the bargain of May 14, 1869.

These so-called partnership debts, I think, should be wholly discarded in this consideration, and the fundamental fallacy of the defense lies in treating them otherwise; or, if not wholly eliminated, they can only serve to show, under the circumstances of their creation, the weakness of Ferguson's mind, his

inability to take care of himself in matters of business, and the legal impossibility of an agent like Dent dealing with him for any advantage of his own, be it great or small. No bargain such a dominating agent could make with so feeble a principal would stand in a court of equity without its being shown beyond all peradventure that it was beneficial to the principal, not only in the nature of the bargain itself, but also in its actual results. These debts certainly cannot be used to magnify Dent's part in the transaction, or dignify his attitude towards it.

The fatal mistake that Dent made, and that counsel here perpetuate, is that, in determining the fairness of Dent's bargain, the evasion of the debts, in whole or in part, so that Ferguson was released from them, is equivalent to payment of them by him in full. He can only be allowed for what he paid; otherwise Ferguson receives no benefit and no consideration for his property. Except to the extent of the actual payments by Dent either to Ferguson or his creditors, and a reasonable compensation to him, there could be no consideration for sale by Ferguson of his property.

Unless there be some other available defense, it is impossible to sustain the fairness of this bargain of May 14, 1869. We refer again to the case of *Brooks v. Martin*, *supra*, to say that in all respects it is in principle a complete precedent for our judgment on this branch of the case, and on its authority alone we must pronounce it. We have only carefully applied the principles and reasoning of that case to this.

Statute of Limitations and Acquiescence.

It is hardly necessary to say that this defense cannot be available. Under more favorable circumstances it did not prevail in *Allore v. Jewell*, 94 U. S. 506. Ferguson was in the toils of Dent. He had no capacity to manage his affairs; certainly none to war against Dent. He did not know enough about his business to understand his rights, and no wonder, for its complications are difficult to unravel even now by counsel and the court, with the aid of this immense record. It does not lie in the mouth of Dent, or those who come after him, to complain that his schemes to cover up this property from creditors and all the world, and appropriate it to himself, were not sooner challenged by a man in Ferguson's situation. His heirs have proceeded as promptly as they could. Dent kept the books, if any were kept, and the evidences of his transactions as agent, and it is his fault if there be any want of proof in this case on behalf of his heirs; it certainly is not Ferguson's.

Ferguson's Bankruptcy.

Without undertaking to decide the issue tendered by the plaintiffs, that Ferguson's bankruptcy was instigated and procured by Dent for the very purposes for which it is now used, as a shield against any possible attack upon his operations, we can have no difficulty in holding that it cannot avail the defendants here. The estoppel, by his oath, so much relied on, does not apply to the circumstances of this case, as we understand the law. *Behr v. Insurance Co.*, 2 Flippin, 692; *Broom*, Leg. Max. 168. It appears plainly enough from this record that Ferguson did not know the true condition of his affairs, and Dent, being his agent, did know it. He was familiar with Ferguson's property, knew it was liable for his debts, and knew of the bankruptcy, and it does not belong to him to stand by and see Ferguson get into that predicament by his oath, and then rely upon it as a defense. If the bankruptcy is to have any effect, it is not in favor of the defendants, but of Ferguson's creditors. The act itself requires the bankrupt to hold the property in trust, and protect it until it can be delivered to an assignee, and if the bankrupt dies before an assignee is appointed the trust passes to his heirs. The plaintiffs here, then, could recover it for the assignee when appointed.

We do not think the case has been discontinued by the abandonment of

Ferguson or the action of the register in returning it marked "discontinued." This could only be done by the formal action of the court. The creditors, never having been notified, cannot be said to have abandoned their interest in the proceeding, and it cannot be discontinued by the bankrupt without notifying them, as they have the right to prosecute it. But, in looking over these bankrupt schedules, there do not appear to be any creditors except those as to whom some suggestion of a settlement of their claims appears in this record through the transactions we have been scrutinizing, and one or two comparatively small claims reaching back to 1861-1865, and presumably barred by statute before the bankruptcy commenced. The others are too insignificant to notice. We have therefore concluded to treat the bankruptcy proceeding as worthless for any purpose in this case, and leave the creditors who are in a condition to prosecute to whatever remedy they may have after the property has been recovered.

Other Property not in Exhibit A.

What we have called the O'Toole lot, (60x125 feet,) at the corner of Beale and De Soto streets, and the small lot (60x60 feet) on Hernando street, south and in the rear of Ferguson Hall, are not included in Exhibit A, and must be separately considered. As to the latter the record is obscure, and there is some confusion in its description and boundaries, and it is sometimes treated as a part of the Ferguson Hall lot. The claim of the defendants to both these lots must, in its ultimate analysis, rest on the lien of and the decree of sale under the Miffliton bill, which was filed to collect a judgment of about \$400 against Ferguson. Its lien, under our law, attached to all the property described in it, and included not only these two lots, but all the property in Exhibit A, and much else besides; the object being to reach all Ferguson's realty in Shelby county. The bill was filed March 29, 1869, about 40 days before Exhibit A was executed, and no doubt alarmed Ferguson and Dent, as it was calculated to disclose to the creditors everything which was concealed. It went to a decree, and all Ferguson's interest in the whole property, including these two lots, was sold to satisfy that small debt. Although the answers were somewhat promptly filed, there was no decree of sale until February 15, 1871, and here the matter rested till March 14, 1873, when the attorney for the plaintiff entered into a contract to transfer the decree to one J. M. Walker for \$25 in cash and \$125 to be paid in 90 days. Walker in this matter was acting for Dent. On this contract there was paid in small sums \$110. Afterwards, on May 3, 1873, the order of sale was renewed, presumably by Dent, who in the name of Walker had become the assignee.

On May 31, 1873, there was a sale of Ferguson's interest in all the property described in the bill, and it was bid off by H. Buchanan, a young man working for Dent, a connection of his, and, like Walker, one of his instrumentalities, for the following sums: All of lot 1, block 46, including these two lots, for \$10, and the other property described in that bill for \$34. On March 9, 1874, the bid on lot 1, block 46, was assigned to Thomas Buchanan, a brother of the other, and an instrumentality of Dent's; title was vested in him March 31, 1874. All this was done for the benefit of Dent. In 1866 Ferguson gave a deed of trust on the (60x125 feet) lot at the corner of Beale and De Soto to secure O'Toole a debt of some \$3,255.12, and the same year Fitzgerald levied an execution upon that and the (60x60 feet) lot on Hernando street, both of which were sold to the execution plaintiff for \$693, and were conveyed to him in 1868 by the sheriff. Soon afterwards Dent redeemed from Fitzgerald, in the name of Dillard, another family connection, and an instrumentality of his in these transactions. Under the O'Toole trust deed the beneficiary became the purchaser at the sale, and went into possession subject to redemption under our laws. Dent, in the name of Buchanan, afterwards filed a bill against Mrs. O'Toole for redemption. The case went to

the supreme court and resulted in charging her with the rents during her possession and applying them to the redemption of the lot from her sale. In this proceeding the plaintiff relied upon Ferguson's title as being superior to that of Dillard, (who was shown to have no title, and only holding for Dent,) claimed under the Mifflerton decree, and had the title vested in him, Dillard's being set aside. This Dillard had become involved as a surety on McLean's bond as tax collector, and was otherwise bankrupt, and no longer a safe depository or stake-holder for Dent, and therefore the above process was resorted to to get the property out of him, as was the bill filed against the sheriff to enjoin a levy of the McLean execution on these two lots as Dillard's property, the title standing in his name. From all this it is plain, in view of the relations existing between Dent and Ferguson, that the agent was guilty of a breach of trust in thus, through the Fitzgerald execution and the O'Toole redemption, possessing himself of his principal's property for an inadequate price, and under circumstances that show its unfairness.

Purchase of the Selby Decree.

The same considerations must prevail to avoid the pretended purchase by Susan R., a sister of Henry G. Dent, of the Selby decree, and her claim to it. It needs no argument to show, on the facts, that Dent was merely acting in her name in the transaction, one circumstance being conclusive. She did not pay the lawyers, who were paid by Dent's widow out of the College lot, nor does she show any payment of her own money to Selby. Like Dillard, Walker, the Buchanans, and the rest, she was only an instrumentality of Dent in these transactions.

The \$4,500 Note.

The defendants produce a note of \$4,500 made by Ferguson, payable to Dent's order, dated March 9, 1873, and due three years after date, with 6 per cent. interest. They know nothing about this note except that they found it among Dent's papers after his death, but assume that it is still a subsisting liability, and seek a twofold use of it: *First*, as a fact tending to show that Ferguson would not have given it had Dent at that time owed him anything, and his acquiescence in and satisfaction with the bargain they had made; *second*, as a set-off. The plaintiffs urge that its real date was 1863, and that Dent having procured it with other papers taken from Van Dyke's papers after his death, or from Ferguson's room after his decease, the defendants have sought to make a fraudulent use of it by changing the date to 1873. This contention is based alone upon the appearance of the paper. It is on a printed form containing the figures 186-, for the year of the date after which is written the figure 3, and upon the printed 6 is written the figure 7. The note has on the back the signature of H. G. Dent in the usual form of a blank indorsement, and there is written over the signature these words: "June 8, 1876, credit, by cash, \$123."

The plaintiffs insist that this figure "7" is of different ink from the "3," which appears dim and rubbed or abraded, while the "7" is fresher, heavier, and in a different hand, and that the credit indorsed shows a more recent writing than its pretended date. We are not satisfied that the figure "7" is in different ink from the "3," notwithstanding the difference in appearance, but there is undoubtedly a great difference between the age of Dent's signature and the indorsed credit. It was evidently simply indorsed in blank at first and this credit afterwards written above the signature, but whether of a later date than it purports we cannot say, though it has a suspicious appearance of more recent writing. We deem this quite immaterial. Upon the undisputed facts of this case the defendants cannot rely upon the bare possession of this note as evidence that it is unpaid, or remains, or ever was, the representative of a liability from Ferguson to Dent as between themselves. In the first place, whether Dent ever got Exhibit A and the two in-

portant exhibits to Smith's deposition from Sallie Horn after Van Dyke's death or not, and whether he got them from among Ferguson's papers after his death or not, and whether he was technically Ferguson's agent and the custodian of his papers after 1869 or not, there is no kind of doubt that Van Dyke was in possession of papers belonging to Ferguson up to his death, and that Dent's relation of partner to Van Dyke was used to induce Sallie Horn to deliver to him some papers after Van Dyke died, nor that he visited Ferguson's home after his death and got other papers from those belonging to Ferguson, and inspected all there were in the place where he kept them.

These circumstances are sufficient to impose upon the defendants the burden of proving something more than the bare fact that they found this note among Dent's papers, before they can use it against Ferguson or the plaintiffs. Moreover, while there is a good deal asserted about mutual indorsements by Dent and Ferguson for each other, no proof is made that Dent ever indorsed for Ferguson, nor ever had any credit to make such accommodation valuable, and no doubt, as appears from this record, neither of them used bankable paper in that way, and not a single transaction through a bank is proven. But it is shown that in the Hardin matter Dent held a note of Ferguson for \$1,500, executed purely for his accommodation, and that two years after it became due he transferred it to Hardin for \$600, according to his story, pledging it as collateral security for a loan of that amount, at the usurious rate of 2 per cent. interest a month, and, according to Hardin's version, selling it outright. They had a lawsuit about it, one of Dent's creditors (plainly at his instigation) filing a bill against Hardin to recover the usury. A judgment was obtained by collusion with Dent, under which Ferguson's property was levied on and sold to Hardin and afterwards redeemed by the Trezevant-Dillard transaction, as before shown. Again, Ferguson, after the Exhibit A transaction, executed, without any pretense of consideration, four notes to Jobe, Dent's brother-in-law, for \$400 each, on which Ferguson was immediately sued and submitted to judgment, and the judgments were used by Dent to transfer Ferguson's property to himself. This is a most remarkable transaction, which defendants do not seek to explain, and only apologize for by saying, in the briefs of their counsel, that Ferguson had agreed to aid Dent in "working out the purchase," and to extend him every facility, and that, being already hopelessly insolvent, these judgments could not hurt him and he could not have expected to pay the notes; and yet they were used, in connection with other transactions, to transfer to Dent the O'Toole lot and the Chelsea property, not conveyed by Exhibit A, and as to which Ferguson was under no such obligation as counsel indicate, in regard to the other property in Exhibit A, and Dent used these Jobe judgments to pick up such of Ferguson's property as was not included in that exhibit. Ferguson's reckless compliance in this, and many other quite as remarkable transactions, shows clearly that after the bargain of May 14, 1869, he continued so completely under the dominion of Dent, and was so incapable of taking care of himself, that no transaction between them can be supported upon the mere technicalities of its appearance. Defendants cannot be allowed to rely on the bare possession of this \$4,500 note.

Frazer's Cross-Bill

Frazer's cross-bill to collect attorney's fees against Dent for services in these numerous lawsuits, upon the theory that he holds the legal title to the property in his name as a surety, cannot be sustained. He does not technically plead innocent purchaser, and it is apparent that his relations to these transactions are such that he could not sustain such a plea. The claim that he has an equity as against the property for protecting it, by his professional services, from Ferguson's creditors and Dent's, cannot avail him in this action. He has no contract for a lien except with Dent, (and for which he has

no judgment or decree,) and Dent had no title. Besides, his services were for the benefit of Dent as against Ferguson, and did the latter no good.

Trezevant's Cross-Bill.

The same may be said of Trezevant's cross-bill for his fee in the Dillard transaction, for which he holds a deed from Dillard as a mortgage. He does not remember the deed he wrote for Ferguson to sign, but which he did not execute. Nevertheless, the existence of the deed in his handwriting, as well as other circumstances not necessary to mention, conclusively fix him with notice, even if he had a technical plea of innocent purchaser, which he has not.

Building and Loan Association Cross-Bill.

This association is in no better attitude than Frazer. It does not sustain its plea of innocent purchaser. Frazer was not in possession, and Dent was as trustee for Ferguson in reality. Lemmon says that Dent was in possession while he and Barbour held, and afterwards continued when the legal title was put in Frazer. The loan was really made in the name of Frazer for Dent, the former being only the go-between. The association should not have relied alone upon the paper title, but gone further and found whether Frazer had actual or constructive possession. Dent did not have the legal title, but only a contract with Ferguson, which was executory; and Ferguson's equity is prior to that of any purchaser from Dent, either directly or through Frazer, who held confessedly for him. *Boone v. Chiles*, 10 Pet. 177. This severance of the legal title and pretended ownership, as evidenced by the possession of the claimant of that ownership, was a suspicious circumstance to invite inquiry and inspection of Dent's title, whereupon its true character would have been developed by a knowledge of the facts upon which it must depend. The trust deed must be canceled, and the sale made under it since this suit was begun set aside, the association having been the purchaser at the sale.

The Proof.

As will be observed, these conclusions have been reached almost exclusively upon the documentary evidence, and such facts in the testimony as cannot reasonably be disputed. It has not been found necessary to consider whether the evidence establishes the plaintiffs' theory, that the exhibits upon which defendants rely were never, in fact, executed by delivery; or, if they were, whether the whole was not a mere contrivance between Ferguson and Dent to protect the former's property from creditors, in the belief of which, and of Dent's good faith, Ferguson lived and died. This latter theory would reasonably account for many remarkable transactions in this marvelous record, which otherwise would place Dent in the attitude of deceiving Ferguson, as well as the creditors, with a scheme of selfish aggrandizement unparalleled in the history of judicial investigation, if the plaintiffs' view of this case be correct. But our judgment is placed on the defendants' own theory, and we find that, on the facts as they present them, not, however, as they look at them, the bargain they set up, and the transactions they rely upon, are unfair and unconscionable, as between persons occupying the relations that had existed between Ferguson and Dent, at and prior to the time they were made.

Account.

As remarked by defendant's counsel, since Ferguson's and Dent's administrators are not parties here, a technical account between them as debtor and creditor is impossible. Still, it would be proper to take an account, if necessary, solely to settle the respective equities of the parties; but, following the precedent of *Allore v. Jewell*, 94 U. S. 506, we do not think an account necessary. It could only proceed, for the purpose indicated of charging defendants with all the rents and profits from the date of their possession under

their claim of title, to the appointment of a receiver in this case, and crediting them with payments made by Dent, or themselves, to Ferguson, or on his account, and for his benefit. Now, from May 14, 1869, when defendants say Dent went into possession, as of his own right, to the qualification of the receiver, on December 29, 1882, would be 13 years and seven months. Taking the receiver's operations as the basis of rental value,—and it is lower than the other witnesses, and, no doubt, too low for past years, when the property was in better condition,—and the rental value amounts to \$2,880 a year, which for the whole time is \$39,120. Now, it is manifest that these rents will largely overbalance any credits to defendants, under the most liberal allowance, even counting the payments to Clafin, Miller, Apperson, Carmack, Harbour, Hardin, Stapleton, and all the Ferguson incumbrances in full, for they all, as we have seen, amount to but little over \$20,000. There would be, under this most liberal estimate possible, a balance of nearly \$20,000 due the plaintiffs. Hence, as indicated by the case last cited, it is useless to take such an account, and we can safely and equitably leave the rents to set off the payments and compensation Dent might fairly claim, and any improvements that have been made by the latter, of which there is no proof; yet we know, from the receiver's reports, there have been none of much, if any, value.

The Decree.

The decree therefore should be to cancel and vacate all the muniments and claims of title by the defendants, or any of them, of whatever character, and divest the title out of them, and each and every one of them; and vest it in the plaintiffs, free from all demands of any kind by said defendants or any of them. Also to enjoin the defendant Susan R. Dent, now Hooper, and her husband, from prosecuting any claim to the Selby decree mentioned in the bill; and to dismiss the various cross-bills. Also that the receiver pass his accounts before the master to be reported and settled by the court, and that he have judgment against the defendant Sarah L. Dent, and the sureties on her refunding bond, for any sums paid to her by him according to the tenor and effect of said bond, but for the use of the plaintiffs, and that upon the settlement of his accounts the receiver be discharged. Also that he deliver possession to the plaintiffs, for which purpose a writ of possession should issue to place them in the quiet possession of the property, freed from all tenants of the receiver and their effects.

Costs.

The Building & Loan Association, Frazier, and Trezevant should pay all costs, respectively, accrued at their instance either upon their answers or cross-bills. Out of the funds in the hands of the receiver the officers of the court, including the examiners for taking testimony, should be paid their legal fees, not already paid by the parties themselves, but this should not include any docket or deposition fees taxed to counsel for plaintiffs until the other officers are first paid. The plaintiffs should have judgment against the widow and heirs at law of Henry G. Dent for all costs paid by them directly or through the receiver.

NOTE. By direction of the circuit justice the plats, abstracts of title, analysis of debts, incumbrances, etc., table of dates, subject index to the record, etc., prepared by the district judge for the convenient consultation of the record, are filed as part of the opinion, to accompany the transcript of the record in case of an appeal, but it is not deemed necessary to insert them here.—[RER.]

KIRK, Trustee, etc., v. WILLIAMS, Ex'r, etc.

Circuit Court, W. D. Tennessee. April 10, 1885.)

1. STATUTE OF FRAUDS—SALE OF LANDS—PROMISE TO PAY PURCHASE MONEY—WRITTEN PROMISE NOT REQUIRED.

In Tennessee the statute of frauds is fully answered by the grantor's deed for the land, and the grantee's promise to pay the purchase money need not be in writing, but may be proved by parol.

2. SAME SUBJECT—ACTION ON THE DEED—EVIDENCE.

It has not been decided in Tennessee whether an action for the purchase money will lie upon the deed itself against a grantee who has not signed but has accepted it and the estate conveyed, but, in an action on the case for the money, the deed, its acceptance, and possession under it, are evidence of a promise to pay the consideration; and from those facts such a promise will be implied.

3. SAME SUBJECT—LIEN RESERVED—EFFECT AS EVIDENCE.

Where the grantor reserves a lien for the purchase money, it is in effect as if the grantee had signed a mortgage or deed of trust; and while it is not settled in Tennessee that an action will lie upon such implied mortgage, as it would upon one actually signed by the debtor, in an action for the consideration not founded on the deed, the facts that the lien is reserved and that the grantee has accepted the estate are conclusive proof of a promise to pay the money.

4. SAME SUBJECT—UNSIGNED MEMORANDUM—LETTERS.

Where a grantee, at the request of the grantor, has given, in his own handwriting, an unsigned memorandum relating the facts of the transaction, but containing in itself no explicit promise to pay the money due, this memorandum is competent and relevant as evidence of the grantee's admissions of facts from which the law implies the promise to pay, although it might not be sufficient to answer the statute of frauds if a written promise were required. The same is true of a letter written by the grantee, importing by its language a recognition of the debt, though not an express promise to pay it.

5. PLEADING—ACTION ON FACTS—PROFERT—DEED.

Although a declaration may make profert of a deed, if it appear that the plaintiff has a cause of action on the facts of the case, one of which is the execution of the deed, the statement of it will be taken, under the Tennessee Code, only as an inducement, and not as implying that the deed is the foundation of the action.

6. STATUTE OF LIMITATIONS—ACKNOWLEDGMENT—PARTIAL PAYMENTS—EFFECT AS EVIDENCE.

While, in Tennessee, partial payments, either of principal or interest, standing alone, are not such an acknowledgment of the debt as will save the bar of the statute of limitations, they are taken in connection with other circumstances as potential there as elsewhere to prove such an acknowledgment. *Held*, therefore, where it appears that the debt was intended by the parties as a permanent investment of a trust fund; that the interest was paid quarterly in advance before and for many years after the time limited by the statute had expired; that these payments were accompanied by letters of remittance and receipts to be signed; that the debtor, at the request of the beneficiary for some evidence of the transaction, prepared the memorandum and letter above referred to after the bar attached,—that these circumstances were sufficient evidence of an acknowledgment of the debt, from which the law implies a promise to pay within six years before the suit was brought.

7. SAME SUBJECT—SUFFICIENCY OF LETTERS.

The writings above mentioned contain no explicit promise to pay the debt after the bar attached; but since no such promise is required in Tennessee, but may be implied from an acknowledgment of a subsisting liability, they furnish evidence of that acknowledgment in this case.

The defendant's testator, Joseph R. Williams, sold a lot in Memphis to C. M. Fackler, taking a deed of trust to secure the purchase money. Fackler settled the property on his wife and children by a deed of settlement, making the plaintiff and another trustees. The purchase money remaining unpaid, and interest having accumulated, the settlement trustees, to avoid a sale for the purchase money, re-conveyed to Williams, by a deed dated February 28, 1866, and signed by them and Mrs. Fackler, whose husband had died leaving children. It is not signed by Williams, but contains the clause quoted by him in the paper to be hereinafter inserted as a part of this statement of facts. He accepted the deed and went into possession, remaining until his death, in February, 1881, and paid the interest quarterly, in advance, during this time. For reasons given in the subsequent correspondence he withheld the deed from record, and it was not registered until after his death. His widow and devisee remained in possession until, by a proceeding in the equity courts of the state, the lien reserved in the deed was foreclosed. This is an action of *assumpsit* for the balance of the purchase money, amounting now to \$6,508.08. The defendant pleads the statute of frauds, the statute of limitations, and *plene administravit*. From an agreement of parties filed, and from other proof, it appears, in addition to the foregoing facts, that when Williams would pay the interest, by draft or otherwise, he sent to Mrs. Fackler a written receipt, which she signed, some of which are mentioned in nine letters filed and proved in the record, covering remittances of interest on the \$10,000 from July 15, 1878, to December 4, 1880, all in his handwriting. One of the receipts written wholly by him, which was not signed but retained by her, is produced. It reads as follows:

"Received of Joseph R. Williams three hundred dollars, in full of interest up to first July, 1877, on the sum of \$10,000, specified and secured to be paid in deed of J. J. Fackler and E. C. Kirk, trustees, and myself, (then Anna R. Fackler,) to Joseph R. Williams. \$150 of this \$300 was invested in sight draft on Paris, France, and remitted to me from New York in December, 1876, for interest up to April 1, 1877; and \$150, being in full of the interest as stated up to first July, 1877, was invested in sight draft on Paris, France, in New York, and remitted to me and received by me, as shown by this receipt."

Some time in 1877, Blount, the present husband of Mrs. Fackler, at her request, applied to Williams for some evidence of the contract of purchase, because he had withheld the deed from registration, and received from him a paper wholly in his handwriting, but not signed, which reads as follows:

"No. 67 UNION STREET.

"Joseph R. Williams' deed to C. M. Fackler, November 9, 1857. Conveyance in trust by Fackler to Shepherd and Jones, as trustees, to secure purchase money. Deed of C. M. Fackler to J. J. Fackler and E. C. Kirk, trustees, tenth August, 1859, conveys subject to lien created by deed to Shepherd and Jones, trustees, (purchase money) in trust 'for the use and benefit of Anna Kirk Fackler, wife of said Calvin M. Fackler, that the same shall not be subject

to his control in any way, or liable for his debts or contracts in any form;' also, 'that whenever, in the opinion of said trustees, or the survivor of them, it may be thought to the interest of said Anna K. to sell or dispose of the premises, the same may be sold, upon condition (1) that the said Anna K., of her own free will, consent to the same; and (2) that the proceeds thereof shall be invested for her separate use and benefit under the same provisions which guard the conveyance to her; that whenever the said Anna K. shall be capable, under the law, of holding this property in her own name free from the debts or contracts of said C. M. Fackler, that it shall be the duty of said trustees, or survivors of them, to convey it to her during her natural life, and after her death to her children by the said C. M. Fackler; that, in the event of a sale or change of occupancy, the right is hereby reserved to Joseph R. Williams, in preference to all others, of purchasing the premises at a fair price;' also 'in the event of the death of the said Anna Kirk Fackler, the said trustees will hold the premises hereby conveyed for the benefit of her children by the said C. M. Fackler.' The deeds mentioned are all of record. The trust deed to Fackler and Kirk was originally written so as to give the property to the wife absolutely, upon extinguishment of lien for purchase money, but Mr. C. M. Fackler would not sign in that way, and the remainder over to her children by him had to be and was added.

"On the twenty-eighth of February, 1866, after the death of C. M. Fackler, the property was sold to Joseph R. Williams for \$23,000. \$13,000 was due on it, and it was liable to be sold to pay that sum by the trustees, Shepherd and Jones. The lien created by this trust was extinguished by the sale, and there was left of the purchase money \$10,000, specified in and secured to be paid by the deed which was then made to Joseph R. Williams by John J. Fackler and Edwd. C. Kirk, trustees, and Anna K. Fackler. This conveyance sets forth the preceding deeds, the situation of the property, the facts and reasons which make the sale a proper one, particularly so far as the interests of the children (remainder-men) are concerned, the consent of 'her own free will' of Mrs. F. to the sale, and closes as follows: 'The purchase money due said Williams, with interest to this date, is thirteen thousand dollars, and forms part of the consideration of this sale, and satisfies and extinguishes the same to that extent. The residue, being ten thousand dollars, is to become due and payable in two years from this date, and is to bear interest at the rate of six per cent. per annum, payable quarterly. But the privilege of paying the principal sooner than the time named above is reserved by said Williams, should he desire to do so. The balance is by express agreement to constitute a lien upon said property until it is satisfied, and stands subject to the trusts of the settlement in favor of Mrs. Fackler and children, and to be reinvested, as provided by the trust deed, when it can be advantageously done.' This deed was duly witnessed, but has not yet been placed on record. There were some good reasons influencing me in the interest of Mrs. Fackler and the children to withhold it from registration. I do not know that they now exist, and if they do not, upon my carefully considering the matter, which I have not done for a long time, I will cause it to be put on record. I am rather of opinion, however, that it may be best not to do so, as the children will soon be of age. In keeping it from record, I, of course, only jeopardize my own interest, as the deed is my only title to the property. As the records now stand, the purchase money and lien for its payment, as shown in the trust deed to Shepherd and Jones, being extinguished and inoperative, the property, by the record, is absolute in Fackler and Kirk, trustees, for benefit of Anna K. during life, and her children of C. M. F. after her death, so that she and the children are not in danger of loss, but the contrary should the deed to me not be recorded. However, if I find no objection, after considering the matter, I will put it on record. The interest on the \$10,000 has been paid up to first January, 1874."

In May, 1877, Kirk, the plaintiff here, as surviving trustee, wrote to Williams, "demanding and requiring" that he should place the deed upon record in the register's office of Shelby county. This letter he had delivered to him by a mutual friend. Williams replied to it by the following letter, which also mentions incidentally another parcel of real estate in this city, as to which he was himself the trustee for Mrs. Blount:

"MEMPHIS, May 28, 1877.

"*E. C. Kirk, Esq., New York*—DEAR SIR: I wish you would advise with some legal friend in New York, or with some clear-headed business man, as to the propriety of putting the deed on record. I do not think it is to Anna's interests, as she is now situated. The youngest of the children will be of age in less than two years, and then it can be done, if thought best. You are aware that there was no marriage contract with Col. Blount. I have received a very abusive letter from him. He seems to have taken offense at my requesting Anna to send me her *direct* address, as I wished to consult with her as to my answer to Gippie's bill in chancery about the Main street lot conveyed by you to Col. Fackler, which is still in suit. I stated to Anna that I wanted to know *her* wishes and *feelings*, and *not* Col. Blount's; that he could be consulted on law points involved, but not otherwise. You know, and Col. Blount knows, that my appointment as trustee was to stand between her and her first husband; and, if so, certainly as to the second husband; and that it was *my duty* to make *all* my communications as trustee to her *in person*, or, if by letter, in such mode as would be sure to reach *her*, and not her husband. I know that this was *my duty*, as it is *yours*. Col. Blount is not a proper adviser for either *you* or *me*. He is anxious to get hold of this trust fund, and is in a position to *improperly* influence Anna. There are several reasons why this deed should *not* go on record, and not a single one why it should. Anna will tell you that I have never failed to pay her the interest quarterly *in advance*. It is now paid up to first July, with \$25 over, which I sent Christmas to Turner, and did not take out of the January or April remittance. There could not possibly be any investment on which interest has been and will be more promptly paid. If I paid over the money, it would have to be loaned out here on real estate, by the terms of the deed. It could not be loaned at more than legal interest, which is six per cent. No court here would permit it to be disturbed or changed so long as *I* was willing to keep it, because it could not be more safely invested, as you well know, and as has been shown by the prompt payment of interest in advance. I think the friends you may consult with will agree with me, and you surely will, that nothing could be worse for Anna in her present situation than to part with this small but regular income for the comparatively trifling sum for which *her life-interest* in it could be sold, and which would be at once absorbed in paying Col. Blount's debts and expenses. Now, as long as this deed is kept *off* the records, Col. Blount finds difficulty in selling Anna's life-estate for what it might bring, and putting it in his pocket; and it is your *duty* and *mine* to render such a sale difficult, and even to regard Anna as *improperly* influenced if she should wish it. You surely agree with me in this. Your clear-headed friends will agree with me. You cannot doubt my friendship for Anna, and you know, or if you don't you can easily find out, that I am not getting six per cent. on my money, and I certainly would not keep this a day except on Anna's account. My keeping it has insured the *regular* payment of interest, and that with her was, *and is*, bread and meat, as she writes me. These are some of the reasons why the deed should *not* be recorded, which must govern *you* and *me*. If you will consider that this deed is the only evidence I have to the lot,—in fact, gives me my title,—you will see that I am

the party to be anxious about the record of it, and that Anna's interest is not jeopardized in any way by not recording it. Col. Blount's sale of Anna's life-estate is made difficult; that is all. Now, Ed., I wish you to reconsider this matter; to look after Anna's interest; to understand that neither you nor I are to consult with Col. Blount, or be influenced by him; and write to me. And I wish you to consider this communication *confidential* so far as Col. Blount is concerned. He is out with me because I have baffled him. Don't *write* Anna what I have written. It is not necessary to write to Col. Blount, or to *write* to Anna what I have written. You can think for yourself. You are in fact bound as a trustee to do so. Consult with any of your friends, and see if all do not agree with me that, to protect Anna's interest, it is best this deed should not be recorded at present.

"Yours, truly,

JOS. R. WILLIAMS."

To this letter Kirk replied, insisting on the registration of the deed, which, however, was not done for more than a year after Williams' death. No verbal or written promise to pay the \$10,000, except such as can be implied from or based on the facts above stated, has been proved in the case. It is agreed that defendant has fully administered the personal assets coming into his hands.

Clapp & Beard, for plaintiff.

Craft & Cooper, for defendant.

HAMMOND, J. The defendant insists that no promise to pay for the land has been proved by any memorandum thereof in writing, signed by the party sought to be charged, and that the statute of frauds, therefore, is a complete protection. Code Tenn. (T. & S.) § 1758. Counsel argues that, Williams not having signed the deed, the plaintiff's only remedy is against the land itself, in the absence of some separate note, bond, covenant, or other like security containing a promise, signed by him, to pay the purchase money; that, although a vendor may proceed to enforce a technical vendor's lien, some mortgage that has been given, or a reserved lien like that contained in this deed, as the case may be, he can thus subject the land only because there has been attached to the grant a limitation or condition, which the grantee has accepted or created, that he shall not hold the land without paying the consideration for the grant; but that, whether he gives a mortgage, a lien is implied by the law, or is reserved by the grantor, this does not operate to bind him further than the land goes; and, to hold otherwise, is to violate the statute of frauds. There certainly seems to be some rule like this as to a mortgage, for the mortgagor, although he signs the mortgage deed, is not bound beyond the land, unless there is an express stipulation or covenant in the deed to that effect, or some separate bond or other promise to pay the money. And so much favored is the doctrine that no such promise shall be implied from the mortgage, that some states have enacted statutes forbidding the implication. 4 Kent, (12th Ed.) 145, and notes; 1 Jones, Mortg. §§ 677, 678; *Scott v. Fields*, 7 Watts, 360. But this rule does not arise out of the statute of frauds at all, but from the peculiar nature of a mortgage, which was the conveyance of an estate upon condition, which not being performed, the estate be-

came absolute; and it may be doubtful if the rule prevails in Tennessee, as we shall presently see.

It is difficult to determine or define the precise character of a lien reserved in the face of a deed, like that we have here, but it seems in Tennessee to be settled that it is substantially a mortgage; that is to say, it stands as if the vendee had executed a mortgage to the vendor for the purchase money, and "creates an express lien *by contract or agreement of the parties*." *Lincoln v. Purcell*, 2 Head, 142; *Thompson v. Pyland*, 3 Head, 537; *Hines v. Perkins*, 2 Heisk. 395; *Chitwood v. Trimble*, 2 Baxt. 78; *Miskelley v. Pitts*, 1 Tenn. Leg. Rep. 207; *Gudger v. Barnes*, 4 Heisk. 570. In this last case the court was considering the position of a purchase under a title bond, the vendor reserving the legal title as a security for the purchase money, and this too was likened to a mortgage. Because of the confusion that has grown up on the question, the court takes the pains to review the relation of vendor and vendee, in such cases, for the very purpose of refuting the notion that the vendee holds the land on any condition upon a breach of which the vendor's rights attach, and decides that it is solely by the contract of the parties that the lien exists; the vendee being in possession under its stipulations, one of which is that he agrees to the lien for the purchase money as if upon his own contract. If this be so where the legal title is reserved to the vendor *a fortiori*, must it be so where that passes to the vendee, and only a lien is reserved on the face of the deed, as in the other cases cited?

Of course, it must be observed that while the court assimilates all these liens to that of a mortgage, it does not mean the old common-law mortgage, in its technical sense, but the modern signification of that term, as one applied to any lien created by express contract of the parties as a security for a debt. These cases, therefore, seem to militate against the argument of the defendant construing this deed, particularly since, within itself, there is a recital that the \$10,000 is, "by express agreement, to constitute a lien upon said property." The circumstance of giving a note for the purchase money cannot be material, because that is a wholly independent contract, and the agreement of the vendee that the vendor shall have the lien provided for—whatever be its characteristics—rests alone on an implication from his acceptance of the deed reserving the lien, for he has never signed it. And in one of the above cases the court even held the lien efficacious to secure the notes of strangers to the original contract, which were substituted for the notes of the vendee. *Hines v. Perkins*, *supra*. This agreement for a lien is as much within the statute of frauds as a promise to pay the purchase money could be, and if one can be implied from a bare acceptance of the deed, without a violation of that statute, it is difficult to conceive why the other may not be. True, the defense was not suggested in these cases, but so important a matter could scarcely have been overlooked by counsel and the court. Our court seems to treat a transaction like this as a contract by the vendee

to secure the vendor; as if, in fact, he had formally executed a deed of trust or mortgage; and these adjudications will show that, in many respects quite as important as the statute of frauds in its relation to the contract, this estimate of the transaction has a formidable bearing on the rights of the parties. Moreover, in *Couger v. Lancaster*, 6 Yerg. 476, it was held that an action of debt would lie upon the mortgage itself, without any express stipulation to pay the money, the same as if a separate bond or note had been given. It was, in fact, a deed of trust, called by the court a mortgage, but it contained no other stipulation as to the debt than the ordinary condition of such instruments that, if the amount secured should not be paid by a given time, the trustee might sell. This seems to be somewhat contrary to the general rule on this subject, that if there be no express covenant to pay the money contained in the mortgage, the creditor has no other remedy than a foreclosure, and is confined to the land, unless he has some separate note or bond on which to bring his action; but, taken with the other cases, it shows the tendency of our state court to treat the mortgage itself as sufficient evidence of indebtedness without a separate bond or note.

Whether this applies as well to that implied mortgage arising on a lien reserved in a deed not signed by the debtor, it is unnecessary to determine, but it is difficult to see why it should not be so applied, and it may be mentioned here that, while the cases cited speak of separate bonds or notes as necessary, this is somewhat misleading, for the reason that, outside of those cases governed by the statute of frauds, a debt may rest in parol, and a mortgage or like security may be given for it, it being none the less a debt for which an action would lie; as if, for example, a deed of trust or mortgage should be given to secure an open account. It will be found, I think, that the real inquiry is whether, under the circumstances, there was a debt due which is secured, or only a transaction from which no more can be implied than that the security given should be the full extent of the liability; and this inquiry may arise on a proceeding to foreclose the lien, for, in modern practice, either by statute or rule of court, it is competent for the foreclosing court to give judgment for that part of the debt which remains after the lien is exhausted, or it may arise on an independent action for that balance. It is, after all, an inquiry for the intention of the parties, and that intention should prevail when it is reached by that which is competent proof of it. The defendant files, in support of his argument, an unreported opinion of the supreme court of Mississippi, of date March 17, 1884, in the case of *Vicksburg R. Co. v. Oates*, and a printed brief upon an application for rehearing, in which the whole doctrine of the effect of the acceptance of a deed-poll by the grantee is considered in relation to the covenants thereof as against him. It was the case of a grant to a railroad company, imposing certain obligations upon the grantee as to the keeping up of stations, use of cars, etc. The bill alleged non-compliance with the

obligations by the company, and asked that it be compelled to perform or to surrender the premises, or for an account of damages, etc. There was a demurrer, which the court below overruled, and an appeal, upon which the decree below was affirmed. The statute of frauds, among other things, was relied on by the demurrer. The court held that the proper construction of the deed was that the stipulations were imposed as conditions and not as promises or assumptions of personal obligations by the grantees; that the estate was forfeited by a breach of the conditions; and that the grantor had a right to re-enter; but that, while this was the technical situation, it was apparent from the nature of the contract that the parties did not intend, in fact, that there should be a forfeiture and re-entry, because it was not expected that a railroad, with its iron rails, ties, etc., should be torn up and the land returned in a less valuable condition to its former uses, to the detriment of the grantor and injury of the grantee; and, as no specific performance could be decreed for want of a promise binding on the grantee, the only relief possible was compensation or damages.

This seems to me to sustain the idea that on a proper proceeding, where there is no violation of a positive rule of law, like the statute of frauds, the court will enforce the actual intention in spite of the technical attitude of the estate as conveyed by the deed; so that, if the defendant should be right in his contention here as to the construction of this deed, it would not aid him as against his actual intention to pay for the land, if that can be proven by a parol promise to do so. This opinion and brief are full of authorities that might be useful in determining the question so much argued as to the remedies at law and in equity which a grantor has to compel compliance with the stipulations of his deed made for his own benefit, and imposed on the grantee solely by his acceptance thereof; but I do not see that any of them deal with the obligation to pay the purchase money, but only with those stipulations that concern the use of the land and the like, providing for easements, etc. The court says:

"The doctrine that, by accepting an estate conveyed by deed-poll, the grantee binds himself to the performance of the covenants contained therein as fully as though he had signed and sealed the instrument, though recognized in many cases, was never satisfactory to some of the most learned judges, and, without regard to the statute of frauds, has been repudiated by many courts." *Platt, Cov. 16; Lock v. Wright, 1 Strange, 571; Sutherland v. Lishnan, 3 Esp. 42; Kimpton v. Eve, 2 Ves. & B. 353; Maule v. Weaver, 7 Pa. St. 329.*

I am informed by the clerk of the court that, since this case was submitted, the opinion was, on reargument, withdrawn, and the court contented itself with overruling the demurrer, and reserving these questions until a final hearing of the case. I cite it merely to show the force of defendant's position, and to say that an examination of many of the cases cited by the court and in the brief leads me to the conclusion that the apparent conflict of cases may be reconciled by attention to the distinction between using the deed as a foundation

of the action, and as mere evidence of facts which will support an action *aliunde* the deed itself. *Locke v. Homer*, 131 Mass. 102; *Lee v. Newman*, 55 Miss. 372; *Bishop v. Douglass*, 25 Wis. 696; *Newell v. Hill*, 2 Mete. 180; *Finley v. Simpson*, 2 Zab. 311; *Cooper v. Louanstein*, 37 N. J. Eq. 284; S. C. 22 Amer. Law Reg. (N. S.) 738, and notes; *Browne*, St. Frauds, 7, 124; 2 Sugd. Vend. 238, and notes; *Abb. Tr. Ev.* 385; *Rawle*, Cov. 462.

The case of *Cooper v. Louanstein* is a very recent and elaborate consideration of the subject, and in one of the opinions the very distinction above-adverted to was taken, namely, that while the covenant might not establish an easement, and be binding as such on the grantee, yet "the statement in the deed, it being accepted by Louanstein, was a circumstance of evidence, more or less strong, as the case may be, tending to show a parol agreement for such easement." And as there had been a part performance it could be enforced, notwithstanding the statute of frauds. The dissenting opinion maintains with force that even at common law the deed became, by its acceptance, *ipso facto*, the deed of the grantee, and he might be sued in covenant upon it.

Now, this suit is not an action on the deed, but on a promise to pay the consideration for the land. It is true, the declaration makes proffer of the deed, and is susceptible of that construction, but under our peculiar mode of pleading in Tennessee, where all forms are abolished, and the pleader may sue upon "the facts of the case," it must be treated as a statement of the facts and maintained as a good pleading, if, on the facts, it contains a sufficient cause of action in any view of them. The construction placed on the declaration by plaintiff's counsel, that the deed is stated merely as an inducement, and as one of the facts of the case, must therefore prevail, if he is, on that construction, entitled to a cause of action, whether he would be entitled to sue on the deed itself as a foundation for the action or not. *Whittenton Manuf'g Co. v. Memphis & Ohio River Packet Co.* 21 FED. REP. 896. So treating it, the question is whether the statute of frauds requires the promise to pay for lands, for which the grantee has accepted a deed, to be in writing; and if not, what effect the deed and its acceptance may have as evidence of the promise, and what effect the other writings relied on in this case may have as evidence of that promise, and not whether the deed may be a foundation for the action, or whether it and the other writings are sufficient in themselves to answer the statute of frauds. If the statute of frauds requires that promise to be in writing, in view of the conflict of authorities already noticed, while I am inclined to think the deed itself might, in Tennessee, be a foundation of the action, I am not prepared to say that our court has so, precisely, decided; nor am I satisfied that the unsigned paper written wholly by Williams would answer the statute of frauds as a memorandum of that promise. It seems to be a kind of chronological or historical statement of the facts, in which his name appears,

written by himself, but it is not clear that he intended it *as a signature* which was to be as efficacious as if he had formally signed the paper. This intention seems to be necessary. *Browne*, St. Frauds, §§ 354-357; 1 Sugd. Vend. 212; *Barry v. Coombe*, 1 Pet. 640; S. C. Lawy. Pub. Co. Ed. and notes.

But, however the law may be elsewhere, it is established in Tennessee that the promise to pay the consideration need not be in writing; that the execution of the deed by the grantor satisfies the statute of frauds, and an action will lie for the purchase money, which may be sustained by parol proof. *Davis v. Tisdale*, 4 Yerg. 172; *Whithy v. Whithy*, 4 Sneed, 472; *Perry v. Central S. R. Co.* 5 Cold. 138; *White v. Blakemore*, 8 Lea, 49, 59; *Mowry v. Davenport*, 6 Lea, 80, 93; *Taylor v. Ross*, 3 Yerg. 330; *Gilman v. Kibler*, 5 Humph. 19. Here, then, the action may be maintained, and the alleged promise to pay for the land is proved by the execution of the deed, its acceptance by defendant, his possession under it, the unsigned paper written by himself taken as his *admission* of facts implying the debt, by the admissions contained in his letter of May 28, 1877, and by his payment of the quarterly interest for all the years before his death; for, as was said in *Howel v. Price*, 1 P. Wms. 291, 294, "the running on of interest, and its carrying interest, was proof of its being a debt." And these facts prove the promise averred in the declaration, whether the documents would be, in themselves, sufficient to answer the statute of frauds or not, if that statute required it to be in writing. No reasonable mind can doubt that there was an express promise to pay, and that it is reasonably proved by such facts; but certainly the law would conclusively imply from them a promise in support of the averment in the declaration.

Somewhat similar reasoning has led me to the conclusion that the statute of limitations cannot avail the defendant. We have no statute requiring the new promise to save the bar to be in writing, nor, indeed, any rule of law requiring an express *promise* at all, but only an express *acknowledgment* of a subsisting debt. The supreme court of Tennessee, recognizing the intensity of a temptation to evade the statute by fraud and perjury, has, in the absence of that wise legislation which prevails in some states requiring a new promise in writing, held very rigidly to the rule that there shall be no implication of a waiver of the statute from partial payments, either of principal or interest, and requiring a distinct acknowledgment on the part of the debtor of a continuing liability to pay. Mr. Chief Justice TANEY has stated the rule as to the character of acknowledgment that will save the bar in terms that fully meet the requirements of the Tennessee cases, as I understand them. He says:

"In order to remove the bar of the statute it is necessary that there should either be an express promise to pay, or an admission of the debt in such terms as would imply that the party was liable and willing to pay it." *Georgia Ins. Co. v. Ellicott*, Taney, Dec. 131; *Bell v. Morrison*, 1 Pet. 362; *Moore v.*

Bank of Columbia, 6 Pet. 86; *Fort Scott v. Hickman*, 112 U. S. 150; S. C. 5 Sup. Ct. Rep. 56.

And Mr. Justice DAVIS likewise enunciates a rule, as to the effect of partial payments, that is the same as we have it in Tennessee. *U. S. v. Wilder*, 13 Wall. 254. So, if the ruling in *Palmer v. Andrews*, McAll. 491, that this is a commercial question which the United States courts will decide independently for themselves, be correct—which I doubt—the two jurisdictions in this state quite agree on the subject. *Russell v. Gass*, Mart. & Y. 270; *Belote's Ex'rs v. Wynne*, 7 Yerg. 533; *Thompson v. French*, 10 Yerg. 453; *Hale v. Hale*, 4 Humph. 183; *Hunter v. Starks*, 8 Humph. 656; *Butler v. Winters*, 2 Swan, 91; *Broddie v. Johnson*, 1 Sneed, 463; *Rogers v. Southern*, 4 Baxt. 67; *Steel v. Matthews*, 7 Yerg. 313; *Locke v. Wilson*, 9 Heisk. 784; S. C. 10 Heisk. 441; *Folk v. Russell*, 7 Baxt. 591.

I do not understand that either the supreme court of the United States, or the supreme court of the state, excludes the circumstance of a partial payment from the consideration of the triers of the fact whether there has been a new promise or an acknowledgment of the debt or not, but only to limit its probative value so that of itself it shall constitute neither a promise nor acknowledgment. Elsewhere, even when there has been a statute, as in England and some of our states, requiring the new promise or acknowledgment to be in writing, the statute usually makes an exception in favor of the implication of an acknowledgment from partial payments, which shows the potential character of that circumstance where that rule has prevailed. But with us, standing alone, part payment implies nothing as an acknowledgment of the balance of the debt, for that which he pays may be all the debtor wishes to admit to be due; but if there be other circumstances attending the payment, showing that it could be made only on a distinct acknowledgment of the whole debt, those circumstances, taken with the payment, are a sufficient basis for the implication of a promise to pay that will save the bar. This was always the correct rule, even where partial payments were fully recognized as saving the bar, and is yet, under the exception in their favor, contained in the above-mentioned statutes. Any departure from it was a misunderstanding of the rule. In *Morgan v. Rowlands*, L. R. 7 Q. B. 493, it is stated that part payment is not sufficient "unless it be such that a jury might fairly infer a promise to pay the remainder. No doubt, very slight circumstances might be sufficient to support such an inference where there is a legal duty to pay." And the circumstances surrounding payment were scrutinized, perhaps not always with the best judgment, before the fact of payment could be treated as an acknowledgment, and often it was unavailing. Thus the fact that the payment was that of *interest* on the debt was often, though not always, a controlling circumstance in favor of the acknowledgment. If the debt was payable "on demand," the fact that interest was paid was quite conclusive of an acknowledgment to save the bar; if not so

payable, the circumstance was of less force; and there is a distinction sometimes taken between interest accrued *before* and *after* the bar attached. *Bamfield v. Tupper*, 7 Exch. 27; *Brown v. Rutherford*, 14 Ch. Div. 687; *Maber v. Maber*, L. R. 2 Exch. 153; *Morgan v. Rowlands*, *supra*; *Sigourney v. Drury*, 14 Pick. 387, 391; *Gilbert v. Collins*, 124 Mass. 174; *Hopkins v. Stout*, 6 Bush, 375; *English v. Wathen*, 9 Bush, 387; *Cocker v. Cocker*, 2 Mo. App. 451; *Shannon v. Austin*, 67 Mo. 485; *Wood*, Lim. 150, and notes. Nor has Lord TENTERDEN's act in England, nor the legislation in our own states, that have substantially re-enacted that statute, changed the rule either as to the precise character of the promise or acknowledgment required, or as to the effect of partial payments, except in states like California and Nevada, which have left out the exception in favor of partial payments contained in Lord TENTERDEN's act, or Wisconsin, which has abolished all kinds of *acknowledgments*, and requires an explicit written *promise*. The only effect of the legislation is to require a written memorandum of the acknowledgment or promise; but when we come to test the sufficiency of the memorandum, we apply precisely the same rule as before in reference to the character of the promise or acknowledgment, as shown by the parol testimony. Only the mode of proof has been changed. In *Lee v. Wilmot*, L. R. 1 Exch. 364, in considering the sufficiency of a letter, it is said:

"If there be a distinct acknowledgment, it is not necessary there should be a promise in explicit terms; but from the acknowledgment a promise may be inferred, unless it be accompanied by a refusal to pay, or any other circumstance which excludes that inference."

And in *Re River Steamer Co.* L. R. 6 Ch. App. 822, Lord Justice MELLISH says:

"Now, it is perfectly settled law what is the description of letters which will take the case out of the statute. * * * Before this statute, not only a verbal promise to pay a debt more than six years old, but a bare, unconditional acknowledgment of its substance made within six years before action brought had been held sufficient to take the case out of the statute. But now, in order to revive the liability of the debtor, after the expiration of the six years, by subsequent acknowledgment or promise, there must be proof of some writing, signed by himself, either containing an express promise to pay the debt, or being in terms from which an unconditional promise to pay it is necessarily implied. If, therefore, the writer, although he admits the debt, refuses to pay it, or reserves the matter for further consideration, or refers the creditor to some third person for payment, or the like, this will not be sufficient to prevent the operation of the statute. That being the rule, there must be one of these three things to take the case out of the statute: Either there must be an acknowledgment of the debt from which a promise to pay is to be inferred; or, *secondly*, there must be an unconditional promise to pay the debt; or, *thirdly*, there must be a conditional promise to pay the debt, and evidence that the condition has been performed."

The mere writing of the name and date on a past-due note was held sufficient. *Bourdin v. Greenwood*, L. R. 13 Eq. 281; *Quincey v. Sharpe*, 1 Exch. Div. 72; *Skeet v. Lindsay*, 2 Exch. Div. 314. And these cases,

professedly, only follow the rule laid down by Lord TENTERDEN himself long before his celebrated act was passed. *Tanner v. Smart*, 6 Barn. & C. 603; *Cleave v. Jones*, 6 Exch. 573. And see *Fairbanks v. Dawson*, 9 Cal. 90; *Pena v. Vance*, 21 Cal. 142; *Palmer v. Andrews*, McAll. 491; *Wilcox v. Williams*, 5 Nev. 206; *Pierce v. Seymour*, 52 Wis. 272; S. C. 9 N. W. Rep. 71; *Williams v. Gridley*, 9 Metc. 482; *Sibley v. Lumbert*, 30 Me. 253; *Palmer v. Gillispie*, 95 Pa. St. 340; *Wesner v. Stein*, 97 Pa. St. 322; *Minniece v. Jeter*, 65 Ala. 222; *Harper v. Fairley*, 53 N. Y. 442; *Pickett v. King*, 34 Barb. 193; *First Nat. Bank v. Ballou*, 49 N. Y. 155; 1 Smith, Lead. Cas. (1872,) 941, 952.

I have gone over these authorities and many others that convince me that our Tennessee rulings on this subject are consistent with the better rulings everywhere, and that the only difficulty arises from misunderstanding or misapplying them in giving effect to the testimony in a particular case. No explicit *promise*, either verbal or written, is required, as in Wisconsin, both before and after their act requiring a written memorandum; there may be an *acknowledgment* of the debt sufficient to save the bar, but that acknowledgment must be of a character that from it a promise may be fairly and necessarily implied, and it may be proved in parol by any circumstances tending to show it, or by any writing sufficient to establish it. Partial payments, either of principal or interest, in themselves are not sufficient to establish such an acknowledgment, but, in connection with other circumstances tending to show an intention to admit a subsisting liability to pay the debt, they are as potential here as elsewhere. It is the implication from the bare payment that is prohibited to us, nothing more.

Now, I concede that if we had the Wisconsin requirement of an *explicit promise* to pay the debt, it would be difficult to find it in any of the writings relied on here, and that it is not otherwise proved. But, apart from that, the requirement of an *acknowledgment* from which a promise is necessarily implied is abundantly met by this proof. In the first place, I think no one can read the deed in the light of Williams' subsequent conduct towards these parties, and certainly when that is supplemented by his admissions in the unsigned paper and in his letter of May 28, 1877, and not conclude that, although Williams carefully provided for himself the privilege of paying the debt at the end of two years or before, it was really intended by the parties from the beginning as a permanent investment for the benefit of this trust, to run indefinitely. So, if we had nothing more than the recitals of this deed, the fact that Williams went into possession under it; that he withheld it from the record to protect beneficiaries, and was so long permitted to do so without complaint; that the interest was payable quarterly, and was in fact promptly paid *in advance* before and *after* the six years expired,—it would be a necessary implication from these payments, under the circumstances, that having so acknowledged a subsisting liability after the bar, he promised to pay the debt. But add the

admissions in the unsigned document in the letter of May 28, 1877, and the letters accompanying the remittances and receipts, and the implication of a promise, from the constantly recurring payments of interest up to his death, is irresistible. Moreover, taking the unsigned document by itself, and more particularly the letter of May 28, 1877, by itself, and either of them would, in its language, be a sufficient *acknowledgment* of the debt from which a promise to pay it would be necessarily implied. They would be sufficient as written acknowledgments under Lord TENTERDEN's act, or that of any of the states examined, except Wisconsin, which requires an express promise; and, as *admissions* proving an acknowledgment, they are as competent and conclusive here, where we require no writing, but the same full proof.

The plea of *plene administravit* must, on the agreed statement of facts, be found in favor of the defendant, but otherwise there must be the usual judgment against him for the balance of the debt and interest. So ordered.

HALL and others v. SUPREME LODGE KNIGHTS OF HONOR.

(District Court, E. D. Arkansas. July 9, 1885.)

1. BENEFICIAL SOCIETIES—SUSPENSION OF LODGES OF BENEFICIARY ORDERS.

If the laws of a beneficiary order authorize an officer or tribunal of the order to suspend a subordinate lodge for certain causes, and a lodge is suspended by such officer or tribunal for such cause, after due notice of the proceedings is given to the lodge, a mere error in the finding of facts, or an erroneous application of the law to the case, which might be corrected on appeal in the mode provided by the laws of the order, will not vitiate the proceedings, nor cause them to be subject to collateral attack in any tribunal; but a suspension by an officer not vested by the laws of the order with that power, and without notice to the offending party, is absolutely void, and cannot affect the legal rights or change the legal *status* of any one, and from such an order of suspension no appeal is necessary to save the rights of parties. *Karcher v. Supreme Lodge*, 137 Mass. 368, distinguished from this case on the facts.

2. SAME—EFFECT OF TENDER OF ASSESSMENTS BY SUBORDINATE LODGE.

A tender of an assessment by a subordinate lodge, which is refused, is just as effectual to preserve the rights of a lodge and its members as if it had been accepted. It does not have to be repeated; the burden to act after tender and refusal is on the creditor, and the debtor is only required to be ready to meet the demand when made.

3. SAME—GOOD STANDING AND PAYMENT OF ASSESSMENTS.

In beneficiary associations, where the time and frequency of payments depend on the mortality of members, and are to be made only upon notice that an assessment is required, no liability is imposed on a subordinate lodge or its members until due notice in conformity with the laws of the order is given, and good standing is not lost by a failure to pay an assessment of which no notice was given through the fault or misconduct of the supreme lodge or its officers.

At Law. Plaintiffs sue as the heirs of Joseph Hall, who was, in 1880, a member of Harrisburg lodge, No. 1,714, of the Knights of Honor, and claim the sum of \$2,000 as a benefit. The case was

tried before the court, which found these facts: (1) That in July, 1879, Joseph Hall was duly admitted as a member of Harrisburg lodge, No. 1,714, Knights of Honor. (2) That said Hall died on the second day of July, 1880, and before his death directed his benefit certificate to be made payable to the plaintiffs, who are his heirs at law. (3) That assessment No. 65, called January 1, 1880, was paid by the lodge to the supreme treasurer in apt time, and that Hall paid his share of said assessment to his lodge in apt time. (4) That assessment No. 66, called January 31, 1880, was forwarded by Harrisburg lodge to the supreme treasurer in apt time, and was received by said treasurer, who returned the same, saying, contrary to the fact, that the lodge was in arrears for assessment No. 65. Thereupon the lodge again forwarded assessment No. 66, with proof of payment of No. 65. The supreme treasurer again returned assessment No. 66, reiterating the erroneous statement that No. 65 had not been paid; and on March 15, 1880, the supreme reporter, without previous citation or notice, suspended Harrisburg lodge for non-payment of assessment No. 65. Hall paid to his lodge assessment No. 66 in apt time. (5) Assessments were called in by the proper officer of the supreme lodge subsequent to No. 66, and before Hall's death, as follows: March 1st, No. 67; April 1st, No. 68; May 3d, No. 69; and June 12th, No. 70; but no notice of these assessments was sent to Harrisburg lodge, and neither that lodge nor Hall had any notice of said assessments or calls prior to Hall's death. (6) There was some correspondence between the officers of Harrisburg lodge and the officers of the Supreme lodge in relation to assessment No. 65, and the controversy was continued up to the time of Hall's death. Subsequent to Hall's death, Harrisburg lodge, by surrender or abandonment of its charter, ceased to exist. It was agreed that the plan upon which the benefit feature of the order is conducted is as follows:

"A fund called the 'Widows' and Orphans' Benefit Fund' is raised by contributions paid in by the members in response to assessments made upon them, and this fund is scrupulously and exclusively devoted to the payment of death benefits to the person directed and named by the deceased member as his beneficiary. All the current expenses of conducting this and all other departments of the order are paid out of another fund called the 'General Fund.' Upon due notice by any subordinate lodge, with proof of death of a member in good standing, the Supreme lodge draws an order on the W. & O. B. fund for the payment of the benefit of \$2,000 to the beneficiary. So long as the amount of money in that fund, not subject to and covered by such orders, exceeds the sum of \$2,000, no further assessments are made upon the members. When that amount falls below that sum, an assessment is made upon all the members, each member being called upon to pay the same sum as previously stipulated; and the aggregate of these contributions, when collected, is again devoted to the payment of death benefits as before. The W. & O. B. fund is realized alone by the means here stated. Each member pays one assessment when he becomes a third degree member, but this assessment remains in the subordinate lodge treasury until the time arrives when the amount in the supreme treasury to the credit of the W. & O. B. fund, not covered by orders drawn to pay on deaths occurring before the time such

member took the third degree, falls below \$2,000, and a new assessment is called, and thus the first assessment thus paid in by such new member receives its proper consecutive number, and is forwarded to the supreme treasurer with other contributions on the same assessment, and thus goes into the W. & O. B. fund; and the new member is called to pay his second assessment when the exigencies of the W. & O. B. fund require a new general assessment under the plan above stated."

Stephenson & Trieber, for plaintiffs.

James O. Pierce, for defendant, argued:

1. Hall was not, at his death, a member of the order in good standing. "Good standing," in the sense of the laws of the order, has a definite and well-understood meaning. To be in good standing the member must have paid every assessment to date within 30 days after it was called for, all regular dues for the particular period, and all fines that may have been imposed. Good standing is lost by the failure of the member to pay assessments. *McMurry v. Supreme Lodge*, 18 Cent. Law J. 372; S. C. 20 FED. REP. 107; *Ma-deira v. Mutual Ben. Soc.* 16 FED. REP. 749; *Benevolent Soc. v. Baldwin*, 86 Ill. 479. It is lost by a suspension in regular form not appealed from. *Karcher v. Supreme Lodge*, 19 Cent. Law J. 152; S. C. 137 Mass. 368.

2. Hall was not, at his death, a contributing member to the W. & O. B. fund. It is a fundamental feature of the beneficiary department of this order that the duty of contributing to the benefit fund, and the right of sharing therein, are reciprocal. The plan on which this department operates is fully set out in evidence in the stipulation of counsel. It will be seen that the only fund provided for the payment of death benefits is raised by contributions, and that the insurance is in force as to each member during only the time his contributions are in hand. When the contributions made in response to any one assessment are exhausted, the insurance thereby effected has expired. With a new set of contributions a new insurance is effected, to exist until these contributions are in turn exhausted. This is "current" or "term" life insurance, in the strictest sense. It is the cheapest possible insurance, viz., insurance at actual cost. In this and some other respects, the order differs from an ordinary life insurance company. It has no capital stock, no reserve funds, no corporate property. It has no funds of any sort out of which to pay death benefits except the contributions of the members, which it is commanded to and does distribute specifically. So, also, the contract is substantially different from the common form of life insurance contract. The order did not make a positive and unconditional contract with the member to pay in any event. It did not receive any adequate consideration for such a contract. If such a contract had been made, it would have been *ultra vires*. Nor did the order make any contract positive in form, but on conditions for its benefit, which it had the power to waive. No doctrine of waiver of hard conditions can be here appealed to. Nor did the order receive any consideration for a contract which should allow the member any "surrender value," or any other interest of any kind beyond the day when his contributions should be exhausted. The character of contract actually made is shown by the constitutions and laws of the order, the general plan of operations of the W. & O. B. fund, and form of benefit certificate in use. It was a contract to receive Joseph Hall's contributions, and to insure, as long as such contributions remain unexhausted by distribution, the beneficiaries of Hall and each of his fellow-members who should die during such limited period.

The money collected on each assessment by the subordinate lodges is to be forwarded by them to the Supreme lodge. There it is subject to drafts or orders for the payment of benefits on deaths due notice of which has been re-

ceived. No member can be called on to contribute to pay for deaths occurring prior to the date when he himself became a beneficial member. No new assessment can be ordered forward while there remains in the W. & O. B. fund a sum sufficient to pay the next death benefit. When that sum proves insufficient, the lodges are to forward the assessment then held by them, and call in a new one. That small balance remaining on hand is of course exhausted by the payment of the first death benefit after the call for the new assessment. Thus a limit is fixed, at the beginning as well as at the ending of the distribution of every particular assessment, by which the officers can ascertain the persons who are to share in such distribution. There is no place or opportunity allowed for sharing in any distribution by the beneficiary of any member who was not a contributor to the fund at the time of his death. Contribution and distribution are reciprocal.

The legality or fairness of this contract cannot be questioned. It was a contract for insurance at absolute and exact cost. This could be obtained in no other way. In some old-style life insurance companies, broader rights and privileges might be secured, but at greater cost. To obtain term life insurance at its exact cost, nothing else than term life insurance, in exact form, can be expected. Hall took this cheapest of all forms of life insurance, and he might have preserved it by continuing to pay for it, but not otherwise. "Payment of the assessments by the members is essential to the successful operation of the Widows' and Orphans' Benefit fund of the order, as the plan of the same is exhibited in the constitution and laws of the order." *McMurry v. Supreme Lodge*, 18 Cent. Law J. 372; S. C. 20 FED. REP. 107. "The obligatory part of the contract is unilateral; payment of assessments is wholly optional with the members." *In re Protection Life Ins. Co.* 9 Biss, 188; 9 Ins. Law J. 145; *A. O. U. W. v. Moore*, 9 Ins. Law J. (Ky.) 572.

3. Defendant controls trust funds only, which are collected and designated for specific purposes. It does not avail to say that defendant contracted to pay. It did not so contract in any general sense. It made no contract at all with the plaintiffs. It contracted with Joseph Hall *sub modo*; that is, to do what he and his fellow-members authorized it to do, which was to recover and disburse trust funds for specific purposes. There has been in this case no deviation or spoliation of trust funds, or violation of a trust, such as will authorize a money judgment against the trustee. *In re Protection Life Ins. Co.* 9 Biss, 188; *State v. Standard Life Ass'n*, 38 Ohio St. 281.

4. No consideration need be given to the question of the regularity of the suspension, because no appeal was taken within the order. The laws of the order make ample provision for the prosecution of appeals and redress of grievances within the order, (Const. Sup. Lodge, art. 1, § 2, art. 9, § 6;) and those who fail to avail themselves of the opportunity thus offered for the redress of grievances within the society will be repelled from the courts. *Karcher v. Supreme Lodge*, *supra*; *Chamberlain v. Lincoln*, 129 Mass. 70; *Lafond v. Deems*, 81 N. Y. 507; *Robinson v. Yates City Lodge*, 86 Ill. 598; *Harrington v. Benevolent Ass'n*, 27 Alb. Law J. 438, (Ga. Sup. Ct. April 24, 1883;) *State v. Knights Golden Rule*, 16 West. Ins. Rev. 474.

CALDWELL, J. This case arose under the constitution and by-laws of the order in force in 1880. Tested by these laws the alleged suspension of Harrisburg lodge by the supreme reporter was a nullity. It was not merely irregular, but it was a void act. The constitution and by-laws then in force conferred no jurisdiction upon the supreme reporter to suspend subordinate lodges in any case, or for any offense; and his mandate suspending Harrisburg lodge had no more effect, inside or outside of the order, than if it had been made by one who did

not belong to the order. Article 9, § 1, article 15, § 1, Const. 1879. Moreover, it was made without giving the lodge an opportunity to be heard, and for an alleged ground that had no existence in fact. If the supreme reporter had been invested with jurisdiction to try and suspend lodges, and he had given Harrisburg lodge due notice of the proceedings, the fact that he erred in judgment in the application of the law to the case, or in his finding of facts, would have been a mere irregularity, which might have been corrected on appeal, or in such mode as the constitution provided; but until his judgment was reversed by the appropriate supervisory power it would be conclusive on the parties, and not subject to collateral attack in any tribunal. This is nothing more than the application to the decrees of these organizations affecting their members of the familiar principles that obtain in relation to the validity and effect of judicial determinations of controversies between citizens in the courts. If the court has jurisdiction of the subject-matter and the parties, its judgment, however erroneous on the law and the facts, concludes the parties unless appealed from. But, if jurisdiction over the subject-matter and person is wanting, its judgment is a nullity. The case of *Karcher v. Supreme Lodge*, 137 Mass. 368, S. C. 19 Cent. Law J. 152, is grounded on this rule. The court in that case say:

"Karcher was suspended by the tribunal which he had chosen to determine the question according to rules to which he assented in becoming a member, and he received notice of the proceeding. The action of this tribunal according to its rules, on a question which it had authority to decide, honestly taken, after the requisite notice to him, cannot be collaterally reviewed in this court on the ground that facts existed which, if brought to the notice of the tribunal, would have warranted or required a different decision."

None of the prerequisites here laid down as necessary to the validity and conclusiveness of a decree of one of these tribunals exists in the case at bar. By the laws of the order in force at the date of this transaction, neither Harrisburg lodge nor Hill consented that the supreme reporter should have jurisdiction to try and suspend lodges, with or without notice. The action of the supreme reporter in suspending Harrisburg lodge was not taken according to the laws of the organization; it was not a question which that officer had authority to decide, and it was, moreover, taken without notice. It was not merely an erroneous proceeding on the part of that officer, but a usurpation which cannot affect the legal rights or change the legal status of any one. *Agnew v. Grand Lodge A. O. U. W.* Missouri Court of Appeals, 1885. Harrisburg lodge was not required to appeal from such an order of suspension. The obligation to appeal is not imposed where the judgment is void for want of jurisdiction. It may be likened to a judgment rendered by a court which has no jurisdiction of the subject-matter or the person. No appeal or writ of error is necessary to get rid of such a judgment; it is void in all courts and places. The lodge, therefore, did right in ignoring the so-called sus-

pension, and forwarding assessment No. 66, as was done. This assessment was forwarded twice, and returned each time. The grounds assigned for this action were two: *First*, that assessment No. 65 had not been paid; and, *second*, that the lodge was suspended. Both the grounds were without foundation in fact. Assessment No. 65 had been paid, and the lodge had not been suspended. The tender of assessment No. 66 was just as effectual to preserve the rights of the lodge and its members as if it had been accepted. For the purpose of avoiding penalties and forfeitures, or the loss of any right or privilege, a tender is the exact equivalent of payment. It does not have to be repeated. After tender made, the burden is on the creditor to act; he must demand the debt, and it is only required of the debtor to be ready to meet the demand. No demand of assessment No. 66 was ever made after it was returned to Harrisburg lodge. For the purposes of this case, therefore, that assessment must be treated as paid. Other calls were made, as stated in the fifth finding of fact, before Hall's death, but notices of these assessments were not sent to Harrisburg lodge, as required by the constitution and by-laws of the order. The officers of the Supreme lodge, supposing Harrisburg lodge was suspended, sent that lodge no notice of assessments after No. 66.

In the case of ordinary life policies, the company is under no obligation to give the assured notice of the amount and maturity of the premiums accruing on the policy, because the policy fixes definitely the amount of the premiums and the time of their payment, and the assured is bound to know these facts. *Thompson v. Insurance Co.* 104 U. S. 252. But under the constitution of the Knights of Honor the amounts which the subordinate lodges and their members are liable to pay cannot be known in advance of the assessments made by the supreme lodge. The amount and frequency of the assessments depend on the mortality of the members of the order. The subordinate lodges forward proof of death of their members to the proper officers of the supreme lodge, who ascertain from these returns the amount necessary to be assessed upon the subordinate lodges, and through them upon their members, to pay the amounts due to the holders of benefit certificates. When this amount is ascertained, it is distributed and assessed on the several subordinate lodges. The constitution of the order requires notice of these assessments to be sent to each lodge. This is the only mode by which the subordinate lodges can be informed of the amount they are required to pay, and the time within which the payment is to be made. Until this is done, no liability is imposed upon a subordinate lodge or its members. *Castner v. Farmers' Ins. Co.* 15 N. W. Rep. 452, (Mich. 1883;); *Bates v. Mutual Ben. Ass'n*, 47 Mich. 646; *Gellatly v. Mutual Ben. Ass'n*, 27 Minn. 215; S. C. 6 N. W. Rep. 627.

The subordinate lodges and their members discharge their constitutional obligation to the W. & O. B. fund when they pay, upon due notice, the assessments made by the Supreme lodge to maintain that

fund. An assessment notice of which is withheld from any lodge and its members is not an assessment on that lodge or its members, and their good standing is not lost by not paying an assessment of which they had no notice, through the fault or misconduct of the Supreme lodge or its officers. The Supreme lodge is bound to discharge its constitutional obligations to the subordinate lodges and their members. When, by its own wrongful act, it puts it out of the power of a subordinate lodge and its members to pay an assessment or assessments, it will not be heard to claim that the unoffending lodge and its members shall be visited with penalties and forfeitures the same as though the failure to pay the assessments had arisen from their fault. The subordinate lodge and its members, who have conformed to the laws of the order, are not to be deprived of their rights by a breach of its constitutional duty by the Supreme lodge. The Supreme lodge is under legal obligation to pay the benefit certificates of all members of the order who have conformed to its laws and died in good standing; and, if it refuses to perform its contract contained in the constitution and by-laws, the lawful holder of the benefit certificate may have recourse to the proper courts to enforce the contract. *Dolan v. Court Good Samaritan*, 128 Mass. 437.

Let judgment be entered for the plaintiffs for \$2,000, with 6 per cent. interest from the first day of January, 1881.

C. N. NELSON LUMBER CO. v. TOWN OF LORAINE.

(Circuit Court, W. D. Wisconsin. July 22, 1885.)

1. HIGHWAY TAX—WISCONSIN TOWNS—AUTHORITY OF ELECTORS—REV. ST. WIS. 1878, §§ 776, 1240.

The electors of a town in Wisconsin have jurisdiction to raise money to build and repair roads, but they cannot in any town in the state raise more than 15 mills on the dollar, nor in any town having less than 500 inhabitants can they raise more than \$1,000, nor in any town of two congressional townships, without regard to the number of inhabitants, can they raise more than \$2,000, exclusive of the mill tax authorized to be levied by the supervisors.

2. SAME—AUTHORITY OF SUPERVISORS.

The supervisors are required by Rev. St. Wis. 1878, § 1240, whether any taxes have been voted by the electors or not, to levy a tax of from one to seven mills on the dollar, and in addition thereto to assess any further amount which may have been ordered to be assessed by the electors, not exceeding in the whole 15 mills on the dollar, provided that the amount assessed in towns of less than 500 inhabitants shall not exceed \$1,000 in all, and in towns of two congressional townships \$2,000, exclusive of the mill tax.

3. SAME—TAX HELD VOID.

Where the supervisors assess a road tax in excess of \$1,000 in a town of but 300 inhabitants, they exceed their authority and the tax is void.

At Law.

N. H. Clapp and Fayette Marsh, for plaintiff.

J. N. Searles, for defendant.

BUNN, J. This action is brought by the plaintiff, a corporation of Minnesota, owning pine lands in this state, to recover back from the town of Loraine the sum of \$547.41, paid by it to the collector of said town for a highway tax assessed upon the plaintiff's logs in 1883. The collector of taxes having seized upon certain personal property of the plaintiff to satisfy the tax, the plaintiff, under protest, paid the tax to save its property, and now brings action against the town to recover it back.

The case has previously been before the court upon a demurrer to the first and third counts of the complaint, which was sustained. See 22 FED. REP. 54. It is now submitted upon the second count, and the answer thereto, and upon certain stipulations of the attorneys for decision by the court, a jury trial having been waived. The question presented is one of law, as to whether, upon the facts alleged and the stipulation of the parties, the highway tax levied in the defendant town is valid; and this involves a construction of sections 776 and 1240 of the Revised Statutes of Wisconsin. Section 776 authorizes the qualified electors of each town, at any annual town meeting, to vote to raise money for the repair and building of roads and bridges, subject to the limitations provided in section 1240. Section 1240, as amended by chapter 163, Gen. Laws 1883, after providing that the supervisors shall assess a highway poll-tax, provides:

"(2) The residue of the highway taxes, to an amount not less than one nor more than seven mills on the dollar, shall be assessed on the valuation of real and personal property in each district; but the supervisors in the several towns in this state shall assess any amount of highway tax, additional to the amount above authorized, which shall be ordered to be assessed at the next preceding annual town meeting, not exceeding fifteen mills on the dollar of such valuation. But no town, containing a population of less than five hundred inhabitants, shall hereafter levy or collect in any one year a highway tax of more than \$1,000, including the amount of money that may be voted at any special or general town meeting, and the mill tax herein authorized to be levied by the supervisors. And no town having two congressional townships or more shall levy or collect a tax, exclusive of the mill tax hereinbefore authorized, of more than two thousand dollars in any one year."

The facts are these: The town electors, at their annual town meeting, voted a highway tax of seven mills on the dollar of the assessed valuation in the town. The supervisors, under section 1240, made an assessment of 15 mills on the dollar, or eight mills in addition to the amount authorized by the electors. It is alleged in the complaint, and stipulated to by counsel, that the amount of highway tax levied in the town was \$1,740; that the town was comprised of two congressional townships, and contained not more than 300 inhabitants.

It is contended by plaintiff (1) that the supervisors have no authority under the law to assess any amount of highway tax without its being voted and authorized by the electors at the annual town meeting preceding the levy; (2) that in any event they can only

raise 15 mills on the valuation in all, including that voted by the electors, and that in this case they could add but seven mills to the seven mills so previously voted by the electors, making 14 mills in all; (3) that the \$1,000 limitation provided in section 1240, Rev. St., as amended by chapter 163, Laws 1883, applies to this town, and that the tax is void because it exceeds this limit.

The defendant's contention is (1) that the supervisors may levy a highway tax of 15 mills in addition to what the electors previously vote, and that the electors may vote a tax of seven mills, making the limit 22 mills; (2) that the \$1,000 limitation has no application to towns of two congressional townships or more.

Neither plaintiff nor defendant is wholly correct in his construction of the statute, and I think the defendant wholly wrong. It seems to me the true meaning of these statutes, taken together, is this: The electors have, by section 776, jurisdiction to raise money to build and repair roads, subject to all the limitations contained in section 1240; that is to say, they cannot, in any town in the state, raise more than 15 mills on the dollar, nor in any town having less than 500 inhabitants can they raise more than \$1,000, nor in any town of two congressional townships, without regard to the number of inhabitants, can they raise more than \$2,000, exclusive of the mill tax authorized to be levied by the supervisors. So much for the authority of the electors. Now as to the supervisors. By section 1240 they are not simply authorized, but required, whether any tax has been voted by the electors or not, to levy a tax of from one to seven mills on the dollar. And, in addition thereto, they are also required to assess any further amount which may have been ordered to be assessed by the electors, not exceeding in the whole 15 mills on the dollar: provided, always, that the amount assessed in towns of less than 500 inhabitants shall not exceed \$1,000 in all, and in towns of two congressional townships, \$2,000, exclusive of the mill tax; that is to say, the supervisors, subject to the \$1,000 and \$2,000 limit, shall assess at least one mill on the dollar for highway tax. They may assess seven mills on the dollar without any authority from the electors. They shall, in addition to the amount which they assess of from one to seven mills, assess any further sum voted by the electors, not exceeding in all 15 mills on the dollar.

I think the defendant's contention, that the 15-mills limitation applies to the amount which the electors have voted, and which the supervisors are authorized to add to the seven mills which they, of their own authority, have power to assess, is clearly wrong. I have no doubt this limitation applies to the entire amount to be assessed by the supervisors, including that voted by the electors. If this construction be the correct one, then the highest sum the supervisors could have assessed in this case was 14 mills on the dollar; that is, they could only add the seven mills voted by the electors to the seven mills which the statute enables the supervisors to assess on their own au-

thority. I am also clearly of the opinion that the \$1,000 limitation applies to this case, and that, in assessing a road tax of \$1,740 in a town of but 300 inhabitants, the supervisors exceeded their jurisdiction, and that the tax is invalid. I am the more satisfied that this is the true construction from an examination into the history of the \$1,000 and \$2,000 provisions severally. That of \$1,000 was first adopted in 1869, in chapter 152 of section 22 of the General Laws of that year, and remained the only limitation except the 15-mills limitation until 1878, when, in the General Laws of that year, chapter 250, the \$2,000 limitation was first enacted in such a form as to leave very little doubt of its meaning, in connection with the \$1,000 limitation also re-enacted in the same section.

It seems very clear that from the time of its adoption in 1869 to its re-enactment in 1878 the \$1,000 limitation applied to all towns in the state having less than 500 population. And it is equally apparent, I think, that the adoption of the \$2,000 limitation by chapter 250, Laws 1878, does not and was not intended to change the previously well-understood meaning of the \$1,000 limitation. The revisors changed the form of both provisions in the revision of 1878, but not, in my judgment, so as to alter the meaning. The various provisions of the statutes referred to, and the changes made, are too lengthy to be quoted in full, but may be easily examined by any one who may be interested in the question.

My conclusion is that the limitation of \$1,000 is upon every town in the state having less than 500 inhabitants. That of \$2,000 is upon every town, without regard to the number of inhabitants, having two or more congressional townships. There is another distinction; the \$1,000 limitation is *inclusive* of the mill tax, while the \$2,000 limitation is *exclusive* of the mill tax. Why the legislature, by the act of 1878, confined the \$2,000 limitation to towns of two or more congressional townships may not be very apparent; but probably it was because of the well-known fact that almost all the old and wealthy and thickly settled towns have less than two townships, while in the north part of the state it will frequently happen that in a town of very few inhabitants, and very little wealth or improvement, there will be several congressional townships. I think it not unusual to have a town 36 miles long, with a rather sparse settlement, in but one congressional township. I have known of such towns and have heard of others. But we are not greatly concerned to find a motive for the action of the legislature in a case where it has expressed itself in language so plain as in this.

I hold the tax in question void because in excess of two of the limitations above referred to, and that the plaintiff is entitled to recover from the defendant town the amount of said tax, \$528.47, with interest at 7 per cent. from the time it was paid to the collector in September, 1883.

RICE and others v. FRAYSER and others.*(Circuit Court, E. D. Arkansas. July 25, 1885.)***1. ARKANSAS STATUTE OF ASSIGNMENTS CONSTRUED—POSSESSION OF ASSIGNED PROPERTY.**

The statute of Arkansas regulating assignments for the benefit of creditors prohibits the assignee from taking possession of the assigned property until he gives bond and files an inventory of the property; and a deed of assignment that stipulates that the assignee shall take possession of the property before he gives the bond and files the inventory, as required by the statute, is void. No inquiry is permissible to show that no fraud was intended, or that the statute was violated for an honest purpose.

2. SAME—NOTICE OF SALE.

The statute provides that the assignee "shall give at least thirty days' notice" of the sale of assigned property, and a deed that provides for a sale upon "twenty days' notice" is void.

3. SAME—REQUIREMENTS OF STATUTE MANDATORY.

The provisions of the statute respecting the possession and sale of property assigned for the benefit of creditors are mandatory and not directory, and a deed which contravenes these provisions is void.

4. STATE DECISIONS BINDING ON UNITED STATES COURTS.

The decisions of the supreme court of a state relating to the validity of deeds of assignments made in such state are binding on the courts of the United States.

At Law.

On the twenty-ninth day of January, 1885, the defendants, Frayser, Mitchell & Co., merchants, made an assignment of their stock of merchandise and other property, for the benefit of their creditors, to L. N. Black, trustee. The deed of assignment contains this provision following the granting clause: "And they hereby deliver the same into the possession of said L. N. Black, trustee." And later on it is provided: "And it is hereby stipulated that said party of the second part shall execute bond, as required by law, make and file a true and perfect inventory and description of said property, and shall thereupon advertise said property for twenty (20) days, by publication in some newspaper printed in said Cross county." The statutes of Arkansas regulating such assignments contain the following provisions:

"Sec. 305. In all cases in which any person shall make an assignment of any property, whether real, personal, mixed, or choses in action, for the payment of debts, before the assignee thereof shall be entitled to take possession, sell, or in any way manage or control any property so assigned, he shall be required to file, in the office of the clerk of the court exercising equity jurisdiction, a full and complete inventory and description of such property, and also to make and execute a bond to the state of Arkansas in double the estimated value of the property in said assignment, with good and sufficient security, to be approved by the clerk of said court, conditioned that such assignee shall execute the trust confided to him, sell the property to the best advantage, and pay the proceeds thereof to the creditors mentioned in said assignment, according to the terms thereof, and faithfully perform the duties according to law." Act February 16, 1859, § 1, as amended by act February 23, 1883.

"Sec. 309. Said assignee shall be required to sell all the property assigned to him for the payment of debts, at public auction, within one hundred and twenty days after the execution of the bond required by this act, and shall give at least thirty days' notice of the time and place of such sale; and any person damaged by the neglect, waste, or improper conduct of such assignee shall be entitled to bring his action on the bond, in the name of the state, for the use and benefit of such person." Act February 16, 1859, § 3; Mansf. Dig. 219, 220.

The plaintiffs sued out an attachment against the defendants, and attached the property in the possession of the assignee under the deed of assignment, upon the ground that the deed was in contravention of the statute and void.

U. M. & G. B. Rose, for plaintiffs.

Greer & Adams, for defendants.

CALDWELL, J. The execution of the deed, and the delivery of possession of the property to the assignee under it, were simultaneous acts. The deed declares "they hereby deliver the same into the possession of said L. N. Black, trustee." A subsequent provision of the deed requires the assignee to execute a bond before he sells the property, but that the deed contemplates that the actual possession of the property shall pass to the trustee before he executes a bond or files an inventory, and that the possession did so pass is not controverted. It is said by the learned counsel who argued this cause for the defendants that it has been decided in *Clayton v. Johnson*, 36 Ark. 407, that such a provision in a deed, and possession taken under it, does not affect the validity of the assignment. This is a misconception of what was decided by the court in that case. The court in that case decided but three propositions, viz.: (1) That the statute regulating assignments was constitutional; (2) that the execution and delivery of the deed of assignment vests the legal title to the property in the assignee, and entitles him to "access" to the property for the purpose of making the inventory, but that he cannot take possession of the property, or sell or in any way manage or control it, until he gives the bond and files the inventory required by the statute; (3) that the assignor may exact releases.

The defendant in that case might, at the trial, have raised other questions, but these were the only questions of law reserved, and of course the court could not pass on any others. It is clear from the later decisions of the court that the deed in that case was bad for several reasons, and must have so been held if the points had been raised. The construction of the statute of assignments by the supreme court of the state is binding on the courts of the United States. The points raised and decided in the case of *Clayton v. Johnson* are rules of decision in this court, but the effect of a stipulation in the deed that the assignee shall take possession before giving the bond and filing the inventory required, or the effect of his taking possession independently of any stipulation in the deed, did not arise, and was not considered or decided, in that case. The statute is peremptory that the

assignee shall not take possession, sell, or in any way manage or control the property assigned until he has given the bond and filed the inventory required. In this respect the statute of this state has no counterpart. The supreme court of the state have never decided that an assignee may lawfully do what the statute expressly says he shall not do; or that a deed containing a provision that the assignee shall do what the statute, in terms, says he shall not do, is valid. When that court decided that the execution and delivery of the deed passed the legal title to the assigned property to the assignee, it seems to have been taken for granted by some that the right of possession passed with the title, without the execution of the bond and inventory by the assignee, and that in some way the provision of the statute on that subject had been abrogated. This delusion was speedily removed by the supreme court.

In *Thatcher v. Franklin*, 37 Ark. 64, an assignee who had not given bond or filed an inventory brought replevin for the assigned property. The circuit court, misinterpreting the case of *Clayton v. Johnson*, held he could recover; but the supreme court said:

"But, though the deed vested the legal title to the goods in the trustee, yet, by the express language in the statute regulating assignments, (Gantt's Dig. §§ 385, 387,) before he was entitled to take possession, sell, or in any way manage or control the property assigned, he was obliged to file the schedule and execute the bond required by the act. This case differs from the case of *Clayton v. Johnson*, *supra*. In that case, the trustee filed the schedule and executed bond before he brought replevin, as provided by the statute. In this case, it appears that the trustee paid no attention to the statute. The court below erred in refusing to charge the jury, as moved by appellants, in effect, that plaintiff having failed to file the schedule and give bond, as required by the statute, could not maintain replevin for the goods."

This doctrine was affirmed in *Falconer v. Hunt*, 39 Ark. 68. The result of the opinions in *Clayton v. Johnson* and *Thatcher v. Franklin* is that the legal title to the property assigned passes to the assignee by the execution and delivery of the deed of assignment; that "he is entitled to access to" the property to make the invoice; but that he cannot take possession, and has no right to the possession, until he gives bond and files an inventory. Until this is done, the assignor must retain the possession of the property. The result is not a novel one. It often occurs that the legal title to property is in one person, and the possession and right of possession in another. There never was any excuse for misapprehension on this subject; for the court in *Clayton v. Johnson* were particular to say: "But whether the conveyance be of real or personal property, and whether the assignor make and attach to the deed a schedule or not, the assignee must file a schedule of the property embraced by the deed before he can take possession of, sell, or in any way control or manage it. If the property be goods, choses in action, etc., he is entitled to access to them for the purpose of making the schedule, if the assignor has not attached to the deed a satisfactory one."

The court here distinguishes between "possession" and "access," giving to each word its appropriate meaning. The term "access," as here used by the court, means liberty to approach and inspect the property, and that is all the assignee can do until he gives the bond. "Possession," in the sense of the statute, means much more than "access." "Possession" is that condition of fact under which one can exercise his power over a corporeal thing at his pleasure, to the exclusion of all others. Burrill, Law Dict. tit. "Possession." This right belongs to the assignor until his assignee qualifies. The prohibition in the statute is addressed to the assignor as well as the assignee. The one is forbidden to give, and the other forbidden to take, the possession until the assignee qualifies himself to receive the possession in the mode pointed out by the statute. The statute requires this, and a deed which provides the contrary is in the teeth of the statute. The court must presume the statute was enacted for some useful purpose. It is obvious its purpose was to prevent frauds; and a deed of assignment directing or authorizing the assignee to act contrary to an express injunction of the statute, renders the deed fraudulent and void in law. No inquiry is permissible to show no fraud was intended, or that the statute was violated for an honest purpose. See further, on this point, *Aaronson v. Deutsch*, post, 465.

The statute says the assignee "shall give at least thirty days' notice of the time and place of" the sale of the assigned property, and this deed provides for a sale of the assigned property upon "twenty days' " notice. It is admitted that the authority given to the assignee to sell upon giving "twenty days' " notice is in contravention of the statute; but it is said that this requirement of the statute, as well as that relating to the right of the assignee to take possession, is directory; and that, if this be not so, the assignee is bound to follow the law, notwithstanding the terms of the deed; and that only such provisions of the deed as are in conflict with the law are void. These arguments are not new. They were addressed to the supreme court of this state in *Raleigh v. Griffith*, 37 Ark. 150, and the court said:

"In providing for the sale of property, the statute is disregarded in the deed of assignment. The legislature deemed it expedient, as matter of public policy, to require assignees, in general deeds of assignment for the benefit of creditors, to sell all property assigned to them for the payment of debts, at public auction, within one hundred and twenty days after the execution of the bond, etc., on thirty days' notice of the time and place of sale. The statute prescribes a mode of sale in this state, and dissenting creditors are not bound by a deed made in a direct contravention of a plain provision of the statute."

In *Teah v. Roth*, 39 Ark. 66, the court said:

"The deed empowered the assignees to retail the goods privately for twelve months, and then to sell the remnant by public auction. This is in contravention of our statute of assignments, which directs a public sale within one hundred and twenty days after the assignee takes upon himself the execution of the trusts of the assignment. And the legal effect is to avoid the deed, as against non-assenting creditors."

The same arguments were addressed to the supreme court of the United States in *Jaffrey v. McGehee*, 107 U. S. 361, S. C. 2 Sup. Ct. Rep. 367,—a case appealed from this court,—and that court said:

"The question presented is, therefore, this: Is an assignment for the benefit of creditors, which authorizes the assignee to violate the provisions of the statute regulating such assignments, valid and binding on the creditors of the assignor? The contention of the appellant is that the assignment is valid, (1) because the discretion given the assignee by the assignment leaves him at liberty to follow the law; and (2) because, even if the assignment required him to administer the trust in a manner different from that prescribed by the law, only such directions as conflicted with the law would be void, and the assignment itself would remain valid. We think that under the construction given the assignment law by the supreme court of Arkansas in *Raleigh v. Griffith*, 37 Ark. 150, these positions cannot be maintained. The effect of this decision—and there is no other decision of that court in conflict therewith—is that the provisions of the statute respecting the sale of property assigned for the benefit of creditors are mandatory and not directory. It follows that the assignment, which vests the assignee with a discretion contrary to the mandates of the statute, and in effect authorizes him to sell the property conveyed thereby in a method not permitted by the statute, must be void; for contracts and conveyances in contravention of the terms or policy of a statute will not be sanctioned. *Peck v. Burr*, 10 N. Y. 294; *Macgregor v. Dorer & D. Ry. Co.* 18 Q. B. 618; *Jackson v. Davison*, 4 Barn. & A. 691; *Miller v. Post*, 1 Allen, 434; *Parton v. Hervey*, 1 Gray, 119; *Hathaway v. Moran*, 44 Me. 67."

It would seem the assignee is bound to observe the terms of the deed, though they conflict with the law, because the condition of his bond is that he "will execute the trust confided to him * * * according to the terms thereof." The supreme court of the state has laid down the rule that the requirements of the statute regulating assignments are mandatory, and that any stipulation in the deed in contravention of these requirements avoids the instrument. This ruling is in harmony with the general, though not quite uniform, doctrine of the authorities, and is binding on this court. Mr. Burrill says: "The principle that an assignment fraudulent in any of its provisions is void *in toto* is said to be too well established to need any reference to authorities to support it." Burrill, Assignm. § 352; *Pierson v. Manning*, 2 Mich. 460; *Caldwell v. Williams*, 1 Ind. 411; *Mussey v. Noyes*, 26 Vt. 472; *Wakeman v. Grover*, 4 Paige, 23; S. C. 11 Wend. 187. And such has been the uniform ruling of this court, concurred in by Circuit Judges DILLON and McCARY. *Bartlett v. Teah*, 1 FED. REP. 768; *Schoolfield v. Johnson*, 11 FED. REP. 297. In Burrill, Assignm. § 319, it is said: "An assignment may be void without being positively fraudulent, as where it fails to comply with some merely formal statutory requirement." It is not for the debtor to assume that he can devise a better mode of administering the trust than that prescribed by the statute; and whenever he has attempted to do so the assignment has been adjudged void. An assignee in a deed of assignment for the benefit of creditors is not a purchaser for value, and has none of the equities of such a purchaser. He must

stand on the letter of his deed, and if that is in contravention of the law it is void. The deed was fraudulent and void in law, and this fact supports the attachment. *Dodd v. Martin*, 15 FED. REP. 338; *Whedbee v. Stewart*, 40 Md. 414; *Teah v. Roth*, 39 Ark. 66.

AARONSON v. DEUTSCH.

(Circuit Court, E. D. Arkansas. July 25, 1885.)

1. ARKANSAS STATUTE OF ASSIGNMENTS—POSSESSION OF ASSIGNED PROPERTY.

Under the Arkansas statute, if the parties to a deed of assignment for the benefit of creditors agree, at the time of the execution of the deed, that the possession of the property assigned shall be delivered to the assignee before he has given the bond and filed the inventory required by law, and that agreement is carried into effect, it avoids the deed, and is good ground for an attachment against the debtor.

2. RULE AS TO VALIDITY OF DEEDS VALID IN THEIR INCEPTION—DOES NOT APPLY, WHEN.

The rule that a deed valid in its inception will not be rendered invalid by any subsequent fraudulent or illegal act of the parties has no application when the fraudulent or illegal act is the consummation of an illegal agreement made contemporaneously with the deed. In such case the illegal act is part of the original design, and the deed is void *ab initio*.

At Law.

T. B. Martin, J. M. Taylor, and Cohn & Cohn, for plaintiff.

W. E. Hemingway, for defendant.

CALDWELL, J. This case turns upon the validity of a deed of assignment for the benefit of creditors. Much of what is said in the opinion in the case of *Rice v. Frayser*, ante, 460, is applicable to this case also. There are some points of difference which will be noticed. The plaintiff claims the deed of assignment is fraudulent in fact, and that it is void by reason of an agreement, carried into effect, to transfer the possession of the property to the assignee upon the delivery of the deed, and before the latter had given the bond and filed the inventory required by law. There is much in the evidence tending to show that the assignment, which prefers a relative of the debtor for a sum sufficient to swallow up the whole estate, was one step in a scheme to delay and defraud his creditors. It does not matter that the assignee was not a party to this scheme. He does not stand on the footing of a purchaser for value, and his participation in the fraudulent purpose does not have to be shown. But, in fact, he did agree to and participate in an act which was in violation of the statute, and therefore a fraud upon the law.

It was the understanding of the parties to the deed that possession of the assigned property should be delivered to the assignee upon the execution and delivery of the deed, and before the assignee had qualified by giving bond and filing an inventory. Accordingly, im-

mediately after the execution of the deed the assignor put the assignee in possession of the property. The key to the store-house containing the property, and the property itself, was delivered to the assignee; the assignor withdrew from the place and abandoned all watch or care over the property, leaving the assignee to exercise absolute and unrestricted dominion over it. The assignee had not given bond and filed the inventory up to the time the goods were attached. The contention of the learned counsel for the defendant is that, because this illegal understanding and action of the parties was not in terms provided for in the deed, the validity of the assignment is not affected thereby; and that the wrongful possession of the assignee was a matter occurring subsequent to the execution of the deed, and cannot affect its validity. The mere act of taking possession was subsequent to the execution of the deed; but it was done in pursuance of an understanding had at the time of the execution of the deed, and when that fact is shown, its legal effect is the same as if the deed had provided for it. When the parties to the deed enter into an agreement to do an act in violation of the requirements of the statute of assignments, and that agreement finds expression in the deed, the instrument is fraudulent and void in law upon its face. Where such an agreement is made, but is not disclosed on the face of the deed, it must be proved; and when it is proved, and it is also shown that the parties are carrying out their illegal purpose, the effect upon the validity of the assignment is precisely the same as if the illegal purpose had been declared on the face of the deed.

The rule which the defendant seeks to invoke, that a deed valid in its inception will not be rendered invalid by any subsequent fraudulent or illegal act of the parties, has no application where the fraudulent or illegal act is the consummation of an illegal agreement made contemporaneously with the deed; and the rule must be taken as not intended to deny that such subsequent acts may reflect light back upon the original intent, and help us to ascertain that correctly; and if the illegal acts are part of the original design, the deed is void *ab initio*. *Shultz v. Hoagland*, 85 N. Y. 464. Where the assignment is tainted with either moral or legal fraud, the property does not pass. *Burrill*, Assignm. § 501. In the brief filed by defendant's counsel it is said:

"To place an assignee in possession of goods, without bond or inventory, puts it in his power to defraud creditors; he may make way with or secrete the goods, if he can do so without the creditors' knowledge, but he has less power to do it than the debtor, for if he is seen doing it, being the trustee of the creditors, they through chancery can control his conduct and enforce their rights."

Speculation as to the efficacy of the statutory provision in question, to prevent fraud, is bootless. *Ita lex scripta est*. Courts must give it effect. And a deliberate agreement, in or out of the deed, made at the time and carried into effect, to violate the statute, is a fraud upon the

statute, and a fraud upon the legal rights of creditors, which the law will redress by removing the fraudulent barrier to the assertion of their legal rights against their debtor. It is useless to inquire whether equity could give relief in such case. Conceding that it could, its jurisdiction is not exclusive, and it is certain that the parties to the fraud cannot insist that those injured by it shall be denied redress at law on their legal demands. The case of *Clayton v. Johnson*, 36 Ark. 406, gives no sanction to the proposition that where an assignment is void for matter either in or *dehors* the deed, that creditors must appeal to a court of equity to purge it of the fraud, conform it to the law and the court's ideas of justice, and enforce it as thus reformed. All the court said in that case about invoking the powers of the court of equity was to announce the familiar rule that where the assignment was valid, and the assignee failed to qualify, the creditors might apply to chancery for the appointment of an assignee who would qualify and execute the trust. See page 422 of opinion. Undoubtedly, if a trust is once properly created, the courts will not allow it to fail for want of a trustee. But it was never heard that a court of equity could metamorphose a void deed or trust into a valid one. But argument on this question, in this state, was set at rest by the judgment of the supreme court in *Teah v. Roth*, 39 Ark. 66. That was a case in which the deed authorized the assignee to sell the assigned property in a mode different from that prescribed by the statute. The creditors of the assignor, believing this rendered the deed fraudulent and void, and that it constituted a good ground of attachment, sued out an attachment and levied on the assigned property in the hands of the assignee. The court say:

"SMITH, J. In these cases the plaintiffs brought actions against the maker of an assignment for the benefit of certain enumerated creditors, and caused attachments to be levied upon portions of the stock of goods assigned. The defendant interposed no defense to the merits, but contested the ground of attachment, which was that he had fraudulently disposed of her property; the fraud relied upon being the making of said assignment. The attachments were sustained, and we affirm the judgments below upon the authority of *Raleigh v. Griffith*, 37 Ark. 150."

The court gave no consideration to the suggestion that it was the duty of non-assenting creditors to file a bill to perfect a void assignment. The laws of this state are exceedingly liberal to debtors in the matter of assignments for the benefit of their creditors. They may make preferences, exact releases, and appoint their own assignee. They may, in a word, make their own bankrupt law. In view of these large powers of the debtor, the legislature has prescribed a few wholesome rules for the protection of the creditors, and these the debtor cannot strike down or evade with impunity. They are mandatory, and any stipulation in the deed, or any agreement of the parties to the deed at the time of making it, carried into effect, contravening them, annuls the assignment. *Rice v. Frayser*, ante, 460.

In re STOWELL and others. .*(District Court, N. D. New York. July, 1885.)*

BANKRUPTCY—COMPOSITION—VESTED RIGHTS—INJUNCTION—LACHES.

An order in composition proceedings, based upon a resolution passed by the requisite majority of the creditors, cannot deprive a non-consenting creditor of a vested right with which the bankruptcy court has no power otherwise to interfere.

Motion for an Injunction.

On the seventh of June, 1876, the bankrupts above named made an assignment to Samuel W. Perry, pursuant to the statutes of New York, for the benefit of their creditors. The assignee duly qualified and entered upon the duties of his trust. On the twenty-second of August, 1883, Perry died. The petitioners are his executors. On the fourteenth of February, 1878, a year and eight months after the assignment, a voluntary petition in bankruptcy was filed by the Stowells in this court, and on the twenty-seventh of the same month they were adjudicated bankrupts. On the first of April, 1878, the bankrupts submitted a proposition for composition under the bankrupt act, by the terms of which they agreed to pay to their creditors 20 cents on the dollar, upon condition that the creditors would release and discharge whatever right they had in the property theretofore assigned to Perry, and consent that it be restored to the bankrupts. This offer was accepted, and the condition duly agreed to by the requisite majority of creditors. The assignee, and the firm of Fraser, Bell & Loughran, the creditors who oppose this petition, had due notice of all the bankruptcy and composition proceedings; their names, addresses, and indebtedness appearing in the statement produced by the bankrupts at the meeting of creditors, as required by the bankrupt law. On the sixteenth of April, 1879, this court made an order that the resolution accepting the said composition be recorded, and that the statement of assets and debts be filed. Thereafter all the creditors were paid, except Fraser, Bell & Loughran, who declined to receive the 20 cents upon their indebtedness, which was duly tendered them. After the creditors were all paid and the tender made, Perry turned over to the bankrupts all the property and assets which had been assigned to him.

Fraser, Bell & Loughran are now seeking to have the petitioners substituted as the representatives of Perry, for the purpose of compelling them to account for the property received by him under the assignment. On the second of August, 1881, there was entered an order of the county judge of Chemung county, deciding that Perry was excused from rendering a further account, upon the ground that he was justified, after the composition proceedings, in turning over the property in his hands to the bankrupts. Upon an appeal to the general term of the supreme court this order of the county judge was

reversed, and, upon an appeal by the assignee to the court of appeals, that court dismissed the case upon the ground that the order was not appealable. The county judge, therefore, considers it his duty, under the decision of the general term, to proceed with the accounting. The petitioners ask for an order staying the proceedings before the county judge, insisting that many of the facts now presented were not before the general term.

Gabriel L. Smith and Robert H. McClellan, for petitioners.

Roswell R. Moss, for creditors.

COXE, J. It is not deemed necessary to enter upon an extended discussion of the questions presented by this motion. The opposing views are maintained with great clearness and ability in the conflicting opinions delivered in the state courts. Little additional light, therefore, can be thrown upon the controversy. See *In re Stowell*, 26 Hun, (New York Sup. Ct. R.) 258. At the outset the petitioners are confronted with the proposition that the assignment to Perry was valid. This is the broad foundation upon which the creditors construct their argument. When the petition in bankruptcy was filed, the assignment had been in existence 20 months. It was not preferential. The assignee in bankruptcy could not have attacked it successfully. A bill filed by him for that purpose, the dates appearing, would have been held bad on demurrer. The assignment was unimpeachable. Not only so, but the bankruptcy court had no jurisdiction of the assigned property. This difficulty could not be remedied by a majority of the creditors. They could deal with property and rights within the control of the bankruptcy court. They could, by their voluntary action, release their interests, respectively, in other property, and estop themselves from asserting claims thereto. But the majority could not in this manner trample upon the privileges of the minority. The dissentient creditors here had acquired an equitable interest in the assigned property. The court had no power to deprive them of this right. The other creditors had no such power. They could dispose of their own property, but not *in invitum* of the property of others. These creditors are not bound. They consented to nothing. They ignored the composition proceedings. But it is said that the debt is satisfied, and that all remedies, rights and privileges incident thereto perish with it. Undoubtedly the debt is discharged so far as the debtors are concerned. The creditors can no longer pursue the bankrupts personally, but the right to demand that the property set aside for their benefit shall be applied for that purpose is by no means relinquished.

The simple question, then, is, does an order in composition proceedings, based upon a resolution passed by the requisite majority of the creditors, deprive a non-consenting creditor of a vested right with which the bankruptcy court has no power otherwise to interfere? I am constrained to answer this question in the negative.

The petitioners further contend that these creditors are estopped by

their own laches. They had, it is said, full notice of the composition proceedings. They knew, or could have known, of each successive step as it was taken, yet they made no sign. No objection was interposed, no suggestion made to the court, no warning given to the assignee. They stood by and saw the composition resolution carried out in good faith by the court, the bankrupts, the assignee, and the other creditors without dissent, and cannot now be permitted to set in motion machinery calculated to give them an unfair advantage, and affect injuriously the rights of innocent parties. This is the argument. It is certainly persuasive, and would, quite likely, be controlling, were it not that the question, being jurisdictional in character, cannot be affected by the mere inertness and the silence of the creditors; and further, an examination of the papers discloses the fact that the proceedings in the county court were commenced only four days after the petition in bankruptcy was filed. At the date of the final order in composition, at the very time the assignee delivered back the property to the bankrupts, a motion was pending, at the instance of Fraser, Bell & Loughran, to compel him to account, and to punish him for contempt in not having accounted before. He had, then, direct and positive notice of the position of these creditors, and cannot now be heard to say that he was entrapped, or that he proceeded in ignorance of their hostile attitude towards him. He was perfectly aware of the situation, acted with full knowledge, and, knowing what risk he ran, concluded to assume it.

It would, in such circumstances, be an arbitrary assumption of power to permit the summary writ of injunction (which should never issue in a doubtful case) to go out against creditors who have a decision of the supreme court of New York in their favor, and thus, in effect, restrain a state tribunal which has had jurisdiction of the controversy for more than seven years, and which is fully competent to protect the rights of all parties concerned.

The motion must therefore be denied.

SMITH and another v. SANDS and another.

(Circuit Court, W. D. Michigan, S. D. April 11, 1885.)

PATENTS FOR INVENTIONS—MANUFACTURE AND SALE OF ONE MACHINE—USE BY PURCHASER—REMEDY OF PATENTEE.

P. manufactured a single machine protected by complainant's patent, and B. bought the machine and continued to use it in his saw-mill for disposing of the saw-dust and refuse of the mill, the purpose for which it was intended. *Held*, that the extent of the injury to complainant was the royalty or proper license for the use of the machine, that he had an adequate remedy by action at law, and that the bill for an injunction and accounting should be dismissed.

In Equity. Demurrer to the bill of complaint.

Keating & Dickerman, for complainants, *Edward Taggart*, of counsel.

A. V. McAlvy, for defendants.

WITHEY, J. The demurrer filed to the bill of complaint is for the misjoinder of the defendants. At the time of the argument the defendants' counsel was permitted to present, *ore tenus*, the additional ground that the bill fails to state a case for equity jurisdiction. Inasmuch as this last ground of demurrer is believed to be well taken, the question as to a misjoinder will not be considered.

In substance the bill of complaint states that complainants are owners of certain letters patent for machines and devices for burning the saw-dust and refuse of saw-mills, that they have put the machines into practical use, and that the public has long acquiesced in their exclusive right to the same. The defendants, without license or permit, have unlawfully made, or caused to be made, sold, and used infringing machines; particularly that defendant Peters erected one infringing machine about July 15, 1881, and sold the same to defendant Sands, who has ever since used such infringing machine, and that said defendants still continue so to do in defiance of your orators' said rights, whatever that may mean. The bill states that the complainants have been damaged and suffered large loss of profits, to-wit, to the amount of \$10,000; that the defendants have been requested to refrain from "such infringement," but they still continue the infringement and wrongful acts aforesaid. The prayer is for an accounting as to profits and damages, and for an injunction.

So far as the matters stated in the bill are well pleaded, the demurrer admits them to be true. Accordingly, it appears that the defendant Peters, by making and selling the infringing machine for use, infringed the exclusive patented rights of the complainant, and so did the defendant Sands by using the infringing machine, and both are undoubtedly liable for the injury in an action at law. But the defendant Peters manufactured but the one machine, which was in July, 1881, more than three years before the bill of complaint was filed, in September, 1884, and there is no claim that he threatens or gives out, that he shall repeat the wrongful act by making another. As to him, therefore, no ground exists either for asking or granting an injunction, and the bill of complaint states no ground for entertaining jurisdiction by a court of equity, if there is no cause for an injunction, so far as regards the defendant Peters.

How is it as to the defendant Sands? He bought, and has continued to use, the one infringing machine. It is used only in his saw-mill for disposing of the saw-dust and refuse of the mill; it is not employed in the manufacture of any article or thing for market or for sale, and it is for the interest of complainants that all saw-mills use their patented machines, provided they are paid the price of a license. The extent of their injury for using a single machine in-

fringing their patents is the royalty or a suitable license fee. When once they have been paid the price or value of a license, they have received the full measure of the "actual damage" they suffer for any particular infringing machine used by another, and it is the full remedy they are entitled to, except a court may treble the actual damages if the circumstances justify it. Such damages once recovered would be a bar to a subsequent suit for further damages, no matter how long the infringing machine is used by Sands subsequent to such recovery, because the injury for the particular wrongful act of using the one machine is complete and has by such recovery been fully compensated. The infringement is not one where there is a damaging and constantly increasing competition and loss of profits, and hence there is no irreparable injury to the complainants, and no occasion to exercise the power of an injunction to restrain or prevent a multiplicity of suits. As has been said, complainants by an action at law against the respective defendants can recover full compensation for the infringements. The only wrong done is the non-payment of suitable license money, and the indefinite use by Sands of this same infringing machine will give no right to demand more.

It is conceded that courts of equity have assumed jurisdiction in similar cases as the one presented by this bill of complaint. *Howe v. Newton*, 2 Fish. 534, *Morris v. Lowell Manuf'g Co.* 3 Fish. 68-70, and *Blake v. Greenwood Cemetery*, 3 Bann. & A. 112, are among them. But Justice GRIER, at the circuit, refused an injunction, and intimated very clearly that a court of equity does not have jurisdiction in cases like this one; that the remedy is at law. *Sanders v. Logan*, 2 Fish. 167. The bill in that case was dismissed on another ground. Since *Root v. Railway Co.* 105 U. S. 189, was decided, in which Mr. Justice MATTHEWS reviews the patent laws and the decisions under them, showing when the remedy is in equity and when the sole remedy is in a court of law, for the infringement of letters patent, no court of equity, it is believed, would assume jurisdiction in a case like this, or in either of the cases cited above.

The demurrer is sustained for the reason stated, that there is no case for equitable jurisdiction under the statements of the bill of complaint.

THE M. VANDERCOOK.

(District Court, D. New Jersey. June 30, 1885.)

1. SALVAGE SERVICE—HELL GATE—TOWAGE—AWARD.

On May 4, 1884, the M. Vandercook was bound through Hell Gate to the city of New York, the tide running a strong ebb. When she reached a point in said Hell Gate abreast of Flood rock she broke her shaft and lost her propeller, by reason of which she became perfectly helpless, and was in danger of and would have gone ashore, and filled and sunk, as the channel of Hell Gate is dangerous, full of rocks, through which the tide rushes with great velocity,

and she could not anchor therein. The tug Gratitude went to her rescue, and towed her safely to Jersey City; in so doing subjecting herself to the risk of getting ashore and sinking. *Held*, a salvage service, but one of low grade, and that the amount of \$60 contracted to be paid was a fair compensation for the service rendered by the Gratitude.

2. SAME—ASSIGNMENT OF CLAIM FOR SALVAGE—MARITIME LIEN.

The assignment of a debt (such as claim for salvage agreed to be paid) secured by a maritime lien will carry the security with the claim when the parties so intend.

3. SAME—PRIORITY OF LIENS.

A claim for salvage service has a priority of rank over claims for repairs and materials.

4. MARITIME LIEN—MASTER'S CLAIM FOR WAGES.

A claim of a master for wages is not an admiralty lien.

5. SAME—NEGLIGENT TOWAGE—TORT—PRIORITY OF LIEN.

A claim for damages to a vessel and her cargo, caused by the negligence of a tug while towing her in pursuance of a contract, has priority of payment over liens for repairs and supplies to the offending vessel.

6. SAME—SUPPLIES—REPAIRS.

Claims for supplies and repairs stand in the same grade, and in this case are to be paid *pro rata* out of the residue of the fund in court after payment of the claims for salvage, and for the tort of the tug.

In Admiralty.

Alexander & Ash, for libelants Davies & Russell.

Carpenter & Mosher, for libelants Jas. McWilliams and others.

Bedle, Muirheid & McGee, for libelant Whitman B. Littlefield, and other libelants.

See Bros., for other libelants.

NIXON, J. A number of libels have been filed against the steam-tug M. Vandercook, and the commissioner has reported the amounts found due upon the respective claims. The boat was sold, and the net proceeds are now in the registry of the court. The amount, after the payment of liens for wages, is \$1,974.41, which is wholly inadequate to pay all the claims found due; and the question to be determined is, in what order shall they be liquidated, and which, if any, are entitled to preference?

1. We have the petition of Davies & Russell, praying that \$60 be awarded to them, out of the proceeds of the sale, for a salvage service rendered to the tug. Two objections are made to the allowance: (1) Because the service was not, in fact, a salvage service; and (2) because the petitioners are assignees of the party who performed the service, and therefore have no lien.

As to the first, no evidence has been taken, but the respective parties have agreed that the statement of the service, as set forth in the petition, shall stand as true, and in the place of evidence. It is there alleged that on the fourth of May, 1884, Eunice A. Dooley and G. N. Milliken were the owners of the steam-tug Gratitude; that on that day the tug M. Vandercook was bound through Hell Gate to the city of New York, the tide running a strong ebb; that when she reached a point in said Hell Gate about abreast of Flood rock she broke her shaft and lost her propeller; that by reason of said accident she be-

came perfectly helpless, and was in danger of and would have gone ashore, and filled and sunk; that Hell Gate is a dangerous channel, full of rocks, through which the tide rushes with great velocity, and in which the said tug could not anchor, and was entirely at the mercy of the tide; that while in this helpless condition the tug Gratitude went to her assistance and took her in tow, rescued her from her peril, and safely brought her to Jersey City; that the Gratitude, in rendering the services aforesaid, subjected herself to the risk of getting ashore and sinking; that the owners of the M. Vandercook agreed to pay the owners of the Gratitude for said salvage services the sum of \$60, no part of which has been paid, although payment has been demanded, and that before the commencement of said proceedings the owners of the tug Gratitude duly assigned their claim, together with their lien upon the M. Vandercook therefor, for a valuable consideration, to said petitioner.

It appears from this that the tug was in some peril, was helpless from an accident to her machinery, and was in a dangerous locality, and the service rendered was necessary for her safety. It is thus brought within the category of a salvage service, but having none of the ingredients which warrant a large allowance. A liberal charge for towage would almost meet the case. Under the circumstances, \$60 would not seem to be unreasonable, especially as that was the sum which the parties interested agreed upon at the time as a proper compensation.

As to the second, there is no reason in principle why the assignment of a debt, secured by a maritime lien should not carry the security with the claim, where the parties so intend. The debtor is not injured by it, and the creditor is greatly benefited. The question was carefully examined by Judge LOWELL in *The Sarah J. Weed*, 2 Low. 555, and I see no good reason to doubt the correctness of his conclusion, that in the assignment of a maritime lien the rights and remedies of the original creditors pass to the assignee. See, also, *The Liberty No. 4*, 7 FED. REP. 231. A claim for salvage service has a priority of rank over claims for repairs and materials, and a decree must be entered for the payment of the \$60, and costs.

2. The next inquiry is whether the claim of Whitman B. Littlefield for wages is an admiralty lien which is entitled to payment out of the fund in the registry. In his testimony he describes himself as the mate of the tug; but it is alleged by the contesting libelants that he was in fact the master, and as such has no lien for his wages. He appears in that relation on the enrollment of the vessel, and on taking out their papers in the custom-house he makes the usual master's oath. But it is claimed that his position, and the usual course of business of these tugs, are peculiar, and that the reasons which are ordinarily assigned why the master should have no lien for his wages do not apply in his case. He makes no contracts; he has no voice in procuring business or freights; he receives no moneys for tow-

age service or for freights; but is in all these respects subject to the control of the owner. There would be much force in this if the receipts of the earnings of the boat were the only ground on which the law denies a lien to the master. Following the rule of the English admiralty, the courts of this country, from the earliest times, have held that the master should not be classed with the seamen in having the privilege against the ship for the payment of wages. Various reasons have been assigned for this by elementary writers and learned judges. Mr. Justice STORY, in *Willard v. Dorr*, 3 Mason, 92, says that it has generally been ascribed to the fact that the master, when he contracts, trusts to the personal credit of the owner,—not quoting, but doubtless following, Sir WILLIAM SCOTT, in *The Favourite*, 2 C. Rob. 232, who states that the master, when he hires, is supposed to stand on the security of his personal contract. In *The Grand Turk*, 1 Paine, 73, LIVINGSTON, J., remarks that, in addition to the foregoing reason, the master is not allowed a lien for his wages on account of the inconvenience and expense to which owners might be subjected if, in every dispute with the master, he could take their vessel out of their hands and thus compel them to submit to improper charges.

I am of the opinion that, under the circumstances of the case, the libellant must be treated as the master, and that his claim for wages is not an admiralty lien.

The claim of James McWilliams and others for damages to libellants' boat, Two Brothers, and her cargo, caused by the negligence of the tug in towing, raises the question whether such a claim has priority of payment over liens for repairs and supplies to the offending vessel. The libel alleges that the M. Vandercook took the Two Brothers in tow at Jersey City on December 17, 1884, to safely tow her, with other boats, to New Haven, in Connecticut; that the Two Brothers was placed on the port side of the tug, and two other boats on the starboard side; that the tug and tow proceeded up the East river, and at about 5 o'clock A. M. reached a port on East river near the foot of North Ninth street, Brooklyn, where the tug was put in to pick up other boats for the tow; that at the time the weather was clear and a flood-tide running, and that in proceeding to said pier the steam-tug, in rounding the tow to, was so carelessly and negligently managed that libellants' boat was brought violently in collision with the dock or pier below the foot of North Ninth street, the port side of said boat striking the corner of the pier about 15 feet from her stern, breaking in her side and deck, and twisting the boat out of shape, and causing her to leak badly; that the pumps were manned and the boat taken into the slip, when it was found that she had three feet of water in her hold; that by constant work the water was reduced by 2 P. M. to about 18 inches, and the said boat and cargo were towed by another tug back to Jersey City, where, for the safety of the boat and cargo, she was put upon the flats. The parties have stipu-

lated that the allegations of the libel are true, and that the damages amount to \$821.76, as reported by the commissioner.

Did these damages arise *ex contractu* or *ex delicto*? The proctors for the contestants insist that it is in no sense a collision case, in which, it is conceded, the claim would be of a higher rank and take preference over claims for supplies and repairs. Their contention is that the action of the libellant is for damages sustained by reason of a breach of a towage contract, and hence has no priority over any other claim founded on a contract; and they rely upon the cases of *The Samuel J. Christian*, 16 FED. REP. 796, in the Eastern district of New York, and *The Grapeshot*, 22 FED. REP. 123, in the Southern district of New York, to sustain their view.

I have so much respect for the opinion of these learned judges in admiralty causes, and am so fully persuaded of the importance of a harmony of judgment and procedure in districts so contiguous, that I have examined these cases with great care, and am sorry that I am not able to concur in the conclusion to which they have arrived. They do not seem to me to be consistent with other decisions in the same districts, or in other districts, or in the supreme court of the United States.

The nature of a suit in the admiralty, brought to recover damages for injuries done to a vessel by negligent towage, was fully discussed before Judge BLATCHFORD in the case of *The Brooklyn*, 2 Ben. 547. The jurisdiction of the court in that case depended upon whether the action was for a tort sounding in damages, or for damages arising from the breach of a contract. It was held to be the former, and the judge, in his opinion, states that—

"The fact that the steam-boat was at the time of the loss engaged in towing the canal-boat under a contract of towage, either express or implied, does not make the negligent and careless navigation of the steam-boat in performing such towage any the less a tort towards the canal-boat, or her cargo, if injured thereby, than it would have been towards a third and stranger vessel which should have been injured thereby. Nor does the fact that such negligent navigation may be a breach of the contract of towage make it any the less a tort towards the canal-boat or her cargo if injured thereby. This view is sustainable entirely aside from any of the doctrines upon which the cases in regard to pure contracts are placed. In cases of contracts of affreightment, and contracts for supplies, the obligation of the delinquent rests wholly upon the contract, and arises wholly out of it. In the present case, the obligation of the steam-boat not to commit a tort against the canal-boat did not arise out of the contract of towage, any more than the obligation of a third vessel, meeting the canal-boat on her trip, not to collide with her, arose out of such contract, or out of any contract. The obligation of the steam-boat not to commit such tort arose out of the principle applicable in all cases of tort, *sic utere tuo ut alienum laedas non*. Her duty did not result from the consideration paid, or to be paid, for the towage. It was imposed by the law, and would have existed even though her service had been gratuitous."

Two years afterwards a similar question arose before the same judge in *The Deer*, 4 Ben. 355, and he reaffirms the doctrine held in the case of *The Brooklyn*, saying:

"If the steam-boat was negligent in her navigation in towing the barge, whether she was towing under a contract of towage or not, she was as much guilty of a tort, if the barge was injured through such negligence, as she would have been towards a third and strange vessel, which should have been injured through such negligence. Her duty not to be guilty of such negligence was imposed by the law, and existed even though the service of towing was gratuitous. The barge being lawfully where she was, the steam-boat owed a duty towards her, independent of any contract of towage, and is liable for any damages to her caused by negligent navigation, to the same extent that the steam-boat would be liable for such negligent navigation to a vessel which she was not towing."

To the like effect is the *dictum* of the same judge in the recent case of *The Frank G. Fowler*, 17 FED. REP. 655, and which has been strangely quoted by the proctors of the contesting libelants to support the doctrine that damages for negligence in towing are *ex contractu* and not *ex delicto*. The case was before the circuit court on appeal, and the only question was whether the district court had erred in holding that a subsequent claim for damages arising from negligent towage was entitled to priority of payment over an older claim of the same nature and character. The circuit court reversed the district court, and decided that the earlier claim should be first paid. In the course of his opinion the circuit judge repudiated the notion that claims of this sort arose out of the contract for towage, and said that he could not consider them other than claims sounding in damages for a tort.

The case of *The Liberty No. 4*, 7 FED. REP. 226, in the Southern district of Ohio, was this: The owners of the steam-tug *Liberty* entered into a contract to tow the barge *Speed*, with a cargo of salt, from Pomeroy, Ohio, to the port of Cincinnati. The cargo had been insured by the libelants, and upon its total loss on the Ohio river, while proceeding on the voyage, they paid to the owner the amount of the insurance, and filed a libel against the *Liberty* for damages sustained from negligent and careless towing. On exceptions to the libel for not stating facts sufficient to constitute a cause of action, Judge SWING overruled the exceptions, holding that such an action by the insurance companies to recover for the loss occasioned by negligence was not an action upon a contract. He says, (page 228:)

"If this is an action brought upon a contract, then, as between the libelants and the steam-boat *Liberty No. 4*, there is no privity in law. Is the libel, however, sounding in contract or is it in tort? The libel sets out the contracts, but that is more as a history of the matter than as a foundation for the action. I think the libel is one against the defendant, not for the violation of a contract which it had entered into, but it is a libel for the wrongful and negligent acts of the defendant in failing to carry out what it was bound to when it undertook to tow the barge to Cincinnati."

The same question was before the supreme court in the case of *The Quickstep*, 9 Wall. 665, on an appeal from the circuit court of the United States for the Southern district of New York. The libel alleged a contract with the steam-tug *Quickstep* to tow the canal-boat *Citizen* from New York to New Brunswick, New Jersey, for a stipulated price,

and negligence in the towing, whereby an injury was done to the canal-boat and her cargo; and it claimed damages for the loss sustained. Mr. Justice DAVIS, speaking for the court, in the course of his opinion said:

"The libel was not filed to recover damages for a breach of a contract, as is contended, but to obtain compensation for the commission of a tort. It is true, it asserts a contract of towage, but this done by way of inducement to the real grievance complained of, which is the wrong suffered by the libellant in the destruction of his boat by the carelessness and mismanagement of the captain of the *Quickstep*."

The claims, then, being *ex delicto* and not *ex contractu*, they have a higher rank, and should be paid before the claims for repairs and supplies. I think this is a settled doctrine in the American as well as the English admiralty, notwithstanding some recent attempts to call it in question. In Abb. Shipp. 533, (10th Eng. Ed.,) it is said:

"The maritime lien of damages, originating in the wrong of the master and crew of the vessel in fault, and founded on considerations of public policy for the prevention of careless navigation, takes precedence * * * of liens *ex contractu*. It absorbs, in the event of the *res* proving insufficient to meet all demands, the liens of wages, towage, pilotage, and bottomry, leaving them to be enforced by proceedings against the person of the owners."

And such, I understand, is the opinion of the supreme court in *Norwich Co. v. Wright*, 13 Wall. 122, where, speaking of claims for damages, it is said that "liens for reparation for wrong done are superior to any prior liens for money borrowed, wages, pilotage," etc.

A decree must be entered for the payment of these damages in full, and costs.

The remaining claims are for supplies and repairs, and as these all stand in the same grade, though lower than the claims for salvage and for a tort, they are entitled to share *pro rata* the residue of the fund in the registry.

THE PRES. BRIARLY.¹

DOUGLAS v. THE PRES. BRIARLY.¹

(Circuit Court, E. D. Louisiana. June 10, 1884.)

1. TOW-BOAT AND TOWS.

It is the duty of a tow-boat to see that her "tow" is properly made up, and secured with lines of proper strength.

2. SAME.

If a person, in charge of one of the barges which make up a tow, throw off the lines without authority of the master of the tow-boat, and damage ensue, to that extent the barge is in fault.

¹Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

3. SAME—ABANDONMENT OF TOW.

If a man, in charge of a barge that has broken loose from a "tow" abandon her, and that abandonment contributed materially to the loss of the barge, it was negligence and fault on the part of the barge.

Admiralty Appeal. Action for loss of a barge against a tow-boat towing same; barge having broken loose from tow-boat, and afterwards sinking by coming into collision with same.

W. S. Benedict and Richard De Gray, for libellant.

A. B. Philips and A. G. Brice, for claimants.

PARDEE, J. The evidence leaves no doubt that the tug was in fault in several important particulars, to-wit: (1) In not seeing that the tow was properly made up, and secured with lines of proper strength. Half-inch lines, even new, are not sufficient for the securing together of large barges to be towed in the Mississippi river. See *The Quickstep*, 9 Wall. 665. (2) In not securing the "cabbage" barge with a line from the tug before undertaking to back the tow up the Mississippi river. (3) In not keeping clear of the "cabbage" barge after the same had broken loose from the tow, but, on the contrary, colliding with her, causing the injuries from which she was filled with water and her cargo lost.

The answer of claimants goes no further than a general denial of fault on the part of the tug, except that fault is alleged on the part of libellant as follows:

"But the truth is that the carelessness lies on the officer in charge of said barge, who unloosened the rope that was attached to said cabbage-bargestern, which was attached to the potato barge that said tug had in tow; that he took upon himself to loosen said line without any orders, causing the front line, which was a rotten line belonging to said barge, to break loose from the potato barge; that he never made any attempt to take a skiff to secure the said barge that he had caused to drift."

There can be no doubt that, notwithstanding the precarious and shiftless way in which the two barges were lashed together, and to the tug, the difficulty in handling the tow, resulting in the breaking loose of the "cabbage" barge, and her subsequent collision and loss, commenced with the throwing off of the new line—bed-cord—which lashed the sterns of the two boats together. This line was thrown off by the man in charge of the cabbage barge, who abandoned his own boat to accomplish the feat, and the separation of the boats followed so quick as to prevent his return to his own boat. The libel alleges that this line was thrown off at the order of the master of the tug, with the intention of placing the tug between the two barges. The master of the tug denies explicitly giving any such order, and swears to no intention, expressed or implied, to place the tug between the two barges. The evidence as to such order on the part of the libellant is the testimony of the man in charge of the cabbage boat, which is too conflicting and confused to be very reliable. In his examination in chief he states that he threw off the line because the master

of the tug ordered him to do so. On cross-examination he says as follows:

"*Question.* You say you let this line loose? *Answer.* When the tug— *Q.* Just answer my question and nothing more; you have a right, after you answer my question, to make any explanation you wish. Now, what made you let go that line that ran from the potato boat to the cabbage boat? *A.* I did not want it on there when his line was on it. *Q.* You did not want it there, you say? *A.* It would have done no good. It was across the tug. What good would it do there? It was not fastened to the tug, and I took the line and threw it off. *Q.* You had received no orders from the captain of the tug to let it loose? *A.* I don't know that the captain told me to let it loose."

Three days after, on being recalled, he answers to about the same effect. The fact is now conceded that the tug was not placed between the barges, whatever intention the master may have had; and it is clear, from all the testimony on the point, that at the time the line was cast off the master of the tug was 100 feet away, at the bow of the potato boat, looking after the fastenings of a head-line from the tug to the bow of the potato boat. I am satisfied that the man in charge of the cabbage barge threw off the line without authority, and to that extent the barge was in fault. See *Dutton v. The Express*, 3 Cliff. 462.

It also seems to me that, though not pleaded, the court should notice that the abandonment of the cabbage barge by the man in charge was negligent and faulty, and contributed materially to the loss of the barge; at least, to render fruitless efforts to prevent loss.

The exceptions and objections to the commissioner's report as to the amount of the damage are not well taken. The commissioner has given the lowest award compatible with the evidence; in fact, if he had been more liberal the court would not have interfered. As both parties were in fault contributing to the loss, the damages, under admiralty rules, must be divided. Let a decree be entered in favor of the libellant for one-half of the damages reported by the commissioner, to-wit, for the sum of \$545.75, with 5 per cent. interest from January 15, 1885, and condemning claimant and his surety on the release-bond to pay the same. The costs of the district court, and for all evidence of claimant offered in this court and not in the district court, to be paid by claimant. The remaining costs of this court, with costs of the transcript of the record for appeal, to be paid by libellant.

THE THOMAS FLETCHER.¹ROSS v. THE THOMAS FLETCHER, etc.¹

(Circuit Court, S. D. Georgia. November, 1884.)

COSTS—REV. ST. § 750—RECORDS IN ADMIRALTY APPEALS.

The final record in cases of admiralty appeals must be such as is required by section 750 of the Revised Statutes of the United States, including the "process, pleadings, and decrees," and such record must correspond with the "judgment record" of the common law.

Admiralty Appeal. On exception of clerk to report of referees on motion to retax costs.

Marion Erwin, for the clerk.

Hayward & Johnson and *Garrard & Meldrim*, *contra*.

PARDEE, J. In equity and admiralty causes, "the process, pleadings, and decree" "shall be entered upon the final record," together with "such orders and memorandums as may be necessary to show the jurisdiction of the court and the regularity of the proceedings." Section 750, Rev. St. Said section applies as well to the circuit as to the district court; it is included in chapter 12 of the Revised Statutes, entitled "Provisions common to more than one court or judge," and the record therein prescribed is referred to in section 698, Rev. St., in a way that shows that it does apply to the circuit court. The "Transcript" sent up from the district court, when filed in the circuit court, becomes and is a part of the proceedings in the circuit court; and as it contains the "libel," the "process," and the "pleadings" in the cause, without which the final record in the circuit court would not "show the jurisdiction of the court, and the regularity of the proceedings," it would seem such pleadings and process must be recorded, by the express provisions of section 750, Rev. St.

The referees, in their finding on this point, take the view that as the process and pleadings contained in the "Transcript" were recorded in the court below, there is no necessity for the same to be recorded in the circuit court; and, viewing the matter from the standpoint of economy, they avoid the provisions of section 750, Rev. St., by interpolating into it the words "originating in said court," so as to make it read, by intendment, "In equity and admiralty causes (pending in any court) only the process, pleadings, and decree, (originating in said court,) etc., shall be entered on the final record." It is clear that no such meaning can be fairly inferred from the words of the statute itself, and the idea of reducing costs is all that can be urged in favor of such a construction.

Admiralty causes do not come up to the circuit court as a court of error, but of appeal, and the proceedings are had in the circuit court as if the cause proceeded *de novo*; the process and pleadings of the

¹ Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

district court becoming the process and pleadings of the circuit court, the circuit court executing its own decrees; all decrees in the district court being vacated by the appeal. See *The Lucille*, 19 Wall. 73; *The Grotius*, 1 Gall. 503; *The Wanata*, 95 U. S. 600; *The Lottawanna*, 20 Wall. 201. The importance of having its entire proceedings recorded is, therefore, not to be measured by the rules and practice in courts of error, which remand cases to lower courts after correcting errors of law, and which do not execute their own decrees.

The circuit court is a court of record. The very fact that a writ of error lies to it would be sufficient to establish that. 3 Bl. Comm. 406; 1 Mass. 510. Blackstone says that a court of record is "a court where the acts and proceedings are enrolled in parchment for a perpetual memorial and testimony." 3 Bl. Comm. 24. The "final record" of our courts corresponds with the "judgment record" of the common law,—the record "*in perpetuum rei memoriam*," a complete set of which, it is said, has been handed down in the English courts from the time of Richard II. The importance of the final record in our courts in all cases a few years old, where loose papers are constantly being misplaced, is too well known to be argued. In some cases of importance disposed of in this court, even since the late war, the "final record" is all that is left from which the questions determined by the litigations can be determined.

The "final record" of the circuit court ought not to be left incomplete in appeal cases, because of a few dollars' cost, and force the public to go to the records of the district court to find out upon what pleadings and issues the circuit court acted when it made and executed its decrees. It might save a few dollars to litigants, but outside innocent parties are the usual sufferers from a failure to record important papers.

The government does not charge litigants for the services of its judges and juries, but it does provide that the clerk's office shall be made self-sustaining by making its revenues derivable, in part, at least, by recording the suits litigated, (many other services in the case being performed by the clerk without compensation,) so that the record answers the double purpose of protecting the public by standing as a perpetual memorial of the questions litigated, and also of furnishing the fees of the clerk for making it, which, if the clerk's fees exceed his maximum, goes to the United States, and is a part of the tax imposed upon litigants to support the judiciary. For this reason the law does not make it optional with the litigants whether or not the records shall be made. The recording being required by law, the charge of 15 cents per folio is legal and proper. Section 828, Rev. St.

It is therefore ordered that the exception of H. H. King, clerk, to the referee's report be sustained, and that the said clerk be allowed to collect his proper fees for final record in the present cases from the fund in the registry of the court to the credit of such cases.

THE LAURA LEE.¹ST. LOUIS & VICKSBURG ANCHOR LINE CO. and others v. RED RIVER COAST LINE.¹*(District Court, E. D. Louisiana. June 23, 1885.)*

1. DAMAGES BY COLLISION.

Where damages have occurred by reason of a collision, and the court has ordered a division of the loss, both parties having been found to be in fault, the value of a vessel that has been totally lost is not the amount she was worth to her owners when in use, nor what they would have been willing to sell her for. In a sale, a price is often paid for the consent of the vendor much above the market value of the thing sold. When a vessel, by reason of a collision, becomes a wreck, the power on the part of her owners to consent to part with her ceases, and defendants should not now be required to contribute any sum beyond her commercial value,—the amount she could have been sold for in open market.

2. SAME—COMPUTATION OF DAMAGES.

In estimating the value of a Mississippi river steam-boat destroyed by collision, upon which all necessary repairs had been made from time to time, the rule is that after the first year the boat is worth 20 per cent. less than she was worth when she was built; the second year the 20 per cent. should be taken from her value at the end of the first year, and the result will represent her value at the end of the second year, and so on through the remaining years.

In Admiralty. S. C. 22 FED. REP. 847.

Charles B. Singleton, Richard H. Browne, and B. F. Choate, for libelants.

W. S. Benedict and Albert H. Leonard, for claimants.

BOARMAN, J. The question involved in this cause now is as to the amount of damages resulting from the collision between the steam-boats City of Greenville and Laura Lee, which damages, or loss, according to the finding and decree of Judge BILLINGS, before whom the case was recently tried, has to be borne equally by the respective owners of these steam-boats. The City of Greenville was almost a total loss. Some articles of small value, constituting a portion of her equipment, were saved; the damage to the Lee was comparatively slight. The evidence as to the value of the Greenville is conflicting, as is always more or less the case when the court is called on to adjust such losses. The libelants' witnesses vary in their estimation of her value from \$90,000 to \$125,000; the respondents say she was worth from \$30,000 to \$37,000.

Notwithstanding this conflict of testimony, the court has, by a careful analysis of the evidence, and by the aid of the counsel on either side, been enabled to reach a satisfactory conclusion as to the amount of the loss sustained by the owners of the Greenville; there is no dispute as to the amount of the loss or damage sustained by the Lee. The libelants insist that the value of their boat was the amount she was worth to them when in their use, and that they are now entitled, in the adjustment of these losses, to have their boat so valued.

¹Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

I do not agree with their method of estimating their loss; it may be, for the sake of this argument, conceded that the libelants rightly considered their boat worth more to them than she would have been to any one else; it may be that her owners would have felt justified in refusing to sell her for what may have been her commercial value at the time of the collision. In adjusting the loss claimed to have been incurred by the libelants, we must keep in mind the fact that the Greenville is lost to all persons concerned, and that for the purposes of this suit we must consider that no one, more than another, is to blame for her loss; besides, we should consider that in every sale the consent of the owner of the thing sold must be obtained, and that it is often the case that such consent to sell has to be paid for by the purchaser in addition to the sum which may in the market fully represent the value of the thing sold. When the Greenville became a wreck, the power on the part of the libelants to consent to part with her ceased, and the owners of the Lee should not now be required to contribute any sum which represents the amount which the owners of the Greenville might have felt justified in asking from a purchaser for their consent to be deprived of her especial usefulness to them.

I have carefully examined and weighed the evidence presented by either side, for the purpose of reaching a satisfactory conclusion as to the value of the Greenville in the market at the time she was lost; her commercial value is the sum she could have been sold for in open market. Under the view I have of the law in this case, I have not been much aided by the witnesses for libelants. Scudder, the president, and Keyser, the secretary, of libelant company, state what they consider the Greenville was worth to the company. I presume their opinion as to what she was worth to the company had its source in their knowledge of her usefulness in the past, and was based upon their belief, which could be only speculative, in her continuing to be as useful in the future, under the libelants' management. I regret that these witnesses confined so much of their evidence to making estimates of the lost boat's usefulness and value to the libelants, rather than to informing us of her commercial value, for we shall deem it proper to consider only her market or commercial value as the measure of libelants' loss. John Bird and Massingale, neither of them pretending to be experts in estimating the value of steam-boats, think the lost boat was worth from \$110,000 to \$125,000 to the libelants. Other witnesses, who claim more or less to know the value of steam-boats, say she was worth from \$90,000, to \$125,000 to libelants. Some of them place her commercial value at \$90,000. None of them think she was worth less than that sum.

Among these witnesses, Haarstick, Morse, and O'Neil estimate the cost of the boat at \$120,000. As she in fact cost about \$85,500, they are in error, and their evidence as to the value of the boat cannot be very valuable to the court. With the exception of Scudder, Keyser, and Howard, the witnesses offered by libelants do not know

the original cost of the boat. Howard seems to be the only one among them that knows the age of the boat. Without such knowledge it does not appear that such witnesses are very competent to fix the value of the boat. Besides, the statements of most of these witnesses are not accompanied by reasons for their opinions and conclusions. There are, however, in this case admitted facts which have materially assisted the court in arriving at the commercial value of the lost boat: (1) She cost originally, including her full equipment, \$85,000 or \$86,000; say, \$85,500. (2) She was at the time of the collision within a few days of four years old. (3) She received during her life *only* such repairs as were necessary from time to time to keep her in good running order.

In cases of this kind we often find it proper to consider and take cognizance of things or facts other than those which may be in the evidence. And whether the causes which make steam-boats waste and perish with use and time are stated in the evidence or not, we know that such boats are perishable property, and that age and constant use, amid the perils that attend the navigation of our western waters, cannot be said, in truth, to enhance their value.

Under the most favorable conditions and circumstances, and in the very nature of their construction and uses, steam-boats must, in the wear and tear that attends active employment, day by day, diminish in usefulness and value, and their average life must necessarily be short. So, in our judgment, the Greenville, on the day of her loss, must have been worth much less to her owners, as well as to any one else, than her original cost; and we can hardly be expected, in the view of such well-known facts, to consider as serious the evidence of libelants that suggests that she was worth more when she was four years old than she was when she began her active life. Common experience, and the common knowledge that belongs to mankind, forbids that much weight should be given by any one to the evidence of witnesses who say the boat at the time of her loss was worth from \$5,000 to \$35,000 more than she cost when she was new. Starting from the fact that the boat and her equipment cost \$85,500, her commercial value may be found with reasonable accuracy by deducting from that sum the amount of depreciation in value during the four years of her life. Five witnesses, wholly disinterested in this matter, and well known among all persons interested in steam-boats on the Mississippi river as men of large and valuable experience in such matters as make them expert witnesses, viz., L. N. Cooper, O. F. Vallette, Matt. Howe, R. L. Robertson, and Capt. Kenneson, agree generally in fixing 20 per cent. a year as a fair estimate of the depreciation in the value of a steam-boat under the conditions and circumstances which attended the life of the Greenville.

The testimony shows that Cooper has been engaged for 25 years as inspector of steam-boats at New Orleans for the board of underwriters, and is now so employed. The other named witnesses are men of great

experience in such things and affairs as make them competent judges of the use and value of steam-boats, and all of them accompany their statements with reasons for the opinions they express, which appear to the court to entitle their judgments to great consideration. The rule which they lay down is a general one, and it should apply in this case, unless there is some good reason for denying its force in this case. The 20 per cent. rule assumes that all repairs necessary to keep the boat in good condition have been, from time to time, made. The rule, as explained, is that after the first year the boat is worth 20 per cent. less than she was worth when she was built; the second year the 20 per cent. should be taken from her value at the end of the first year, and the result will represent her value at the end of the second year, and so on through the remaining years. Applying this rule, the Greenville was worth, at the time she was lost, \$34,021. The opinion of Cooper and the other named witnesses, to whose judgment the court is disposed to give great weight, is supported in a general way by the evidence of some other disinterested persons of large experience in such matters as we are now considering, among them Capts. Bell, Gould, and Kouns. The opinions of these expert witnesses are grounded substantially on the same reasons that are given by Cooper and the other witnesses named with him.

In addition to these witnesses, we have strongly corroborative evidence from a number of other experienced steam-boat men, some of whom are more or less interested in the result of this suit. A strong feature in all the evidence of respondents' witnesses is that they, though differing some as to the per cent. of yearly loss, all agree as to the method of estimating the loss or depreciation attending the use and wear of steam-boats. The libelants' witnesses suggest no uniform rule for estimating such depreciation, while the respondents' witnesses, agreeing substantially among themselves, base their statements on such sound reasons as must carry conviction to the mind. Leaving further discussion of the method by which it seems the yearly depreciation in value of a boat should be obtained, we find from evidence of respondents' witnesses, who give the cost price of certain steam-boats, and the sale price of the same boats, that steam-boats certainly depreciate greatly in value from year to year. Their testimony shows sales of a number of boats on the Mississippi river, among them the steamer Halliday, built at the same time with the Greenville, of about the same dimensions and about as good a boat, cost \$75,000, sold at the end of two and a half years for \$50,000; the Cannon cost \$135,000, when three years old offered for sale for \$50,000, and no one bought her; the Fanchon cost \$30,000, sold when three years old at \$12,500; the Yazoo Valley cost \$38,000, at two and a half years sold for \$16,000; the R. R. Springer cost \$80,000, was offered when four years old for \$35,000, and found no purchaser; the Maria Louise cost \$45,000, at seven years old sold for \$10,000. The evidence shows that the boats named were kept in

good running order, and were in such order when they were sold or offered for sale.

I conclude that the value of the Greenville must be determined by the 20 per cent. rule, rather than from the unsatisfactory testimony of the libelants' witnesses, and that the boat should, at the time of the collision, be valued at \$35,021. The furniture, or a portion of it, seemed to be the only things saved from the wreck, and that sold for \$987.51. What became of other valuable things that were saved, or might have been saved, the court is not informed by the evidence. Deducting the sum for the furniture, \$987.51, and we find the loss to libelants to be \$34,033. The damages sustained by the Lee, as shown by uncontradicted evidence, is \$1,906.96; the respondents are liable for one-half of \$34,033; libelants are liable for one-half of damage to Lee, \$953.48; deduct this sum from \$17,016.78, and we find \$16,033.22 to be the amount for which decree will be rendered in favor of libelants. The cost, including the master's fee, to be borne equally.

THE GULNARE.¹

MACHECA and others v. THE GULNARE.¹

(Circuit Court, E. D. Louisiana. June 27, 1885.)

MASTER—AUTHORITY OF.

"The master of the ship is the confidential servant or agent of the owners, and they are bound to the performance of all the lawful contracts made by him relative to the usual employment of the ship, and the repairs and other necessities furnished for her use. *The Aurora*, 1 Wheat. 102.

Admiralty Appeal. Libel on a draft for supplies furnished in foreign port.

Geo. H. Braughn, Chas. F. Buck, Max Dinklespeil, and J. Ward Gurley, Jr., for libelants.

B. F. Jonas and J. O. Nixon, Jr., for claimants.

PARDEE, J. In February, 1884, the steam-ship Gulnare, D. W. C. Kells, master, cruising in Caribbean sea, looking for a cargo of fruit, entered the port of Livingston, Guatemala, in need of fuel. There was no coal market, nor supply of coal, nor coal dealer, in that port. All the coal in port belonged to Anderson & Owen, who had just received about 15 tons by steamer from England, for their own use in supplying a small steamer run by them up the river in that country. According to the statement of the master, he applied to Anderson & Owen to supply him with coal, which, after repeated solicitations and a great deal of talk, and as a personal favor to him, they agreed to

¹ Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

do to the extent of the 15 tons aforesaid, on consideration that he would give a bond to return the same amount of coal on the return of the steamer, or on the next steamer of the Macheca line visiting that port.

The bond was to consist of a draft on the ship's agents at New Orleans for \$300, which would be \$20 per ton for the coal, which draft would be considered canceled when the coal was returned. The draft was not considered as fixing the price of the coal; it was merely a bond to secure the return of the coal. The statement of Mr. Anderson agrees substantially with that of the master. He says:

"We told him (the master) that we were not in immediate need of it, and that if he would guaranty to return it by the next trip of the *Ella Knight*, or by the next steamer of the Macheca line, he could have it, and we would charge him nothing for it. We simply required him to replace the coal. He said all right, he would return it. We told him that in the event of the coal not being returned it would put us to inconvenience, because we needed it to mix with our wood. We told him the coal was worth to us twenty dollars a ton,—three hundred dollars,—and he agreed to give us a draft on his agents, Woodward & Wight, for the value of the coal at twenty dollars a ton, and if they returned the coal the draft was to be considered canceled. That was the verbal agreement we had with Capt. Kells. They didn't return the coal, and when we forwarded the draft they declined to pay it."

The coal was furnished, and the draft now sued on was given. It seems by the testimony of Anderson that the draft was not to be sent on for collection, but was to be retained to give an opportunity to return the coal. After waiting about 90 days the draft was sent on here for collection. The payment of the draft being refused, the present suit was brought to recover the full amount of the draft. The evidence is conflicting as to whether the master of the *Gulnare*, on reaching the port of New Orleans, notified the owners and agents of the *Gulnare* of the contract as to the return of the coal and the drawing of the draft, but the weight of the evidence is that such notice was given, and that thereafter, and before the draft was forwarded for collection, there was ample time to have returned the coal according to the contract.

It seems that after the draft was received at New Orleans for collection that the agents of the *Gulnare* offered the attorneys holding the draft to settle by returning the coal, or by paying therefor at the rate of \$12 per ton, but neither was done. After suit was commenced, however, the agents of the *Gulnare* paid and tendered in court \$180, with interest from February, 1884, as full compensation and payment for the coal, being at the rate of \$12 per ton. There is no doubt that the master had the authority to make the contract as it is shown to be by the evidence in this case.

"The master of the ship is the confidential servant or agent of the owners, and they are bound to the performance of all the lawful contracts made by him relative to the usual employment of the ship, and the repairs and other necessities furnished for her use." *The Aurora*, 1 Wheat. 102.

There is no suggestion that the contract in this case was unlawful.

"The owner is personally responsible for all the obligations which the master, within the scope of his authority as master, incurs to their full extent, whether arising *ex contractu* or *ex delicto*, and it is not known that any other than a special statute limitation, which marks what the general rule is, has ever been introduced into this country by way of usage or otherwise." Curtis, Mer. Seam. 199, and note citing cases.

"Every contract of the master for repairs and supplies in a foreign port imports an hypothecation." Id. 200, and cases cited.

As the contract was lawful, and is binding on the ship and owners, I see no good reason for not enforcing it. The claimants urge that the master never notified them in time so that they could return the coal. The master swears he did; but it is immaterial. It was the master's duty to have informed them, but Anderson & Owen are not responsible for his neglect of duty. If the master had dumped the coal in the port of Livingston it would not affect the libelants' rights. It is also urged that the draft was withheld and not presented in time for them to comply, and that they were not in default until the draft was presented. The proof is that the agreement was that the draft should be withheld to give time to return the coal. It is urged that the price of \$20 per ton is exorbitant, and that coal, in the port of Livingston, was not worth at the outside over \$12 per ton. The evidence supports the claim as to the actual merchantable value of the coal in the port of Livingston; and this makes it clear that the Gulnare's owners and agents ought, in their own interest, to have taken the option given them by the contract, and have returned the coal in kind.

The case shows that the claimants neither returned the coal nor paid, but compelled Anderson & Owen, who, all through the case, appear to have acted in a generous and friendly spirit towards the ship and owners, to follow the ship to this country and involve themselves in expense and litigation to secure the return of their own. The kind of favor that was shown the Gulnare in her necessity should be encouraged and rewarded in a court of admiralty. If Anderson & Owen had been coal dealers, or had sought to take advantage of the Gulnare's necessities, or had even furnished the coal for chance of gain, there might be some reason in applying technical rules to defeat their demand; but, as the case is, I am clear that they are entitled to the full amount of the draft sued on.

Let a decree be entered for libelants for \$300, and all costs against the claimants and their sureties on the release bond.

THE MABEL COMEAUX.¹COUNTY v. THE MABEL COMEAUX. ¹

(Circuit Court, E. D. Louisiana. June 27, 1885.)

1. ADMIRALTY LAW—CONTRIBUTORY NEGLIGENCE.

The common-law doctrine of contributory negligence does not prevail in the admiralty to the extent of denying all relief to one whose negligence may have contributed to his injury.

2. COLLISION—POSITION OF MASTER.

It is not fault that the master of a steam-boat was not on the hurricane deck, his post of duty, at the time of a collision, when it appears that he was at dinner and the mate was on watch.

Admiralty Appeal.

Emmet D. Craig, for libelant.

Thomas L. Bayne and *George Denegre*, for claimant.

PARDEE, J. This is a suit brought by libelant, Melvina County, on her own behalf, and on behalf of her minor children, (whose names are set forth in the libel,) to recover \$4,000 damages alleged to have been suffered by them through the death of Warren County, husband of Melvina County, and father of the other libelants; his death, it is alleged, having occurred through negligence of the officers of the *Mabel Comeaux*.

From the evidence in the case the facts appear to be, substantially: That Warren County, September 16, 1884, was employed upon a coal barge lying in the Mississippi river at the foot of Harmony street, in the city of New Orleans, and at 12 o'clock left the barge in a skiff for the purpose of going ashore to get dinner; that he rowed ashore, got his dinner, placed it in the skiff, and then started back to the coal barge, which was lying at the foot of Harmony street, just above several grain elevators which projected out into the river somewhat beyond the coal barge upon which he was employed; that the time at which he re-entered his skiff and commenced to row back towards the barge, the river for some distance below him was free from obstructions, so that, had he looked down the river he could have seen some three or four hundred yards down without trouble; that the steamer *Mabel Comeaux*, being then upon one of her regular trips up the Mississippi river, was at the time in the neighborhood of Washington street, some four or five blocks below the elevator, and in full view; that, in order to reach the coal barge, it was necessary for County, after rowing some distance up the river along the shore, to go further out into the river and around the elevators; that he saw, or ought to have seen, the *Comeaux* during the whole time, but seemingly paid no attention to her; that it was and is a common occurrence in the city of New Orleans for skiffs to row on the river, and go out whenever

¹ Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

a steam-boat passes for the purpose of riding over the swells in the wake of the steam-boat, and these skiffs are familiar sights to all pilots; that the pilot and mate of the Comeaux, who were on watch, (the master of the Comeaux being at dinner,) saw County in his skiff when they were about five or six hundred yards distant from him, but it caused no uneasiness, because a familiar and usual sight, and because he was in no danger, being too near the shore and too far out of the track of the Comeaux to make his presence a matter of uneasiness, and the Comeaux continued her course in the usual path pursued by her and other steam-boats going up the river, (which runs closely to the city bank of the river in order to avoid the strong current;) and that County was in no danger from the Comeaux until, having reached the stern of the elevator at foot of Harmony or Ninth street, he attempted to shoot out into the river and around the elevator, in doing which he went further out than was necessary, and directly ahead of the Comeaux; that the steam-boat was then quite close to him, and as soon as the pilot saw this, and that County was exposing himself to danger, gave the signal to back, reversed his engine, and did all in his power to stop the headway of his boat and avoid any accident, and was so successful in this, and the headway of the Comeaux was so well checked, that she struck the skiff very lightly, did not break in the sides, or even capsize it.

When County pulled out around the elevator and in front of the Comeaux, he was about 60 yards ahead, and he still had time to pull directly across the bows of the Comeaux to the outside, or even to have backed his skiff to the inside out of danger; but it appears that the rowing apparatus of his boat was not in good order, and that he lost his presence of mind, for he pulled "first one way and then another," (in the words used by one of libellant's witnesses,) then threw down his oars, hallooed to the steam-boat to stop, and then jumped overboard from the stern, going inside towards the shore, while the skiff, thus shoved further out, floated down against the bows of the Comeaux.

County swam for some distance in and down the river, either not seeing or neglecting a plank thrown overboard from the Comeaux, when, for some reason not appearing, he suddenly sank and was drowned. It appears that the Comeaux was not steered further out to avoid County's skiff, when he was discovered in front, because of a skiff still further outside, in which a man was fishing, which would have thus been run down.

It seems clear, from the facts as found, that the conduct of County was reckless and careless, and contributed to the circumstances which resulted in his death; and this, too, without holding him responsible for his act of jumping overboard, when he undoubtedly considered himself in extreme peril. But, as the common-law doctrine of contributory negligence does not prevail in the admiralty to the extent of denying all relief to one whose negligence may have contributed to

his injury, the question still remains as to whether the Mabel Comeaux was in fault.

The learned proctor for the libelant urges that the Comeaux was in fault because her master was not on the hurricane deck, at his alleged post of duty. It seems that the master was at dinner, and the mate was on watch. No authority requiring the master to be on the hurricane deck is cited, and no custom to that effect is proved. And as the pilot and mate both saw County when he pulled into danger, and took all effective measures to stop the headway of the boat, the master's absence from the hurricane deck seems to have been no injury to County, nor does it appear that his presence there would have been any benefit.

It is further urged that the Comeaux was in fault in hugging the shore too closely, and it is claimed that her pilot was negligent in not keeping further out. The proof is conflicting as to the exact distance the Comeaux was outside of the elevator. Claimant's witnesses put her at least two widths out, while libelant's evidence gives her various distances much nearer, down to 15 feet. I think the weight of all the evidence is in favor of about two widths distance; but this point loses materiality, because other evidence shows that the Comeaux was pursuing the usual and customary track.

It is further urged that the rules governing steam-vessels when approaching sailing vessels should be applicable to steam-boats in approaching skiffs. This may be granted for this case. One of the best settled of those rules is that the sailing vessel must hold its course, and not suddenly change and run into danger. A sailing vessel that changed its course and run across the bows of a closely approaching steamer, and, having got directly in the way, should down all sail and wait to be smashed, would not be allowed damages if collision resulted.

I recognize this as a case of hardship for the libelants, but I cannot say from the evidence that the Comeaux was in fault, and if I should determine that libelants' hardships entitled them to some relief from the owners of the Comeaux, I could only do so by rejecting evidence that really strikes me to be not only credible but true. The judge of the district court evidently took the same view of the case, and his judgment must be affirmed. A decree will be entered dismissing the libel. Neither party, however, are to recover costs.

THE BRITISH EMPIRE.

(District Court, S. D. New York. July 3, 1885.)

1. COLLISION—NAVIGATION—WHARVES AND SLIPS—STAY-LINES.

Reasonable prudence and caution in moving heavy boats about wharves and slips in a high wind and strong tide require the use of stay-lines at bow and stern to prevent such boats from becoming unmanageable; and where a coal-boat, for want of such lines, became unmanageable from a sheer, caused by striking another boat in the slip, and swung against the propeller blades of a large steamer, and was sunk, *held*, those moving her were responsible for not using such lines.

2. COAL-BOATS CONSIGNED TO STEAMER—CUSTOM IN MOVING—STEVEDORES.

The coal-boat J. R. W. was consigned along-side the steamer B. E. with coal for her use. On arrival the B. E. was not ready to receive it, and the J. R. W. lay by the wharf till the next day. The stevedore's men then undertook to move the coal-boat along-side, using a line to the steamer's steam-winch, the captain of the J. R. W. being aboard; from want of bow and stern lines the J. R. W. became unmanageable and went under the B. E.'s propeller and was sunk. *Held*, upon the evidence, that by the custom it was the duty of the stevedore's men to aid in getting the boat along-side; that their aid was not merely voluntary; that taking, in fact, most of the control, but not sole control, nor ousting the captain from suitable directions, both were answerable for want of proper caution, and the libellant recovered half his damages.

In Admiralty.

Hyland & Zabriskie, for libellant.

A. O. Salter, for claimant.

BROWN, J. On the third of January, 1884, the large steam-ship British Empire was lying in her slip at the north side of pier 3, on the North river. The libellant's canal-boat, John R. Weld, had been loaded with coal for the use of the steam-ship, and consigned along-side, and had been left in the slip by a tug the day before; but the steamer not being ready to receive the coal, the canal-boat was obliged to haul up along-side the pier under her stern. The next day, when the steamer was ready to receive the coal, it was attempted to haul her around by lines along-side. The wind being very high from the north-west and the tide strong ebb, a line from the steam-winch, forward on the steamer, was attached near the bows of the canal-boat, and the steam-power applied to pull her along. While moving up towards the steamer, the canal-boat came in contact with a barge, which was somewhat quartering in the slip and struck the starboard bow of the canal-boat. No injury to either was done by the blow; but a sheer was given to the canal-boat's bow, which, in combination with the ebb-tide and the high wind, rendered the canal-boat, for the time being, unmanageable, so that her stern swung under the stern of the steam-ship against her propeller blades, making two holes in the canal-boat, causing damage, for which this action was brought.

The evidence is extremely conflicting on every material fact. The captain of the canal-boat was the only person belonging to her who was previously aboard. She was moved mainly by the stevedore's men, who, by the stevedore's directions, went to assist in bringing

her along-side. The stevedore testified that he had previously notified the captain to bring her along-side, which the latter denies. It was contended, in behalf of the steamer, that the assistance of the stevedore's men was voluntary, and did not affect the ship, whether there was negligence or not on their part. I am satisfied, however, from the evidence in this case that it has become an established practice and usage, so as to form a part of the understanding in the dealings of the parties, that when coal-boats consigned along-side have to wait the convenience of the steamer, they shall be moved, when wanted, through the aid, if not through the entire control, of the stevedore's men. If boats, after being left in the slip by the tugs, are not sufficiently manned to be moved without additional help, it is for the interest of the steamer that this help should be rendered by her own men when wanted, rather than to call in outside aid. In the long run, all such expenses must be borne by the steamers. Their acts, under such a custom as is proved, cannot, therefore, be held to be voluntary only, but rendered in the service of the ship, and for her benefit in procuring her supplies. In this case, moreover, the steam-power of the ship was applied to move the boat, under the supervision of one of her officers. If there was negligence on their part, the ship must therefore be held answerable.

The principal fault which led to the accident was, I think, in undertaking to move this loaded canal-boat in the slip, under the circumstances of a high wind and a strong ebb-tide, without the use of any additional bow and stern lines as stays to keep her in place. Without these she was liable to become uncontrollable by any slight mishap; and in not making use of these precautions, there was a want of reasonable care and prudence. It is evident from the testimony that the stevedore's men took the principal charge of moving the boat; and the steamer must therefore be held responsible for the lack of suitable precautions against accident. It would seem that the barge with which the canal-boat came into collision was moved across from the other side of the slip to the steamer at about the same time that the canal-boat was moved, and by the direction of some persons on the steamer. The evidence is so conflicting that it is difficult to get at the exact facts. She clearly had crossed the line of the canal-boat's approach. But their collision did no harm; and it would not have been followed by the subsequent collision with the propeller blades, or by any damage, had the movements of the canal-boat been properly guarded and controlled by stay-lines. The absence of these should therefore be deemed the chief negligence in the case.

The captain of the canal-boat cannot be wholly excused for the absence of such precautions, because it does not appear that he made any effort to protect his boat and keep her under control. He was at least equally familiar with the liabilities to accident in the slip, with the unwieldy character of his boat, her liability to take a sheer,

and the need of protecting lines to steady her movements. Hé gave some orders in regard to his boat. He was not ousted from all control of her; and it does not appear that the stevedore's men intended to take sole control. Had he insisted on the use of lines to steady the boat, and the other men had refused, the fault must have been charged wholly upon the steamer's men. As he did not do so, I think the neglect must be considered as the neglect of both alike, and that he should recover, therefore, but half of his damages. An interlocutory decree may be entered accordingly, with costs, with an order of reference to compute the amount, if not agreed upon.

THE FRISIA AND THE JOHN N. PARKER.

(District Court, E. D. New York. February 16, 1885.)

COLLISION—STEAMERS CROSSING—RIGHT OF WAY—SPEED.

A collision occurred in New York harbor in the afternoon of a clear day, between the steam-ship *F.*, bound to sea on a S. S. W. course, and a bark which was in tow of the tug *P.*, and proceeding from Red Hook towards Bedloe's island, on a N. N. W. course. *Held* that, as the vessels were on crossing courses, and the tug had the steamer on her starboard hand, the tug was charged with the duty of avoiding the steamer, and that the collision was caused by the fault of the tug in attempting to cross the steamer's bows; that on all the evidence there was nothing to charge the steamer with knowledge that the tug was intending to cross her bows until it was too late, and that no fault could be ascribed to the steamer; that it was not a fault for the steamer to proceed at the rate of 15 miles an hour on a clear day, when the harbor was not crowded.

In Admiralty.

Jas. K. Hill, Wing & Shoudy, for libelants.

Butler, Stillman & Hubbard, for the *Frisia*.

Benedict, Taft & Benedict, for the *John N. Parker*.

BENEDICT, J. This action is brought against the steam-ship *Frisia*, and the tug-boat *John N. Parker*, to recover the sum of \$40,000 damages for the sinking of the bark *James L. Harway*, in a collision that occurred on the seventeenth day of June, 1882, in the harbor of New York. At the time of collision the bark was being taken by the tug upon a hawser from Red Hook to a place of anchorage off Bedloe's island. The tide was ebb, and the course of the tug and bark, after passing the buoy below Governor's island, was N. N. W. At the same time the steam-ship *Frisia* was bound to sea from her pier at Hoboken, and was proceeding down along the west shore of the channel upon a S. S. W. course. The steam-ship and the tug were therefore approaching each other upon crossing courses, and the tug having the steam-ship on her starboard side, as soon as danger of collision arose; became charged with the duty of avoiding the steam-ship. It was a

¹Reported by R. D. & Wylls Benedict, of the New York bar.

clear day. The vessels were in plain sight of each other, and neither tug nor steamer was embarrassed by the movements or position of any other vessel. The harbor was substantially clear, and there was abundant room for the tug to pass ahead or astern of the steam-ship, as she might be advised. Judging that she could cross the steamer's course ahead of her, the tug made no change of course, but quickened her speed as the steam-ship approached nearer. The tug herself succeeded in passing the steamer's bows, but the bark was struck by the steam-ship.

I have no hesitation in finding this collision to have been caused by fault of the tug in attempting to cross the steamer's bows. The bay being clear, and the tide ebb, there would have been no difficulty whatever in the tug's bearing up head to the tide and allowing the steam-ship to pass ahead of her. Instead of adopting this safe course, the tug concluded to attempt to cross the steamer's bows, when, as the result showed, it was impossible for her to do so. The attempt was, obviously, hazardous, and wholly unnecessary. Having attempted a hazardous maneuver when a safe course was open to her, and having failed, she must pay the damages resulting from her failure. Whether the steam-ship was not also in fault is the next question. Notwithstanding the obligations resting upon the tug to avoid the steamer, it was the duty of the steamer, as soon as it became apparent to her that the tug had selected a course calculated to bring the vessels in contact, to do all in her power to prevent collision. If the account given by those on board the tug could be taken to be true, doubtless the steamer would be condemned; for, according to their account, the steamer was given timely notice, by whistles from the tug, that the tug intended to cross ahead of the steamer. But, in fact, the tug's whistles were not blown until the steamer was close upon her. One witness from another vessel, called in behalf of the tug, shows that the tug, although moving at a speed of six knots, ran only about her length between the time of the first whistle and the last whistle from the tug, and the last whistle was at the instant of collision. The testimony of other witnesses also makes plain the fact that all the whistles from the tug were blown when the steamer was so close at hand that stopping and reversing her engine was the only thing then to be done by the steamer towards avoiding a collision.

The reason why the tug did not sooner inform the steamer of her intention to cross the steamer's bows is manifest. The master of the tug, as he frankly said upon the stand, believed, up to the very blow, that he could take the bark across the steamer's bows in safety, without calling on the steamer to do anything. Consequently, he did nothing to warn the steamer of his intention to insist upon crossing her bows until he discovered that he was in danger. Then, indeed, he blew to the steamer, and quickened his speed, and then the steamer stopped and reversed, but it was too late. The steamer cannot, therefore, be held responsible for the collision, unless it can be found that

in the absence of signals from the tug to that effect the steamer was, nevertheless, chargeable with knowledge of the tug's intention to attempt to cross her bows. If, notwithstanding the omission of the tug to give timely notice by her whistle, the circumstances were such as to inform the steamer in time that the tug was intending to cross her bows, such circumstances cast upon the steamer the duty, by a timely change of her course by slacking of her speed, to avoid the danger attending the course selected by the tug. I find in the circumstances proved nothing calculated to convey such information to the steamer. The steamer was on a course down the bay, on the western side of the channel. The tug came into the channel on the east side, below the buoy at Governor's island. Her destination was unknown to the steamer. The tide was ebb; the tug headed up against the tide about N. N. W. She had a bark in tow, upon a hawser 60 fathoms long. She could, at any moment, bring herself and her tow quickly head to the tide. The steamer's approach was plainly to be seen, and the tug gave no signal in regard to her course. I find nothing in these circumstances that would inform the steamer of the tug's intention to cross her bows. That intention was not disclosed until manifested by the near approach of the tug to the steamer's course without change. Then the steam-ship stopped and reversed, and in so doing she discharged all her duty, for she could then do nothing more to avoid collision.

It should also be remarked that the steamer furnishes testimony from her pilot and her chief officer that by her whistle she gave to the tug timely notice that it was the steamer's intention to keep her course down the west side of the channel. The witnesses for the bark and tug say they heard no such signal. Their failure to observe this signal may be attributed to the fact that their attention was bestowed upon an Inman steamer which passed up the bay from below, while the Frisia was approaching from above, and crossed the tug's bows before the tug reached the course of the Frisia. The master of the tug says this Inman steamer passed his bows after he had blown to the Frisia. But in this he is mistaken. The Inman steamer passed him before that, and her proximity may have been the reason why the Frisia's signals were not observed. The statements of those on the tug that no signals were given by the Frisia have therefore failed to satisfy me that the pilot and chief officer of the Frisia testify untruly in this particular. Their testimony, if believed, leaves no room to impute fault to the Frisia.

It has been urged against the Frisia as a fault that she was going at 15 miles per hour. If that was her speed it was no fault. The day was clear. The harbor was not crowded. There was abundant room, and at 15 miles an hour the Frisia could easily have avoided the bark, if she had been duly informed of the tug's intention to attempt to cross the steamer's bows. No lookout is also charged upon the steamer. But the tug was seen, and closely watched, by the pilot

and the chief officer of the steamer. No neglect of the lookout, therefore, contributed to cause the disaster. I find no ground, therefore, upon which to hold the Frisia responsible for the collision in question.

The libel as against the Frisia must therefore be dismissed, with costs, and a decree entered against the tug for the amount of the damages resulting to the libellant from the collision between the bark and the steamer.

WEST VIRGINIA CENTRAL & P. RY. CO. v. THE ISLE OF PINES and another.

WILLIAMS and others v. THE ISLE OF PINES.

(District Court, S. D. New York. June 30, 1885.)

COLLISION—RIVER NAVIGATION—TACKING—NOT GIVING WAY.

The schooner *I. of P.*, in beating up the East river off Gouverneur street, on her long tack passed close ahead of the tug *McM.* with a tow, and then, after running 600 or 800 feet, tacked and ran straight across the river, designing to go ahead of the tug again, but collided in doing so. The tug had backed strong, to let the schooner go ahead at first, and had then hooked up her engines to go ahead strong; in order to get ahead of the schooner. *Held*, that both were in fault; the tug, for attempting to get ahead in the narrow space available; the schooner, for not heeding the tug's evident intention, and not either porting or starboarding, as she might easily have done, and thus have avoided the collision.

In Admiralty.

Carpenter & Mosher, for the West Virginia, etc., Ry. Co.

Hyland & Zabriskie, for the Jas. McMahon.

Butler, Stillman & Hubbard, for the Isle of Pines.

BROWN, J. Off Gouverneur street, where this collision took place, there were about 1,300 feet available breadth of the river from pier to pier. All the witnesses agree that the tug McMahon, with a tow of two boats lashed on each side, was making her way directly up the river, at about the rate of four miles an hour, on a course E. $\frac{1}{2}$ N. The schooner Isle of Pines, having the wind about E. S. E., and sailing close-hauled on her starboard tack, about six points off the wind, was heading about N. E., and was going at the rate of about six miles an hour. She passed the bows of the tug and tow from starboard to port, clearing them by some 15 feet only, and, as her witnesses state, ran within about 200 or 250 feet of the New York shore. The difference of their courses was but about three and a half points, and carried the schooner, before she tacked, as was estimated, some 500 or 600 feet ahead of the tug. She then tacked; and upon her port tack, headed nearly directly across the river, perhaps half a point to the southward, and in crossing the bows of the tow came in contact with the starboard boat and caused her to sink.

Assuming, as all state, that the tug was in the middle of the river, and the schooner, including her jib-boom, being 160 feet long, there was not over 450 feet available space on the port side of the tow. Had the schooner run out her full tack, on a north-east course, so as to make this distance abeam, she would have had to run about 800 feet after first passing the tug and tow. This is considerably in excess of the estimate of her own witnesses. The inference, therefore, is that the libellant's witnesses are probably correct in saying that she did not run out her full tack. The mate says that after her tack was completed, and she bore away upon her proper course on the port tack, she was about 500 or 600 feet from the tug. As she was going at the rate of five or six miles an hour, that distance would be accomplished in about one minute, or a little over, allowing for her slowing in coming about, and the tug, during the same time, would move through the water from 300 to 400 feet. This testimony fixes the position of the boats with more than usual accuracy. If it is to be relied on, it shows that the schooner, while she did not fully run out her tack as near to the shore as she possibly might have gone, did not come much short of it; but having the full space available to her, she was, in my judgment, bound to take notice of the incumbered condition of the tug, and of the fact that she was not, at the time the schooner tacked, backing, but was moving ahead all she could, and, therefore, evidently designing to go ahead of the schooner. Had this been observed, as it ought to have been observed, at the time the schooner tacked, there would have been no difficulty in the schooner's following this obvious indication, and, under a continued port wheel, have swung round so as to go astern of the tug and tow. The space that was available to the schooner towards the New York shore was so small that it was dangerous to pass ahead of and so near to the tug upon her previous tack, and then go about and undertake to pass ahead of her again. The tug had backed strong to allow the schooner to pass her at her first crossing, and then had hooked up and gone ahead strong in order to pass ahead of the schooner before her return on her port tack. The maneuvers of each bound each to a careful observance of the other, and when the tug's purpose was evident, as it should have been evident, to any proper lookout on the schooner, the schooner should have governed herself accordingly, and passed astern, or else have luffed and made another short tack; either of which was, in my judgment, entirely available to her.

2. I think the tug, however, was also clearly in fault for hooking up and going ahead after the schooner had first passed to port, instead of keeping her course until the schooner should return upon her port tack. The more rapid speed of the schooner, and the short space available to her, rendered her speedy return ahead of the tug obvious to any competent pilot. It was the primary duty of the tug and tow to keep out of the way of the schooner, and let her have her proper course. There was no danger to the tug and tow either in

continuing to back, or in going under a slow bell, as they had begun, until the schooner again crossed on her short tack. Instead of doing this, the tug attempted, with, I think, obvious imprudence, to run ahead of the schooner, and she thus brought about the collision; but as the tug's purpose was sufficiently obvious to a proper lookout on the schooner, and the danger of collision being apparent, and as the schooner might, by either porting or starboarding, have avoided the collision, the damages must be divided, both being in fault.

MORTEN v. FIVE CANAL-BOATS.

(*District Court, D. New Jersey. July 13, 1885.*)

1. COLLISION—NEGLIGENT NAVIGATION—BURDEN OF PROOF.

In a suit to recover for damages caused by a collision resulting from careless and negligent navigation, the burden of proof is on the libelant.

2. SAME—CANAL-BOATS AND SLOOP—IMPROPER ANCHORAGE—FAULT—EVIDENCE.

On examination of the evidence in this case, *held*, that the sloop was in fault in anchoring at the place where she did; that the evidence of negligence on the part of the canal-boats with which she collided was not sufficient to entitle her to recover; and that the libel should be dismissed.

Libel in rem.

Hyland & Zabriskie, for libelant.

Frank L. Hall, for respondent.

NIXON, J. This suit is brought to recover damages arising from a collision between the fishing sloop *Flash*, of which the libelant is owner, and five canal-boats, the property of the Philadelphia & Reading Coal & Iron Company, of which corporation the claimants are receivers.

It appears that on the sixth of December, 1884, the *Flash* was bound up the North river, and, being overtaken by a storm, anchored off a coal-pier at Jersey City about sundown; that about the time of casting her anchor she was notified by the employes on the pier that she would be in the way of the boats coming for coal and water; that, in order to get out of the way, leaving the anchor where it was first cast, not far from the river end of the coal-pier, they began to pay out the cable. The wind was strong from the south-east, blowing the sloop into the slip between the coal-pier on the south and the dock of the New Jersey Central Railroad Company on the north, until she was floating within about 15 feet of the said dock, her cable stretching across the slip 80 fathoms or more to the anchor. The slip was less than 400 feet in width, bounded on the northern side by the wharf, or dock, of the said railroad company. This was 700 or 800 feet in length, at the lower end of which, next to the river, the five canal-boats were moored,—fastened together, with their bows to-

wards the river,—three of them (Nos. 71, 70, and 7) in front, and the remaining two (Nos. 6 and 31) in their rear. The libelant's sloop was held by her anchor and cable stretching diagonally across the slip, a short distance behind the last-named boats.

As the wind increased later in the evening, the canal-boats were exposed to the full force of the gale across the river, and found themselves in an unsafe and dangerous position. At about 9 o'clock p. m. they were unloosed from the dock, in order to go further into the slip, whither they were carried when unfastened by the force of the wind. In this movement they in some way got entangled with the cable of the sloop, and were brought into collision with her, doing her considerable injury.

The libelant claims that the accident was caused solely by the negligence, mismanagement, and bad navigation of the canal-boats. The respondents reply that the sloop was lying where she had no business to be, and that she was warned to get out of the way before any attempt was made to move the boats.

The suit is for damages for careless and negligent navigation, and the burden of proof is upon the libelant. He must show affirmatively carelessness and negligence in the management of the boats. The testimony is so contradictory that I am afraid all the witnesses have not been careful to speak the truth. There were two persons on the sloop,—the master, who appears to have been below in the cabin until about the time of the first collision, and a seaman named Johnson, who was on deck as watchman. They both swear that they had no information or warning that the canal-boats intended changing their position by dropping from their moorings into the slip, until they were adrift and in contact with the sloop. On the other hand, three of the captains of the canal-boats—Hopkins, of No. 71; Dautrich, of No. 7; and O'Connell, of No. 6—agree in the statement that some time before the canal-boats were moved—one of the witnesses states half an hour, and another three-quarters of an hour—notice was given that they were about to move into the slip, and that the sloop must be removed out of their track. They are quite sure that the notice was heard and understood by those on board the sloop, as a reply came back from some one, saying, "All right."

I think the weight of the evidence is that timely notice was given, and that the respondents are not liable for any damage which arose to the libelant by continuing his boat in such an anchorage. But, independent of the evidence on this point, the libelant has hardly presented a case which entitles him to damages for injury to his sloop. She was lying at anchor at an improper place and in an improper manner, and the law is well settled that she must take the consequences resulting therefrom. Casting his anchor near the south side of the entrance to the slip, he paid out 80 fathoms of cable, until it almost reached the wharf upon the northern side,—the wind carrying the vessel diagonally across the slip. He was lying at anchor within

a few feet of shore, although the uncontradicted proof is that the rules and customs of the harbor of New York and Jersey City forbid vessels from anchoring within 200 feet of shore. There was no stress of weather that justified him in mooring the sloop so near the dock that canal-boats, two or three abreast, could not have room to pass along the wharf without coming into contact with his cable, or in collision with his vessel.

The libel must be dismissed.

THE FERN HOLME.

(District Court, D. New Jersey. July 17, 1885.)

1. CARRIERS OF GOODS BY WATER—DAMAGE TO CARGO—IMPROPER STOWAGE.

On the evidence in this case, it cannot be said that the damage to the cargo was caused by improper stowage, and was not the result of the rough weather experienced on the voyage.

2. SAME—DELIVERY—SHORTAGE—EVIDENCE—BILL OF LADING.

When the bill of lading acknowledges the receipt of 514 bags of canary-seed, "weight, contents, and value" unknown, it will require more than naked proof that a weigher found some of the bags a few pounds short in weight to hold the vessel responsible for the shortage.

S. B. Ransom, for libellant.

Lorenzo Ullo, for respondent.

NIXON, J. On the eighteenth of December, 1883, W. H. Cole & Co. shipped on board the steamer Fern Holme, at the port of Liverpool, England, 514 bags of canary-seed for the port of New York. The merchandise reached its destination, and the libelants in this case, who were the consignees, received notice of its arrival on the seventh of January, 1884. The freight was duly paid and the delivery of the cargo demanded. It was landed from the steamer onto the dock at pier No. 43, North river, when it was discovered that a number of the bags containing the seed were soiled by coming into contact with a Venetian red powder, which composed a part of the freight, in barrels, and which from some cause had escaped from the barrels during the voyage, causing the damage to the sacks. The libel alleges that the injury arose from careless and improper stowage, and demands damages, not only for that injury, but because the respondents refused, for the period of eight days after the freight was paid, to make delivery of the seed to the consignees, whereby a loss accrued to the consignees from a decline in the price, and also for a shortage of 386 pounds in the amount of seed subsequently delivered. The answer denies these allegations, and they are the only issues which are raised by the pleadings.

It appears from the evidence that as soon as the consignees were

arrival of the seed they authorized their brokers, Kraus & Co. to sell the same on their account; that a written contract was made between them with McKesson & Robbins for the sale of the seed at two and three-fourths cents per pound, of good merchantable quality; to be approved only to be taken; stained or damaged, and if any men were sent to the dock to take the seed, a controversy arose between the brokers as to the nature of the receipt to be given on its delivery,—the respondent should be receipted for as damaged, or wholly damaged. A long correspondence ensued, causing a delay of more than a week, and the brokers ascertained what the real trouble was. Both parties were willing that the receipts should describe the merchandise according to the condition of the packages.

There was no difficulty about the rules and principles on which the case was to be decided, if I could find out what the facts were. I was to say that, after several years' experience in admiralty proceedings, I have never known a case where the testimony was more satisfactory on the material points. Before the libelants can recover damages for injuries caused by improper stowage, they must prove that it existed. It is sometimes to be inferred from the circumstances. But it ought not to be inferred in the present case that two or three barrels of Venetian red broke open, scattering the powder over other merchandise, from not being properly stowed, in view of the testimony of the captain that he had the most stormy voyage which he had experienced for 15 years, and that the damage arose from the rough weather and the heavy laboring of the ship. The bill of lading exempted the vessel from all responsibility for losses arising from perils of the sea. The evidence also warrants the judgment that the delay in getting delivery of the cargo arose from a claim of the libelants' men that the seed should be receipted for as damaged, when they were not entitled to demand more than a receipt describing the actual condition of the packages. The bill of lading acknowledges the receipt of 514 bags of canary-seed, "weight, contents, and value unknown." The whole number of the bags was duly delivered. It will require something more than naked proof that a weigher found some of the bags a few pounds short in weight, to hold the steam-ship responsible for the shortage.

The libelant has failed to establish his claim by the proofs, and the libel must be dismissed, with costs.

COKELEY and another v. THE SNAP.

(District Court, D. New Jersey. July 29, 1885.)

TOWAGE—NEGLIGENCE—ICE—DAMAGES.

On review of the evidence in this case, *held*, that the towage contract was negligently performed, and that libelants are entitled to recover damages to the extent of the actual injury caused by such negligence.

Libel in rem.

Hyland & Zabriskie, for libelants.

Wallis & Edwards, for respondents.

NIXON, J. The libelants in this case are the owners of the canal-boat Transport, and file their libel to recover damages for negligence in the performance of a towage contract. On the twenty-ninth of February, 1884, the steam-tug Snap took in tow, at the foot of Sixth street, in Hoboken, New Jersey, the canal-boat Transport, loaded with about 230 tons of bituminous coal, consigned to Spuyten Duyvil creek. She proceeded up the river with a fresh, south-westerly wind, and when she reached the mouth of the creek was unable to enter on account of the accumulations of ice on the eastern shore of the river, whither it had been driven by the westerly wind. The western or New Jersey shore of the river was comparatively free from ice, and the master of the tug towed the Transport to the western shore; but, not finding a satisfactory landing place at Fort Lee, proceeded onward to Shady Side. The canal-boat was deeply loaded, drawing about six feet and a half of water. The tide was half ebb, and there was only a sufficient depth of water to drop the boat at the river end of one of the piers at Shady Side. She was left there, against the remonstrance of the captain of the canal-boat, as the libelants allege, and with his passive assent, as the respondents insist, but with the promise from the captain of the tug that he would return the next morning and remove her to a more safe landing place. He did not return the next morning. The boat was suffered to remain there during all of the next day and night. On the afternoon of the succeeding day the wind changed to the east, driving the floating ice from the eastern to the western shore of the river. She was cut by the ice and caused to sink, thus inflicting the damage to the boat of which the libelants complain.

The testimony is conflicting, but I think the libelants are entitled to a decree. The master of the tug undertook a certain service, to-wit, the towing of the boat to the landing in Spuyten Duyvil creek. He was prevented by the ice from completing the trip, and hence was excusable for its non-performance. But his duty under the contract did not end there. He was still bound to take reasonable care of the boat and her cargo. He might have returned with her to Hoboken on the same afternoon, but he states that he was afraid to undertake

the trip, there being a strong head wind, and the boat being heavily laden, old, and weak. Then he could have remained with her during the night, ready to proceed the next morning to his destination, and to render any aid which changes in the wind or weather might require. He did neither, but left her at the end of the pier at Shady Side and towed another boat lying there back to New York. He assumed the consequences of such an abandonment, and the damage was caused by a change of wind on the next day. He undertook such risk and must be held responsible, as I find no proof which shows that the canal-boat in any way contributed to the damages.

There has been some testimony already in regard to the extent of the injury, growing out of the attempts of the parties to compromise the case. The boat was repaired after the accident, and there is some ground for believing that an attempt was made to introduce into the claim expenses for repairing which did not arise from the injury caused by the ice. The commissioner will be careful not to include in his report any expenditures which were not fairly made for the reparation of the injury complained of.

PHILADELPHIA & R. R. CO. v. NEW ENGLAND TRANSP. CO.

(District Court, S. D. New York. July 1, 1885.)

TUG AND TOW—NOTICE OF DANGER—DUTY TO SEEK HARBOR—COAL-BOATS—PUMPS OUT OF ORDER.

Respondent's tug, having several coal-boats in tow, on Long Island sound, when off Norwalk harbor, was notified by the captain of outside boat, No. 99, that his boat could not stand an approaching thunder shower, and to go into Norwalk harbor. The tug kept on, and No. 99 was sunk in the shower that followed. *Held*, that after such notice, and the boat being old, and but 10 inches out of water, reasonable care and prudence in the tug required her to seek refuge from the coming storm, and that she was in fault in not availing herself of the harbor near at hand. But it further appearing that the boat nearly outlived the storm, and that her pumps were choked up and not available, and that she might probably have survived had the pumps been in order, *held*, that she should recover but half her damages.

In Admiralty.

Benedict, Taft & Benedict, for libellant.

Hill, Wing & Shoudy, for respondent.

BROWN, J. On the twenty-eighth of July, 1882, one of the libellant's boats, No. 99, loaded with coal, was proceeding, in company with other boats, all in tow of the defendant's tug, on a trip from Port Morris to New Haven. The day had been fair, mild, and promising, until about half past two, when there was a change of wind to the southward, and evidences of a coming thunder storm. At about that time, when the tow was opposite, or nearly opposite, the east entrance of Norwalk harbor, the captain of No. 99 asked the pilot of the tug

to go into Norwalk harbor, telling him that he thought a storm was coming, and that his boat could not stand it, and would be lost if the storm should strike them. The tug continued on with the tow. A thunder shower, with a strong wind and heavy sea, fell upon them at about 3:30; and in an hour afterwards No. 99 filled and sank. The evidence shows that No. 99 was an outside boat on the starboard side, exposed to the wind and sea; that she was loaded to within 10 inches of her rail; was 15 years old; that her hatches were not tight; and when she took in water, that her pumps were choked, and could not be worked.

The pilot of the tug does not fully deny these statements of the captain of No. 99; and it appears that when the storm broke upon them they were about four and one-half miles to the eastward of the east passage to Norwalk. This seems to me to confirm the captain's statements, that when he first gave notice to the pilot that a storm was approaching, and that his boat could not bear it, the tug was not far from Norwalk harbor, and that it was a subsequent conversation on the same subject heard by one of the other captains, when it was stated that they were then about as near to Bridgeport harbor as to Norwalk. The defects of the libellant's boat, and her inability to cope with rough weather, were, therefore, not only obvious, but express notice of these facts was brought to the attention of the pilot of the tug with reference to the evident approach of the coming thunder storm. Ordinary prudence and care for the safety of the boats committed to his charge required him to seek any proper place of shelter available. I think the weight of evidence is clearly to the effect that such shelter might easily have been had through the east passage to Norwalk. In disregarding this notice, and not availing himself of the means of safety at hand, the pilot of the tug must be held in fault. *The M. J. Cunningham*, 18 FED. REP. 178; *The Niagara*, 20 FED. REP. 152.

2. The evidence shows that complaint had previously been made by the defendant of the unseaworthy condition of some of the libellant's boats. No. 99 was at this time 15 years old. Not only were her hatches imperfect, but when water began to be taken in, her pumps were found to be so choked up as to be useless. Notwithstanding this, it was an hour after the storm struck them before she sank. All the other boats of the tow were uninjured, and the storm did not last long after No. 99 sank. The choking of the pumps does not appear from the evidence to have arisen from any excusable accident on the trip. Had the pumps been in serviceable condition, it seems probable that the boat would have been kept afloat. Knowledge of the uselessness of the pumps was not communicated to the pilot of the tug, and could not be presumed by him. Upon this ground No. 99 must also be held chargeable with fault contributing to the loss. *The Oswego*, 8 Ben. 129. The libellant is entitled to recover, therefore, but half his damages, with costs.

THE CEPHEUS.¹

(District Court, E. D. New York. March 10, 1885.)

TUG AND TOW—SALVAGE AWARD RECOVERABLE AS DAMAGES IN COLLISION.

Several boats were being towed along-side a tug, when the tug was run into by a steam-boat coming up from behind, and some of the towing lines were broken by the collision, and others were cast off by direction of the master of the tug, who thought the tug was sinking, and the boats went adrift towards the shore, and were in danger of destruction. They were saved by other tugs, for whose services salvage was awarded against them by this court. *Held*, that, under all the circumstances, the peril in which the boats were placed was the natural and immediate result of the wrongful act of the steam-boat in running into the tug, and the owners of the boats were entitled to recover from the steam-boat the amounts they had paid for the salvage.

In Admiralty.

Carpenter & Mosher and Jas. K. Hill, Wing & Shoudy, for libelants.
W. S. MacFarlane, for the Cepheus.

BENEDICT, J. These actions were tried together. They are brought against the Cepheus,—the first, to recover the damages to the barge Manhattan No. 12; the second, to recover for damages to the chunker No. 2,104; the third, for damages to the canal-boat Two Brothers;—these damages being in each case asserted to have been the result of a collision between the steam-boat Cepheus and the tow of which these boats formed a part. It is proved and not denied that while the boats in question were being towed along-side the tug James McMahon, near Hell Gate, the steam-boat Cepheus, coming up from behind, ran into the James McMahon. None of the boats in the libels mentioned were injured by direct contact with the Cepheus, but some of the towing lines were broken by the collision, others were cast off by direction of the master of the James McMahon immediately after the blow, upon the cry of his engineer that his boat was sinking, and the tow thus broken up. The tide being strong, as soon as the lines were cast off, the boats in the libels mentioned began to drift towards the shore, and were put in danger of destruction. They were saved by the exertions of other tugs, for which salvage has been awarded against them.

The only question in this case is whether the peril in which the boats were put after the tow broke up was the natural and immediate result of the act of the Cepheus in running into the James McMahon, or whether it is to be attributed to unnecessary action on the part of the master of the James McMahon in casting off the lines, and to the neglect of the master of the James McMahon to pick up his boats when he might, after he discovered that his boat was not really injured. Upon the whole, considering the locality, the nature of the blow given, and its effects, I am of the opinion that all the damages in

¹ Reported by R. D. & Wyllys Benedict, of the New York bar.

question must be held to be the natural consequence of the wrongful act of the Cepheus in running into the tow.

The case of the Two Brothers and the boat No. 2,104 is not as clear as the case of the Manhattan No. 12; but, after all, is sufficiently clear to warrant a decree in their favor.

Let a decree in favor of the boats be entered in each case.

THE ELLA B.

(District Court, N. D. New York. July 15, 1885.)

ADMIRALTY JURISDICTION—TUG ENGAGED IN TOWING SMALL CRAFT IN HARBOR OF BUFFALO—LIBEL FOR SEAMEN'S WAGES.

A tug of less than five tons burden, whose chief occupation is the towing of canal-boats and other small craft about the harbor of Buffalo and adjacent waters, occasionally running out upon lake Erie and the Niagara river, is engaged in aiding commerce upon navigable waters of the United States, and within the admiralty jurisdiction.

In Admiralty.

Frank F. Williams, for libelant.

D. G. Jackson, for respondent.

COXE, J. This is an action to recover seaman's wages. The defenses are, want of jurisdiction and payment. The *Ella B.* is a tug of less than five tons burden. Her chief occupation has been, and is, the towing of canal-boats and other small craft about the harbor of Buffalo and the waters adjacent thereto. She has occasionally, in pursuing her vocation, been out upon Lake Erie and the Niagara river. Since the act of August 5, 1882, (22 St. at Large, 300,) she has not been enrolled.

It is contended by the respondent that, because of her diminutive size and the restricted theater of her operations, she is not within the admiralty jurisdiction of the court. This proposition cannot be maintained. She was engaged in aiding commerce upon navigable waters of the United States. This fact, irrespective of questions relating to the size and tonnage of the vessel, the absence of enrollment and license, and the circumscribed nature of her employment, is sufficient to give the court jurisdiction. *The B & C*, 18 FED. REP. 543; affirmed, *Ex parte Boyer*, 109 U. S. 629; S. C. 3 Sup. Ct. Rep. 434; *The Genesee Chief*, 12 How. 443; *The Eagle*, 8 Wall. 15; *The Hine v. Trevor*, 4 Wall. 555; *U. S. v. Burlington & H. C. F. Co.* 21 FED. REP. 331; *Endner v. Greco*, 3 FED. REP. 411; *The General Cass*, Brown, Adm. 334; *Malony v. Milwaukee*, 1 FED. REP. 611; *The Gate City*, 5 Biss. 200; *The Volunteer*, Brown, Adm. 159; *The Hezekiah Baldwin*, 8 Ben. 556; *The McChesney*, 8 Ben. 150; affirmed, 15 Blatchf. 183; *Murray v. The Nimick*, 2 FED. REP. 86; *The Florence*, 2 Flippin, 56.

With reference to the defense of payment it is thought that the testimony of the libelant, enforced as it is by dates and memoranda, is entitled to greater weight than the somewhat loose denial of the master of the tug. There should be a decree in favor of the libelant for the amount demanded in the libel, with interest and costs.

THE THOMAS M'MANUS.¹

(District Court, E. D. New York. November 29, 1884.)

1. CARRIERS OF GOODS BY WATER—LIABILITY BEYOND ROUTE—LIEN.

Persons in charge of a steam-boat in New York bound for Hudson, N. Y., gave a receipt for cotton shipped on board, which was marked, "Canoe Cotton Mills, Valatie, N. Y.," with knowledge that it was intended to go from Hudson by rail to K., and that there full freight from N. Y. to K. was to be paid, which was to be divided between the steam-boat and the railroad in accordance with an understanding between them. *Held*, that the duty of the steam-boat as carrier was discharged by delivering the goods to the railroad at Hudson.

2. SAME—EVIDENCE OF SPECIAL CONTRACT.

There must be clear and satisfactory evidence of a special contract to extend the liability of a steam-boat to the transportation and delivery of goods by a railroad beyond the place of the boat's destination, in order to charge the boat with a lien for damages caused by the wrong delivery by the railroad.

In Admiralty.

Goodrich, Deady & Platt, for libelant.

Tenbroeck & Vanorden, for claimant.

BENEDICT, J. The receipt given by those in charge of the steam-boat at the time of the shipment of the cotton does not amount to a bill of lading. It states no contract for the transportation of the cotton. It mentions no place on the route of the steam-boat, or on the line of the railroad connecting at Hudson, for delivery of the cotton, and contains no language from which to infer a contract on the part of the owners of the steam-boat to transport the cotton beyond Hudson, the place of the steam-boat's destination. Nor can such a contract be inferred from the fact that the steam-boat made a connection at Hudson with a railroad running thence through Kinderhook, and received this cotton, marked, "Canoe Cotton Mills, Valatie, N. Y.," with knowledge that it was intended to go by the railroad from Hudson to Kinderhook, and that upon its delivery there freight was to be paid for the whole transportation from New York to Kinderhook, which freight would be divided between the railroad and the steam-boat, in accordance with an understanding between them.

A special contract to extend the liability of the steam-boat to the transportation and delivery of the cotton by a railroad, and at a place

¹Reported by R. D. & Wyllys Benedict, of the New York bar.

beyond the place of the boat's destination, cannot be inferred from the facts proved in this case. Clear and satisfactory evidence of such a contract is required by the law, (*Myrick v. Michigan Cent. R. Co.* 107 U. S. 102; S. C. 1 Sup. Ct. Rep. 425;) and certainly without such an agreement no lien upon the steam-boat was created by the act of the railroad in delivering the cotton to the Canoe Cotton Mills at Kinderhook without the shipper's order, when a receipt containing the words, "To order; notify Canoe Cotton Mills, Valatie, N. Y.," as well as the words, "Account of Tolar, Hart & Co.," had been given at the time of the shipment of the goods.

The libel is accordingly dismissed, without considering the other points made in behalf of the claimant, upon the ground that when the steam-boat delivered the cotton to the railroad at Hudson the duty attaching to the steam-boat as carrier was discharged.

THE SNAP.

(District Court, D. New Jersey. August 13, 1884.)

ADMIRALTY PRACTICE—STIPULATION FOR COSTS—OATH OF SURETY.

Until satisfactory proof is put in that the officer, in accepting a bond, was deceived or did not properly perform his duty, the court will assume that the security is sufficient, and when the surety has made oath that he is worth a sufficient sum over and above all his just debts and liabilities the stipulation is *prima facie* good.

In Admiralty.

Hyland & Zabriskie, for libelants.

Wallis & Edwards, for claimants.

NIXON, J. The proctors for the libelants in the above-stated cause filed with the libel the usual stipulation for costs, offering as surety one Isaac Pierson, who swore that he was worth the sum of \$500 over and above all his just debts and liabilities. This is all that the rule requires, and is, *prima facie*, a good stipulation. The proctors for the claimants, however, gave notice to the libelants to produce their surety (Pierson) before Mr. Commissioner Romaine in Jersey City, on a day stated, to enable them to make further inquiry as to his property and responsibility. The libelants declined to produce him; and a rule was then taken upon them to show cause before the court why additional security for costs should not be furnished. On the return of the rule no evidence was offered to show, or tending to show, that the stipulation filed was not good, but the court was asked to inaugurate the practice of setting aside a stipulation for costs entered into in the usual form, and verified by the usual affidavit, upon the mere suggestion by the respondents that it might not be sufficient.

Until some satisfactory proof is put in that the officer, in accepting

the bond, was deceived, or did not properly perform his duty, the court must assume that the bond is sufficient.

The rule to show cause is discharged.

THE CO. F. YOUNG and THE SARAH C. HAGAR.¹

(District Court, E. D. New York. February 25, 1885.)

COLLISION—CONFLICTING EVIDENCE—PROBABILITY.

Where the evidence in a collision case was conflicting, and one version of the accident made it necessary to suppose that the collision must have been intentional, while the other version did not, the latter was believed to be the truth.

In Admiralty.

Hyland & Zabriskie, for libelant.

Alexander & Ash, for the Hagar.

Benedict, Taft & Benedict, for the Young.

BENEDICT, J. Upon the evidence in this case the libelant can recover against one of the tugs proceeded against, but not against the other. He can recover against the Co. F. Young if he and the witnesses produced by the Sarah C. Hagar tell the truth. He can recover against the Sarah C. Hagar if the witnesses produced by the Co. F. Young tell the truth. I incline to believe the account given by those in charge of the Co. F. Young, for the following reasons: This account is not improbable, while it is highly improbable that the Co. F. Young, with the Sarah C. Hagar and her tow in plain sight, would start up and run into the canal-boat, as the witnesses from the Hagar say she did. Such an act was so uncalled for that the witnesses for the other side say that the collision must have been intentional on the part of the Co. F. Young. Moreover, the testimony given by the libelant and the witnesses for the Hagar is far from harmonious, whereas the testimony given by those from the Co. F. Young is not open to such a criticism. In addition to this, the witnesses who testify to the account contended for by the Sarah C. Hagar are outnumbered by the witnesses for the Co. F. Young. In such a state of the evidence, the libel, as against the Co. F. Young, must be dismissed, and the libelant may have a decree against the Sarah C. Hagar, with a reference to ascertain his damages.

¹ Reported by R. D. & Wyllys Benedict, of the New York bar.

THE G. W. PRATT and THE BLUE BONNET.¹

(District Court, E. D. New York. January 5, 1885.)

COLLISION—DAMAGE—EVIDENCE OF UNSEAWORTHINESS.

On all the evidence in this case it was held not to have been proved that the libellant's boat was so old and unseaworthy as to prevent his recovering against the tug B., towing his boat, the damages which his boat sustained by collision with another, by fault of the B.

In Admiralty.

Hyland & Zabriskie, for libellant.

Beebe & Wilcox, for the Blue Bonnet.

Benedict, Taft & Benedict, for the Pratt.

BENEDICT, J. The collision which gave rise to this action was not caused by any fault on the part of the G. W. Pratt, but was caused by the fault of the Blue Bonnet, in attempting to pass out from pier 4, nearly across the tide, and ahead of the G. W. Pratt. The result was that before she could straighten up in the tide she was carried by the tide down upon the Pratt, and so caused the damage to the libellant's boat. There must therefore be a decree in favor of the G. W. Pratt, and against the Blue Bonnet, unless the breaking of the libellant's boat by the collision was owing to its being too old and weak to sustain the ordinary pressure incident to navigation of this character. Upon this point there is testimony going to show that the libellant's boat was old and weak; but there is also proof that she had on board a cargo of coal, and that she had shown herself able to carry cargoes up to the time of the accident. It also appears that a survey of the damage caused by the collision in question was had, in which the claimants took part, and the report of that survey, while it designates the parts requiring to be repaired, nowhere alludes to any unseaworthiness or insufficiency of the boat; and one of the surveyors, when examined as a witness, says that the boat, with the repairs stated in the report, would be seaworthy. Moreover, one of the persons who held the survey on the boat, and who is called as a witness for the claimants, testifies that he would not hold a survey upon a boat that was unseaworthy prior to sustaining the injury to be surveyed. I cannot, therefore, say that the testimony proves that the damages caused by the collision arose from the fact that the libellant's boat was not sufficient to endure the ordinary strain of navigation of this character.

Let a decree be entered dismissing the libel as against the G. W. Pratt, and directing a decree in favor of the libellant against the Blue Bonnet, with an order of reference to ascertain the damages.

¹ Reported by R. D. & Wylls Benedict, of the New York bar.

FIELD and others v. WILLIAMS.

(Circuit Court, E. D. Wisconsin. June, 1885.)

REMOVAL OF CAUSE—TIME OF APPLICATION—DECISION ON DEMURRER—REV. ST. § 639, SUBD. 3.

A cause may be removed from a state court, under Rev. St. § 639, subd. 3, after a decision or ruling on demurrer. *Alley v. Nott*, 111 U. S. 472; S. C. 4 Sup. Ct. Rep. 495, distinguished.

Motion to Remand.

Ellis, Greene & Merrill, in support of motion.

Webster & Brazeau, contra.

DYER, J. This case was removed from the state court to this court at the instance of the plaintiffs, and is now before us on a motion to remand. The plaintiffs are citizens of other states than Wisconsin, and one of them is an alien. The defendant is a citizen of this state. The suit is upon a judgment recovered by the former against the latter, November 1, 1879, in the superior court of Cook county, Illinois. Issue was joined while the case was pending in the state court. The answer of the defendant contains (1) a general denial of indebtedness upon the judgment; (2) an affirmative defense that the judgment was obtained by fraud; and (3) a counter-claim for damages. The plaintiffs demurred to the second defense, on the ground that it did not state facts constituting a defense to the action, and to the counter-claim, on the grounds that it did not state facts constituting a cause of action against the plaintiffs, and that its subject-matter was not pleadable as a counter-claim. The demurrer, so far as it related to the second defense, was sustained by the state court, and as to the counter-claim, was overruled. Subsequently the case was removed to this court. The removal was made pursuant to the third subdivision of section 639, Rev. St., which provides that "when a suit is between a citizen of the state in which it is brought and a citizen of another state, it may be so removed on the petition of the latter, whether he be plaintiff or defendant, filed at any time before the trial or final hearing of the suit, if before or at the time of filing said petition he makes and files in said state court an affidavit, stating that he has reason to believe, and does believe, that from prejudice or local influence he will not be able to obtain justice in such state court."

The motion to remand was prompted by a suggestion of the court, when the case was called for trial, that there might be some doubt whether the case was removable, in view of the proceedings had in the state court, and is now urged on the ground that the application for removal was made too late. In *Alley v. Nott*, 111 U. S. 472, S. C. 4 Sup. Ct. Rep. 495, it was decided by the supreme court that, as a demurrer to a complaint, on the ground that it does not state facts sufficient to constitute a cause of action, raises an issue which involves the merits, a trial of the issue raised by it is a trial of the ac-

tion, within the meaning of section 3 of the act of March 3, 1875, (18 St. 471,) relating to the time within which causes may be removed from state courts; and therefore that a cause in which such a demurrer had been heard and decided could not be thereafter removed under that section. The present contention is that this ruling applies to a similar removal made under the third subdivision of section 639, Rev. St. The language of section 3, act of 1875, is "that whenever either party, or any one or more of the plaintiffs or defendants entitled to remove any suit mentioned in the next preceding section, shall desire to remove such suit from a state court to the circuit court of the United States, he or they may make and file a petition in such suit in such state court before or at the term at which said case *could be first tried, and before the trial thereof.*" The language of subdivision 3, § 639, Rev. St., is that the suit may be removed on petition "filed at any time *before the trial or final hearing thereof.*" The argument of counsel in support of the motion is that, as to the time when the suit may be removed, the language of the two acts is substantially identical, because in both the words "before trial" are used, and therefore that the decision of the court in *Alley v. Nott*, interpreting the word "trial," as used in the third section of the act of 1875, applies with equal force to a case arising under subdivision 3, § 639; and the point, when first suggested, seemed to the court not without merit.

In the original act of March 1, 1867, (14 St. at Large, 558,) the language used in fixing the period within which the removal might be made was "*at any time before the final hearing or trial of the suit;*" and in *Insurance Co. v. Dunn*, 19 Wall. 214, it was held that the word "final," as thus used, applied to the term "trial" as well as to the term "hearing;" accordingly, that although a removal was made under that act after a trial on the merits, a verdict, a motion for a new trial refused, and a judgment on the verdict, yet, it having been so made in the state, where, by statute, the party could still demand as of right a second trial, the removal was in time, because such first trial was not a "final trial," within the meaning of the act. And in *Stevenson v. Williams*, Id. 575, it was observed by Mr. Justice FIELD, commenting on the act of 1867, that it clearly meant that a removal might be made before final judgment in the court of original jurisdiction where the suit was brought. In *Vannever v. Bryant*, 21 Wall. 41, it was adjudged that a removal could not be made, under the act of 1867, after trial and verdict, and while a motion for a new trial was pending and undetermined, because, for aught that then appeared, the trial thus had might be the "final trial;" but impliedly holding that if a new trial should be granted, and a right to a second trial become thus perfected, a removal might then be made. See, also, *Railroad Co. v. McKinley*, 99 U. S. 147.

Such were the decisions interpreting the act of 1867 as it originally stood. But as that act, revised and condensed, appears in sub-

division 3, § 639, Rev. St., there is a transposition of words, so that its language is "before the trial or final hearing." And it is now contended that the qualifying adjective "final" does not apply to "trial," but only to "hearing," and that "trial" relates to the trial of suits at law, and "final hearing" to the hearing of suits in equity. Hence that a suit at law must be removed under that section before trial, and that in view of the language of the section, thus changed from that of the original act, the hearing and decision of a demurrer is as clearly a "trial" as it is under section 3 of the act of 1875.

This contention we cannot sustain. Under section 3 of the act of 1875 the suit must be removed not only before the trial thereof, but before or at the term at which it could be first tried. This is a requirement which does not appear in the act of 1867, nor in any of the former removal acts; and it has been construed to mean the first term at which the cause is in law triable,—the first term at which the cause would stand for trial, if the parties had taken the usual steps as to pleadings and other preparations. *Babbitt v. Clark*, 103 U. S. 606; *Pullman Palace Car Co. v. Speck*, 113 U. S. 87; S. C. 5 Sup. Ct. Rep. 374; *Gregory v. Hartley*, Id. 742; S. C. 5 Sup. Ct. Rep. 743. Herein the act of 1875 is materially different from any statute which preceded it authorizing removals from the state to the federal court; and this is an important consideration—undoubtedly influencing, to a considerable extent, the decision in *Alley v. Nott*—in determining at what stage in the progress of a cause it may be removed under the act of 1867. It does not follow, therefore, as a necessary sequence from the use of some words in both acts that are identical, that the two acts must have the same construction, it appearing that, in material parts, they are dissimilar.

Subdivision 3 of section 639, Rev. St., was not repealed by the act of 1875. This was expressly adjudged by the supreme court in *Hess v. Reynolds*, 113 U. S. 80, S. C. 5 Sup. Ct. Rep. 377, where it is said that "this clause of section 639 remains and is complete in itself, furnishing its own peculiar cause of removal, and prescribing for causes appropriate to it the time within which it must be done." In determining what is meant by the words "trial or final hearing," as used in this subdivision, the special cause of removal therein prescribed, and not found in the act of 1875, is to be considered. The prejudice, or hostile local influence, might not exist, nor have been discovered, at the beginning of the suit, nor at the time of hearing a demurrer, nor indeed before a trial on the merits which was not final. Therefore, as Mr. Justice MILLER says, in the opinion in *Hess v. Reynolds*, *supra*, "congress intended to provide against this local hostility whenever it existed up to the time of trial;" which, according to the general sense and evident intent of the act, means final trial. The case just referred to was one in which there had been a trial before commissioners appointed by a probate court to pass upon claims against an estate, and after such trial and an appeal to the circuit

court of the state, but before a trial by jury in the latter court, the proceeding was removed to the federal court, and the case was held removable at that stage. Speaking of subdivision 3 of section 639, it is said in the opinion that a trial by jury is "the trial or final hearing of the suit, which would conclude the right of removal, and until such trial commenced the right of removal under this provision remained." Thus it would seem that the supreme court now place the same interpretation upon the act of 1867 in its present form as was placed upon it when *Insurance Co. v. Dunn* was decided, and when its language was "the final hearing or trial." See, also, *Ayers v. Watson*, 5 Sup. Ct. Rep. 642.

We are therefore of opinion that this case is distinguishable from *Alley v. Nott*, and that the motion to remand should be overruled.

HARLAN, Justice, who presided in the hearing of this case, concurs in this opinion.

CHICAGO & A. RY. CO. v. NEW YORK, L. E. & W. R. CO. and another.

(Circuit Court, S. D. New York. July 8, 1885.)

1. REMOVAL OF CAUSE—SEPARATE CONTROVERSY.

As the bill in this case discloses a separate controversy between plaintiff and the removing defendant, the motion to remand is denied.

2. INJUNCTIONS—DAMAGES—INADEQUATE REDRESS.

Injunctions to restrain breaches of negative covenants and mandatory injunctions to compel the observance of affirmative covenants are granted when the threatened breach of an existing contract is clearly shown, but only when the recovery of damages at law would inadequately redress the impending injury.

3. CONTRACT—CONDITION.

Where an agreement is not to be deemed complete until certain parties have signed it, those who have signed it cannot, after they have shown by acting under it that they considered it complete, although not signed by the others, claim that it is not binding and merely inchoate.

4. INJUNCTION—VIOLATION OF COVENANTS.

Equity will restrain the violation of covenants by injunction, notwithstanding their nature is such that specific performance would not be decreed.

5. RAILROAD COMPANIES—CONTRACT TO ESTABLISH DISPATCH FREIGHT LINE—INJUNCTION.

Contract between plaintiff and defendant railroad companies, whereby they agreed to establish a dispatch freight line for their mutual benefit and profit, construed, and held that a breach thereof should be enjoined.

In Equity.

Joseph H. Choate and Charles L. Atterbury, for plaintiff.

B. H. Bristow and W. W. McFarland, for defendants.

WALLACE, J. This suit was removed from the supreme court of this state to this court upon the petition of the New York, Lake Erie & Western Railroad Company. The plaintiff moves to remand, and the motion presents the single question whether there is a controversy in the suit which is wholly between the removing defendant and the plaintiff, and which can be fully determined as between them.

The bill of complaint is filed to restrain the defendants from violating the conditions of several contracts entered into between the parties, and for an accounting for moneys due to the plaintiff, and for damages. One cause of action against the defendants is founded upon the alleged breach of the second clause of the agreement, Exhibit A, annexed to the bill, whereby each defendant covenants to make good any deficiency in the earnings of the plaintiff necessary to pay plaintiff's interest upon its issue of mortgage bonds in the proportion to which each defendant may respectively receive gross earnings accruing from its traffic with the plaintiff. The undertaking thus expressed is not a joint one on the part of the defendants, but is several and distinct by each, and the liability of each is measured by its own proportion of gross earnings received from its traffic with the plaintiff. *Adriatic Fire Ins. Co. v. Treadwell*, 108 U. S. 361; S. C. 2 Sup. Ct. Rep. 772. There is nothing in the agreement which implies that the defendants are to be sureties for each other, or answerable for each other's default.

Although a joint accounting is demanded, the liability of each defendant is several, and the complainant cannot convert a controversy which is wholly between itself and each of the two defendants into one between itself and both defendants, by treating it as joint in the prayer for relief. It is only where the cause of action is founded upon a joint and several liability that a plaintiff may, at his election, proceed against both defendants jointly or each severally. *Boyd v. Gill*, 19 Fed. Rep. 145; *Louisville & N. R. Co. v. Ide*, 114 U. S. 52; S. C. 5 Sup. Ct. Rep. 735. The removing defendant and the plaintiff are the only indispensable and the only proper parties to the suit, so far as it is founded upon the breach of the second clause of Exhibit A. The bill thus discloses a separate controversy between the plaintiff and the removing defendant, and the motion to remand should therefore be denied.

The defendants move to dissolve the *ex parte* injunction obtained by the plaintiff in the state court, restraining the defendants from diverting the traffic of the Great Western Dispatch Freight Line from the railroad of the plaintiff, and from diverting any traffic from the plaintiff's road which it is entitled to receive under various agreements set out in the complaint, and from retaining and appropriating certain moneys of plaintiff to which plaintiff claims to be entitled under various provisions of the agreement between the parties.

It cannot be seriously contended that the injunction should be permitted to stand in the broad form in which it was granted. So far as it restrains the defendants from retaining and appropriating moneys which they ought to pay over to the plaintiff, it should be vacated, because the plaintiff has an adequate common-law remedy to recover these sums. Injunctions to restrain breaches of negative covenants, and mandatory injunctions to compel the observance of affirmative covenants, are granted when the threatened breach of an existing contract is clearly shown, but only when the recovery of damages at law

would inadequately redress the impending injury. So far as the injunction restrains the diversion of traffic from the plaintiff, the plaintiff's case rests upon the breach of two distinct contracts. The first is a contract between the parties by which, in consideration of the mutual stipulations to be kept and performed by each, they agreed that so much of the railroad of the defendant the New York, Lake Erie & Western Railroad Company as extended from the city of New York to Salamanca, and so much of the railroad of the defendant the New York, Pennsylvania & Ohio Railroad Company as extended from Salamanca to Marion, Ohio, should form, with the railroad of the plaintiff extending from Marion to Chicago, and then under construction, a through line for traffic, both freight and passenger, between New York and Chicago. In that agreement the plaintiff covenanted to forward by said through line all freight and passengers which it could lawfully control to all points reached by the railroads of the defendant and their respective connections, provided the same could be done at equal rates and with equal facilities of any other line or route.

The defendant the New York, Lake Erie & Western Company covenanted on its part, so far as it could lawfully control the same, to forward by the way of the railroads of the New York, Pennsylvania & Ohio Company and of the plaintiff, as nearly as practicable, as large a proportion of its all-rail business destined for Chicago and points beyond as the business received by it from Chicago and points beyond, over the railroad of the plaintiff, and of the New York, Pennsylvania & Ohio Company, should bear to the whole amount of its all-rail business from Chicago and points beyond. The New York, Pennsylvania & Ohio Railroad Company covenanted on its part to forward by the railroad of the plaintiff as large a proportion of its business destined for Chicago and points beyond, originating on its own line, as the amount of its business from Chicago and points beyond, coming to it over the road of the plaintiff, should bear to the whole amount of the business coming to it from Chicago and points beyond, and destined for points on its road and its connection. It was further provided in this agreement that through rates on all business done over the three roads should be divided between them proportionately to the distance carried on their said roads, respectively, after deducting the usual terminal and lighterage charges.

The bill does not allege in specific terms the breach of any of the covenants in this agreement on the part of the defendants. It avers on information and belief that the defendants "have violated their contracts with the plaintiff for the maintenance and support of the through line between New York and Chicago by the diversion of traffic therefrom, and by other acts hostile to the interests of such through line;" but in what particulars the defendants have violated their contract does not appear. By a reference to the affidavits accompanying the bill, it appears that the defendant the New York, Lake Erie

& Western Company has collected and retained, and refuses to pay over, moneys, a portion of which belongs to the plaintiff. Clearly the plaintiff cannot maintain its injunction if this is the only breach of the agreement on the part of the defendants. The general averment of a diversion of traffic, when none of the circumstances are shown, is a mere conclusion of law. The bill would be bad upon demurrer. *Dillon v. Barnard*, 21 Wall. 430, 437. More than this is necessary to authorize an injunction. *Spooner v. McConnell*, 1 McLean, 337, 360; *Brooks v. O'Hara*, 8 FED. REP. 529.

Aside from the failure to allege sufficiently a breach of this agreement, there is another fatal objection to the plaintiff's case, so far as it is founded upon this agreement. By the terms of the agreement the defendants were to forward by the railroad of the plaintiff only such a proportion of their Chicago traffic, respectively, as the amount they should respectively receive from the plaintiff bears to the whole amount of traffic coming to the defendant from Chicago and points beyond. There is no allegation in the bill that the defendants have not forwarded to the plaintiff the requisite proportion of traffic to which the plaintiff is entitled under the terms of the agreement. If they have forwarded that proportion the plaintiff has no cause of complaint.

The plaintiff's right to an injunction must be sustained, if it can be sustained at all, upon the case made in respect to the second agreement referred to. By that agreement the plaintiff, the defendant the New York, Lake Erie & Western Company, and several other railroad companies, undertook to form a co-operative organization for the development and accommodation of connecting through freight traffic between certain western and eastern points and districts upon or reached by their respective roads and their connections. The parties agreed to establish a freight line to be known as the Great Western Dispatch, to be operated via Salamanca, both eastwardly and westwardly, solely upon and in connection with the roads of the several railway companies that were parties to the agreement. They were to contribute a capital or line fund and pay expenses in proportion to their earnings, and were to contribute cars in proportion to their business. Each party agreed to give the Dispatch line as favorable rates, time, and working facilities as it should give to other freight lines, and to place it on as favorable a footing in every respect as the most favored lines operating by other routes or roads between the same or similar points. West-bound rates were to be controlled by roads east of Salamanca, and east-bound rates by roads west of Salamanca; and the rates were to be maintained as high as those of other competing lines. The line was to be in charge of a general manager, selected by the companies, who was to have control of its agents, and to whom accounts were to be transmitted by the several companies, and who was to adjust and pay over the sums accruing to each.

The agreement is silent in regard to the manner in which traffic is to be secured for or contributed to the Dispatch line by the several companies. There is no stipulation, express or inferential, which binds either of them to give traffic or business to the Dispatch. The provision that the parties shall give to each other facilities equal to those given to like traffic of other railway lines, negatives the inference that their traffic or business is to be given exclusively to the Dispatch. Manifestly it was the contemplation of the parties to this agreement that their mutual interests would be promoted and developed by this co-operative organization, and that considerations of profit and convenience would induce each to contribute its full share of traffic. The bill alleges that by the terms of this agreement each party stipulated to give to the line all traffic it could control, intended for shipment between points upon the lines of the railroads, parties to the agreement. This averment is a mere conclusion of the pleader, and wholly unwarranted by the agreement. The breach assigned is in part predicated upon this unfounded allegation.

It is alleged, however, and the affidavits support the bill in this regard, that traffic destined for transportation over the Dispatch line, and received by it, has been continuously diverted, by the influence and intervention of the defendant the New York, Lake Erie & Western Company with the manager of the Dispatch line, from the railroad of the plaintiff to lines of railroad companies not parties to the agreement. If freight is delivered to the defendants for transportation by the Dispatch line to Chicago, or to intermediate points to which, by the usual course of business, it would be transported over the plaintiff's railroad, and the traffic which the plaintiff would thereby receive has been diverted by the actions of the defendants, a substantial breach of the agreement on the part of the defendants has taken place, because the agreement expressly provides that the freight line is to be operated solely by the railway companies parties to the agreement. The plaintiff is entitled to receive its due proportion of the traffic which it would thus derive. It is apparent, from the facts stated in the affidavit, as well as from the character of the agreement itself, that it would be difficult and probably impossible to determine the extent of the pecuniary loss which the plaintiff may sustain by this diversion of traffic. The defendants insist that the plaintiff has violated the agreement upon its part; but the affidavits do not sustain this assertion.

The defendants rely upon two legal propositions to defeat the right of the plaintiff to an injunction restraining this diversion of traffic: *First*. It is contended that the agreement for the organization and maintenance of the Dispatch line is not valid, because various railroad companies who were named in the agreement as parties to it did not sign or subsequently come in under its terms. Doubtless an agreement which is not to be deemed complete until other signatures should be attached to it, is not binding upon those who have signed

it. But here the parties who sign have placed their own interpretation upon the agreement, and shown by their own acts in maintaining the organization and transacting the business according to its provisions since the first day of January, 1884, that they regarded it as complete, although not signed by the others. It is quite too late for them to say now that it was merely an inchoate affair. *Secondly*. It is contended that the agreement is of such a character that a court of equity will not attempt to decree its specific performance, and therefore an injunction should not be granted to restrain its breach. It is urged that the contract is one in which the skill, experience, and cultivated judgment of the parties must be exercised, in order to confer upon either of them the substantial benefit of its performance, and also that it would require a constant supervision and intervention on the part of the court, during the five years of the life of the contract, to enforce its observance.

The cases, *Fallon v. Railroad Co.* 1 Dill. 121; *Marble Co. v. Ripley*, 10 Wall. 358; *Port Clinton R. Co. v. Cleveland & T. R. Co.* 13 Ohio St. 544; and *Ross v. Union Pac. Ry. Co.* Woolw. 26, are cited as adjudications of our own courts in point; and the English cases, *Lumley v. Wagner*, 1 De G., M. & G. 604; *Johnson v. Shrewsbury & B. Ry. Co.* 3 De G., M. & G. 914; *Peto v. Brighton Ry. Co.* 11 Wkly. Rep. 874, are also cited.

In many cases where the act to be done by the delinquent party was not a single act, to compel which a single decree of the court would be sufficient, but a series of acts which would call for the frequent interposition of the court during a protracted period of time by successive decrees or orders, the inconvenience of the remedy of specific performance has been deemed so great that the courts have refused to interfere, and have left the party aggrieved to his remedy at law. So, also, when the act to be performed depends upon the skill, experience, and cultivated judgment of the person who has obligated himself for its performance, courts of equity will not undertake to coerce a literal and perfunctory performance which would be but a vain and idle act.

It is one thing, however, to stop a party from doing that which he cannot rightfully do, and another to undertake to compel him to do an act involving the exercise of faculties and judgment which are peculiar and personal to himself; and the argument from inconvenience which may properly be invoked when the court is asked to decree a specific performance would, if it should be controlling when the court is asked to restrain the doing of an unlawful act, apply to all cases in which the corrective power by injunction is exercised.

In the case of *Lumley v. Wagner* the defendant had entered into an engagement with the plaintiff to sing at his theater, and not to sing at any other theater, and it was held that although the court would have been unable to specifically enforce the defendant's affirmative covenant to sing, it could, nevertheless, restrain a violation of

his negative covenant. *McCaull v. Braham*, 16 FED. REP. 38, is a similar case. In *Singer Sewing-machine Co. v. Union Button-hole & E. Co.* 1 Holmes, 253, the court, after a careful review of the authorities, held that an injunction may be granted to restrain acts in violation of a lawful contract, although the nature of the contract is such that specific performance would not be enforced. LOWELL, J., said: "It is now firmly established that the court will often interfere by injunction when it cannot decree specific performance." To the same effect is *W. U. Tel. Co. v. Union Pac. Ry. Co.* 3 FED. REP. 423, 429; *Wells, Fargo & Co. v. Oregon Ry. & N. Co.* 16 Amer. & Eng. R. Cas. 71; and *Wells, Fargo & Co. v. Northern Pac. R. Co.* 18 Amer. & Eng. R. Cas. 441.

Wolverhampton & W. Ry. Co. v. London & N. W. Ry. Co. L. R. 16 Eq. 438, is a case quite in point, where the defendant was restrained from a wrongful diversion of traffic on the plaintiff's road. The agreement between the two companies was that the defendant should work the plaintiff's line, and during the continuance of the agreement develop and accommodate the local and through trade thereof, and carry over it certain specified traffic. The bill was filed to restrain the defendant from carrying a portion of the traffic which ought to have passed over the plaintiff's line by other lines of the defendant. The point was made by the defendant, which is made here, that the court could not undertake to enforce specific performance upon such a contract, because it would require a series of orders, and a general superintendence, to enforce the performance, which could not conveniently be administered by a court of justice; but the point was overruled and the injunction granted.

It is not a valid objection to the plaintiff's right to an injunction that other railroad corporations, parties to the agreement, are not parties to this controversy. None of them are interested in the specific controversy now before the court. It has been assumed by the plaintiff, upon the argument of the motion, that the defendant the New York, Pennsylvania & Ohio Railroad Company was a party to the agreement. It appears, however, that its only relation to the Great Western Dispatch line is that of lessor to the defendant the New York, Lake Erie & Western Railroad Company, and all acts done in violation of the agreement have been those of the latter company.

The order of the court, therefore, is that the injunction be vacated as against the New York, Pennsylvania & Ohio Railroad Company, and as against the other defendant that it be modified in accordance with this opinion.

EASTON v. GERMAN-AMERICAN BANK.

*(Circuit Court, S. D. New York. July 8, 1885.)***1. PLEDGE—DUTY OF PLEDGEE.**

When negotiable instruments are pledged as collateral it is the duty of the pledgee, not only so to deal with them as not to destroy their value, but he is to use ordinary diligence to make them available for the payment of the debt; and if he suffers indorsed paper to mature without resorting to the necessary steps to charge the indorser, or fails to pursue reasonably the primary parties, he may become responsible for any loss that may ensue.

2. SAME—DUTY, WHEN PERFORMED.

When the pledgee has exercised ordinary diligence to secure the fruits of the pledge for the benefit of the pledgeor, in view of all the circumstances of the particular transaction, his duty has been fully discharged.

3. SAME—PLEDGE OF BONDS BEING PART OF ISSUE SECURED BY TRUST DEED.

Where bonds, part of an issue, all of which are secured by a fund to be realized by a public sale of real estate upon public notice by a trustee for the bondholders and the grantors in a trust deed, are pledged, the pledgee owes no duty to the pledgeor of bidding at the sale of the land, and may lawfully bid and become a purchaser of the land himself.

4. SAME—SALE OF LAND—PURCHASE BY PLEDGEE.

B, borrowed of defendant on his note \$27,500, and deposited as collateral 40 bonds, part of an issue of 100, secured by a deed of trust with power of sale on land in Illinois. B. failed to pay his notes, and the land was sold by the trustee pursuant to the terms of the trust deed, and was bought in by an agent of the bondholders, and part of it conveyed by him to the defendant. *Held*, that the defendant did not sustain such a fiduciary relation to B. as to preclude it from acquiring a valid title to the land, although the relation of pledgeor and pledgee existed between B. and the defendant at the time.

In Equity.

Charles P. Crosby, for plaintiff.

Edward Salomon, for defendant.

WALLACE, J. In April, 1875, the firm of Bowen Brothers borrowed \$27,500 of the defendant, giving notes payable, respectively, two, three, and four months from that date. As collateral security for the payment of this loan, Bowen Brothers deposited with the defendant 40 bonds of the denomination of \$1,000 each, made by them payable to bearer five years from date, with interest semi-annually, and bearing date April 1, 1873. These bonds were part of a series of 100 of like tenor and amount, all of which were secured by a trust deed of certain real estate in Cook county, Illinois, executed by Bowen Brothers to one Smith, as trustee, for the purpose of securing the prompt payment of the said bonds and the interest thereon, in whosoever hands the same might be. The trust deed provided that in case of default in payment of the bonds or interest it should be lawful for the trustee, on the application of the holder of any of said bonds, to sell the said real estate, or any part thereof, and all the right and equity of redemption of the grantors therein, at public vendue, to the highest bidder, for cash, and upon making such sale to execute and deliver to the purchaser a deed of conveyance in fee of the premises sold, which sale and conveyance should be a perpetual bar, both in law and equity, against the grantors, their heirs and assigns, and all other persons claiming under them. Bowen Brothers have never paid the defend-

ant's loan to them. By the terms of the pledge made by Bowen Brothers to the defendant of the 40 bonds, the defendant was authorized, on non-payment of the notes at maturity, to sell the collaterals at the board of brokers, at public auction or at private sale, and without notice to Bowen Brothers, and to apply the proceeds of such sale to the payment of the notes. The defendant has never made a sale of the collaterals, pursuant to the terms of the pledge, and still retains the bonds.

In January, 1877, the trustee in the trust deed, upon the application of the State Savings Institution of Chicago, the holder of 32 of the bonds, upon which no interest had been paid, sold the premises, after due notice, at public auction, to one Dexter, the highest bidder, for \$50,000 cash. The sale was regular, and the trustee conveyed to Dexter conformably to the terms of the power in the trust deed. In purchasing the real estate, Dexter acted as agent for the holders of the bonds, including the defendant, he having been authorized by the holders to bid for and purchase the property for them jointly, in order to protect their interests. Thereafter, he conveyed to the defendant 40-100 of the property purchased by him, and in a partition suit, subsequently brought, a separate portion of the real estate was set off to the defendant in lieu of its undivided interest in the property. No part of the purchase money paid by Dexter was actually advanced by the defendant, but the defendant credited Bowen Brothers with 40-100 of the amount upon their loan, leaving Bowen Brothers still indebted to the defendant in the sum of several thousand dollars.

In February, 1881, the defendant sold and conveyed the real estate thus acquired by it to one Dore, for the sum of \$56,000. The complainant claims to have acquired all the interests of Bowen Brothers, and all their cause of action against the defendant growing out of the transaction, by mesne transfers from their assignee in bankruptcy. He files this bill upon the theory that the defendant is bound to account for the \$56,000, the proceeds of its sale of the real estate to Dore, and for the rents and profits during the time the defendant was in possession of the real estate. It is not alleged in the bill that the sale of the real estate was not fairly made, or that the sum for which it was purchased was not a fair price, or that the defendant acted otherwise than in entire good faith, and for the sole purpose of protecting its own debt. The theory of the bill is that the pledgeors are entitled as a matter of strict right to the profits made by the defendant by a fortunate sale of the real estate after four years had elapsed since the purchase.

Inasmuch as the defendant has all along been a pledgee of the collaterals, which were hypothecated to it by Bowen Brothers as security for its loan to them, it is clearly bound to account to them or to their assignee for all moneys received by it from the collaterals. If the defendant had exchanged the bonds directly for the real estate, unquestionably it would be accountable for the value of the real es-

tate, and the pledgeors, upon tendering the sum due upon the loan, would be entitled to a conveyance. In that case it would have exchanged the pledged property for other property, in contravention of its duties as a trustee for the pledgeors to sell the pledged property and apply the avails to the discharge of the debt. Unless the purchase at the sale was, in legal effect, such an exchange, the pledgeors had no interest in the purchase, except upon the theory that the defendant was incapacitated, because of its fiduciary relation towards the pledgeor, from purchasing on its own account.

In considering the rights of the parties, the circumstance that the pledgeors were the grantors in the trust deed may be left out of view, and the case may properly be treated as though the bonds pledged to the defendant, and the trust deed securing them, had been executed by persons other than the immediate parties to the pledge. The interests of Bowen Brothers in the real estate, as grantors in the trust deed, was cut off by the sale made by the trustee, and they occupy no different relation to the transaction as the grantors than if they had never conveyed to the trustee. Their rights, whatever they are, accrue because they were the pledgeors of the bonds. The real estate was not pledged to the defendant, but a sum of money to be produced by a sale of real estate was pledged as an incident of the bonds. That sum, when received, was to become the money of the defendant, and was to extinguish defendant's debt against the pledgeors *pro tanto*. The pledgeors had no interest in it after it was received by the defendant, and whether it was invested profitably or unprofitably, whether in the same land by which it was originally produced or in other lands, was a matter of no concern to the pledgeors.

If the defendant, as a pledgee of the bonds, was under a duty to the pledgeors to intervene at the sale under the trust deed, and to promote a sale on advantageous terms for the benefit of the pledgeors so as to enable them to realize as much as possible upon the bonds, it might well be urged that this duty would subject the defendant to the ordinary disabilities of a fiduciary, and incapacitate it from purchasing directly or indirectly for its own benefit without the consent of the pledgeors. In the language of the court in *Torrey v. Bank of Orleans*, 9 Paige, Ch. 663:

"It is a settled principle of equity that no person who is placed in a situation of trust or confidence in reference to the subject of a sale can be a purchaser of the property on his own account."

Where he has a duty to perform which is inconsistent with the character of a purchaser, he cannot divest himself of the equities of the *cestui que trust* to demand the profits that may arise from the transaction. As was stated in *Michoud v. Girod*, 4 How. 555, by Mr. Justice WAYNE:

"The general rule stands upon our great moral obligation to refrain from placing ourselves in relations which ordinarily excite a conflict between self-interest and integrity."

It matters not, when the fiduciary relation exists, that the sale was brought about by a third party without any active procurement or intervention on the part of the fiduciary, or that the sale was public, or that the price was fair, or that there was no intention to gain an unfair advantage. The real question in the case is whether the defendant owed such a duty to the pledgeors.

When negotiable instruments are pledged as collateral, it is the duty of the pledgee, not only so to deal with them as not to destroy or impair their value, but he is to use ordinary diligence to make them available for the payment of the debt. If he suffers indorsed paper to mature without resorting to the necessary steps to charge the indorser, or fails to pursue reasonably the primary parties, he may become responsible for any loss that may ensue. *Whitten v. Wright*, 34 Mich. 92; *Russell v. Hester*, 10 Ala. 535; *Barrow v. Rhinelander*, 3 Johns. Ch. 614; *Lamberton v. Windom*, 12 Minn. 322, (Gil. 151.) Even the neglect to prosecute overdue paper may subject the pledgee to liability to the pledgeor in case of loss. *Rice v. Benedict*, 19 Mich. 132; *Hanna v. Holton*, 78 Pa. St. 334; *Word v. Morgan*, 5 Sneed, 79; *Noland v. Clark*, 10 B. Mon. 239.

When the pledgee has exercised ordinary diligence to secure the fruits of the pledge for the benefit of the pledgeor, in view of all the circumstances of the particular transaction, his duty has been fully discharged. Applying this standard of diligence to the present case, it seems clear that the defendant was not required by its duties to the pledgeors to become a bidder at the sale, or take any active measure to increase the fund to be realized thereby. By the terms of the trust deed the land was to be sold publicly, after a published notice of 20 days by a trustee, who was to sell or adjourn the sale at his discretion, and whose duty it was to consult the best interests of all parties interested in the sale. The defendant might reasonably rely upon the presumption that such a sale would be fairly conducted and would produce a fair return. It occupied no better position than the pledgeors did in respect to promoting an advantageous sale, and therefore did not stand in the relation of a fiduciary towards the pledgeor. In view of the scheme of the sale, the defendant had a right to infer that the pledgeor intended to consent in advance that the amount of the fund applicable to the bonds should be determined by the result of the sale.

If no active duty to promote an advantageous sale was incumbent upon the defendant, it was not incapacitated from becoming a purchaser at the sale. The reason why a pledgee cannot ordinarily acquire a valid title as against the pledgeor by a purchase of the property pledged, although the sale is regularly and publicly made, unless the pledgeor assents, (*Middlesex Bank v. Minot*, 4 Metc. 325; *Bryan v. Baldwin*, 52 N. Y. 232,) is because he cannot be at the same time a vendor and a purchaser of the property. The defendant here was not the vendor, but occupied the position of a creditor, or of a *cestui*

que trust, seeking to realize as much as might be practicable out of a fund by which its debt was secured. The defendant and the pledgeors stood upon terms of complete equality. The circumstance that the defendant did not actually advance any money upon the purchase is not material. The transaction was the same in substance as if it had paid the purchase price in money, and when it was received back its portion of the proceeds of the sale had applied the amount upon the debt of the pledgeor.

Having reached the conclusion that the defendant had a right to purchase the real estate, and that no equities of the pledgeors were impressed upon the transaction, it is not necessary to consider other questions which have been made in the case respecting the plaintiff's acquisition of the rights of Bowen Brothers.

The bill is dismissed, with costs.

DRAKE v. DELLIKER, Ex'r.

(Circuit Court, D. New Jersey. August 1, 1885.)

EQUITY PLEADING—PARTIES—DEMURRER.

In a suit in equity which is, in effect, an application to the court, to compel the executor of an executor to pay over to complainant a share of the estate bequeathed to one of the testator's children, to which complainant alleges he has succeeded by operation of law, by virtue of certain attachment proceedings to enforce satisfaction of a debt due him, the defendant has a right to demand that such child be made a party defendant, and a bill that fails to do so will be held defective for want of proper parties, on demurrer.

On Bill, etc.

Chancey H. Beasley, for complainant.

Wm. H. Morrow, for defendant.

NIXON, J. To the bill of complaint originally filed in the court of chancery of the state of New Jersey the defendant put in a general demurrer, and then removed the case into this court. The case was duly set down for argument, and several grounds are urged by the counsel for the defendant why the demurrer should be sustained. The demurrer admits the facts set forth in the bill, and these are substantially as follows:

About March 1, 1877, one Abraham Egbert, of the county of Warren and state of New Jersey, made and executed his last will and testament, according to the laws of the state, which, *inter alia*, contained the following clauses:

"*Item.* I also devise and bequeath to my two daughters, aforesaid, all the income of my real estate, wherever the same may be situate, for the term of five years after my decease, and in case my real estate be sold before the expiration of five years after my decease, then I do order the proceeds of the sales of the same to be kept at interest, and the interest to be paid to my two

daughters, aforesaid, until the expiration of the five years, aforesaid; and if either of my daughters should die, leaving no heirs, before the expiration of the five years after my decease, then it is my will that all the bequests hereinbefore shall go to the survivor.

"Item. I do order and direct my executor, hereinbefore named, to sell all the real estate at any time he may think best for the interest of my estate, either at public or private sale, within seven years after my decease, and at the expiration of the five years, or as soon as can be after that time, to divide the proceeds of the sale of said real estate equally between all my children,—the children of Lucy Shoemaker receiving one equal share."

No other disposition was made of his real estate. He afterwards died seized of a good quantity of land, situate in the said county of Warren, and leaving five children and grandchildren, who were the children of his two deceased daughters, Lucy Shoemaker and Eliza Jones. One Robert L. Garrison was appointed the executor of the will, who duly proved and took upon himself its execution. John W. Egbert was one of the testator's children, who resided at Easton, in the state of Pennsylvania. After the death of his father he became indebted to the complainant in a considerable sum of money, and the complainant, in order to recover the same, caused a writ of attachment to be issued out of the circuit court of the county of Warren against the rights and credits, goods and chattels, moneys and effects, lands and tenements, of the said John, which had so descended to him from his father, and which, by the will, was ordered to be sold as aforesaid, and attached the same, and afterwards, to-wit, on the twenty-third of May, 1879, recovered a judgment in said court, by virtue of the said writ of attachment, in the sum of \$972. One Jehiel G. Kerr was appointed by the court auditor in the attachment proceedings, who advertised and sold, in due form of law, the estate and interest of the said John W. Egbert in the lands ordered to be sold by the said testator, and the complainant became the purchaser of the same, to whom the auditor duly conveyed the title by deed dated October 2, 1879. More than five years after the death of the testator, and before the expiration of seven years, Robert L. Garrison, the executor, under the provisions of the will, sold at public sale the real estate of which the said Abraham died seized, and of which the complainant claims to be the owner of the one-seventh part, as purchaser under the attachment proceedings, and received therefor the sum of \$7,500. The estate was duly settled in the orphans' court of the county of Warren, and all the debts of the testator were paid from the personalty, and the executor held the proceeds of the sale of the real estate to be distributed under the provisions of the will.

The bill further alleges that the said Robert L. Garrison, executor, made distribution of the proceeds of the sale of said real estate among the children and grandchildren of the said Abraham, except the sum of \$1,071, the one-seventh part thereof, which he retained in his hands and refused to pay over to the complainant as the purchaser of John W. Egbert's share and interest, and that, still retaining the

possession and control of said money, he afterwards departed this life, to-wit, on the twenty-second of July, 1883, having first made his last will and testament, wherein he appointed the defendant, Augustus H. Delliker, his executor; and that the same was duly admitted to probate in the orphans' court of the county of Warren, the said Delliker taking upon himself the execution thereof, and receiving, as part of the estate of the said Robert, the share of the proceeds of the sale of the realty which the said Robert had refused to pay over to complainant.

The prayer of the bill is that the defendant be decreed to pay to the complainant the said sum of money due to him as aforesaid, and for other and further relief.

The view which I take of the case renders it unnecessary to consider *seriatim* the several reasons urged by the counsel for the defendant why the demurrer should be sustained. I regard it, in effect, as an application to a court of equity to compel the executor of an executor to perform a duty which the former executor neglected to execute, and to pay over to the complainant the share of the estate bequeathed to one of the children of the first testator, to which the complainant alleges he has succeeded by operation of law. Such a view makes John W. Egbert not only a proper but necessary party. No final decree ought to be entered which does not include him, and he cannot be included without being brought in. The defendant is clearly entitled to have every one made a party who sustains any relation to the estate, which may hereafter give him vexation and trouble, unless bound by the final decision of the present suit. The demurrer, therefore, must be sustained on this ground.

I express no opinion on any other ground. But, perhaps, it will not be improper to suggest that the bill of complaint should contain every allegation in regard to the proceedings in the attachment which it becomes necessary to prove on final hearing, and that the form of the bill may be improved by more definitely detailing the several steps taken in the case to bring the interest of the defendant in the estate of his father within the lien of the writ of attachment.

v.24f,no.9—34

HARMAN v. LEWIS and another.¹

(Circuit Court, E. D. Missouri. June 27, 1885.)

1. EQUITY PRACTICE—PETITION FOR REHEARING.

Where a rehearing is desired in an equity case, a petition for a rehearing, stating in detail the reasons why it should be granted, should be filed, and if the reasons stated are considered sufficient, a rehearing will be granted. An ordinary motion for a rehearing is improper, and will be overruled as a matter of course.

2. INSURANCE—BENEVOLENT ASSOCIATIONS—OBJECTION BY HEIR TO INFORMALITY OF ASSIGNMENT OF CERTIFICATE.

Where B., a benevolent association, issued a benefit certificate to C., a member, whereby the latter's life was insured in a certain sum, and the certificate provided that no assignment thereof should be valid unless approved by the secretary, and C. assigned it, without such approval, to D., and died, leaving one child, who, in the absence of an assignment, would have been entitled to the proceeds of the certificate, and B. filed a bill of interpleader, and paid the money due into court, *held*, that the assignment was invalid, because of the failure to obtain the secretary's approval, and that C.'s heir had a right to object to its validity on that ground, and was entitled to the fund.

In Equity. Motion for new trial and rehearing.

The fund in question in this case having been decreed to be paid to John P. Harman, guardian of Lillian Funkheuser, a motion for a rehearing was filed by defendant Lewis, and a motion for a "new trial and a rehearing" by defendant M. L. C. Funkheuser. The body of the latter motion was as follows:

"Now comes the defendant M. L. C. Funkheuser and moves the court for a new trial and rehearing in the above-entitled cause, for the following reasons, to-wit: (1) That the court erred in finding and decreeing that this defendant acquired no interest in the fund in question by virtue of the assignment and delivery to him by Tilden S. Funkheuser of the certificate on file in this cause. (2) That the court erred in finding and decreeing that the fund in question belonged to said John P. Harman, guardian," etc.

For other material facts see 24 FED. REP. 97. The motions for rehearing having been called up, Mr. Givens, attorney for defendant Funkheuser, asked that the matter be laid over until some future day in order that he might have time to prepare himself to argue the questions involved.

Geo. D. Reynolds, for complainant.

O. B. Givens, for Funkheuser.

Geo. E. Smith, for Lewis.

TREAT, J., (orally.) It is very important that counsel should understand the rules of practice. A simple motion for rehearing amounts to nothing. A petition for rehearing must be filed, and you must set out the grounds therefor in the petition. If the court is satisfied that there are good grounds for a rehearing it will so order. The case is not to be heard over again except by leave of court.

Mr. Givens. This is an ordinary motion for a rehearing.

¹ Reported by Benj. F. Rex, Esq., of the St. Louis bar.

TREAT, J. That is waste paper. Parties accustomed to practice in the state court often fall into the mistake that a motion for a rehearing in equity is like an ordinary motion for a new trial, and to be disposed of in the same way. In a suit in equity in the federal court if you wish a rehearing you should set out in detail in your petition the grounds therefor. Otherwise the court will overrule it as a matter of course. It is an application, in other words, for a rehearing—will the court grant the rehearing?—not, will the court rehear it before it decides whether it will or not, and let the parties go into the whole matter over again; that is not equity practice.

Mr. Givens. This case was submitted on a written stipulation, and the motion sets out what the parties claim to be the error in the ruling.

TREAT, J. You set that out before. What has happened since whereby the court should grant you leave to have it heard again? There must be some reason assigned in your application.

Mr. Givens. The only point we raise is that there is an error in the ruling of the court on the law.

(The motion was here read.)

TREAT, J. That is a paper wholly unknown to equity proceedings. I see no good reason why the court should go over this case again. There are many important questions the court might have considered. As stated in the brief opinion heretofore rendered, it was more than doubtful, under the charter and the nature of this benevolent institution, whether a valid assignment could be made. There are a great many questions considered by the courts in respect to these obligations resting on sound principles. A gentleman in good standing in a benevolent institution of this description, so long as he remains in good standing, is entitled to the benefits thereof on conforming to its rules and paying the dues. In the absence of any provision whereby a certificate of membership, which entitles the member to recover, and also entitles those succeeding him to recover, what would become of all these organizations, if strangers, even if assignees, could force themselves into membership regardless of personal or other qualifications, and also of the continued good standing of the original members? The certificate, if assignable, may be assigned to somebody; and if he pays the dues, are they dependent upon the original members remaining in good fellowship, or what? I did not choose to go into these inquiries. I contented myself with the single remark that however that might be under these various decisions, it was certain that, even if this certificate was so assignable, it was so only on the terms stated in the certificate, to-wit: the approval of the secretary. The law of the organization states where the fund should go. That's all there was in this case.

Mr. Givens. The particular point I wished to argue was the question as to the effect of a condition of this kind in a certificate, where the company had filed a bill of interpleader, thereby declaring that

they owed a debt, and waiving any right that they might have themselves,—that from their doing that no other party could have a right to come in and raise this question of the approval of the secretary.

TREAT, J. Unquestionably the company owed that sum of money to somebody. Here were parties disputing among themselves as to whom it should be paid. A bill of interpleader is filed, and the company does not raise the objection. Of course the company owes the money. The question is, who is entitled to it? This alleged assignee the court holds is not entitled to it. Inasmuch as there is no lawful assignee of the fund, the law carries it as in this case, there being no widow, to the only surviving child. Of course the company cannot raise the objection. It owes the money. If it could go a step further, and undertake to determine that because it had done sundry and divers things this child should not have anything, the child would object, and say you cannot convey away my rights.

I am satisfied with my opinion, and will go further if necessary. I overrule the motion, not on the ground of form merely, but on the ground of substance.¹

HERRICK *v.* THROOP, impleaded, etc.

(Circuit Court, N. D. New York. July 25, 1885.)

PLEDGE—FRAUD—EQUITABLE RELIEF.

A., having borrowed \$1,000 from B., delivered his trotting horse to him as security for the loan, under a contract providing for the return of the horse on payment of the loan and expenses of keeping, etc. C. induced A., by falsely representing that B. was inimical to him, to execute an order for the delivery of the horse, reciting that C. had purchased it. No consideration passed from C. to A., but A. executed a receipt for \$3,000 in full for the horse. *Held*, that A. was entitled in equity to have the receipt or bill of sale set aside, and to a decree directing that the horse be returned to him, or that he be paid the value thereof, if the horse could not be returned, upon the payment of whatever was due under the contract for the expense of keeping him.

On the seventh of October, 1882, the complainant delivered to the defendants Haggerty and Walden his valuable trotting horse, "Howard Jay," as security for a loan of \$1,000, and received back from them the following agreement:

"OCTOBER 7, 1882.

"Article of agreement between Dr. William Haggerty and Dr. J. S. Walden, parties of the first part, and B. F. Herrick, party of the second:

"The parties of the first part do hereby agree to resell the roan gelding, known as 'Howard Jay,' for the consideration of one thousand dollars, lawful money of the United States, and legitimate expenses incurred for keeping of said horse; and it is further agreed by the parties of the first part and party of the

¹See *Splawn v. Chew*, 60 Tex. 532.

second part that they shall share equally in all profits derived from said horse during the racing season of 1883.

"And it is hereby further agreed that if the said horse be repurchased, a reasonable compensation shall be given to the parties of the first; the term of said horse to be for one year from date.

WM. HAGGERTY,
J. S. WALDEN."

"Witness: W. H. SNYDER.

On the thirteenth of February, 1883, Haggerty then being in possession of the horse, the complainant signed the following papers in the handwriting of the defendant Throop:

"\$3,000.

"Rec'd, Elmira, February 13, 1883, of B. H. Throop, three thousand dollars, in full for horse known as 'Howard Jay.' B. F. HERRICK."

"Dr. Wm. Haggerty, Scranton, Pa.—DEAR SIR: On payment of my indebtedness to you for advance of \$500, and the keeping of horse, 'Howard Jay,' now in your care, please deliver him to B. H. Throop, who has purchased said horse of me, and oblige,

Very truly,
B. F. HERRICK."

"Elmira, February 13, 1883.

No consideration whatever was paid for these papers. The complainant was induced to attach his signature, believing that they were necessary to effect the removal of the horse from the possession of Haggerty, who was represented as being hostile to complainant's interests. It is now alleged that the defendants Throop and Walden were engaged in a conspiracy to cheat and defraud the complainant, and that Throop had knowledge of and participated in the fraud by which complainant was persuaded to part with his interest in the horse. The defendant Throop maintains, on the contrary, that, having previously acquired the interest of the defendant Walden, he fairly and honestly purchased the complainant's interest, as well as that of Haggerty, and thus became the absolute owner of the horse.

Prior to the commencement of this action a demand for the horse, and an offer to pay all money advanced under the agreement of October 7th, was served upon the defendant Throop. The complainant contends that, the receipt and order being procured from him by fraud, he is still at liberty to redeem the horse pursuant to the original agreement; that Throop has only the rights which Haggerty and Walden possessed, having been subrogated thereto by his purchase from them, respectively. The defendant disputes the jurisdiction of the court, denies the fraud, and insists that he is the *bona fide* owner of the horse.

Walter Lloyd Smith, for complainant.

J. McGuire, for defendant Throop.

COXE, J. Upon the merits the principal issue is: Did the receipt, or bill of sale, of February 13th invest the defendant Throop with the absolute, indefeasible title to the horse? Did he intend to purchase, and did the complainant intend to sell? If the transaction was fair and honest, if, without fraudulent inducements, the complainant parted with his interest, even though the contract was unilateral and

greatly to his disadvantage, he is now remediless. But, on the contrary, if the papers were obtained from him by fraud as part of a conspiracy to deprive him of his property, if he was induced to believe that Haggerty was his enemy, and Throop his friend, and that by this means alone could his horse be transferred from the former to the latter; then, providing always that the defendant Throop was *particeps fraudis*, the complainant is entitled to the relief prayed for. It matters not how adroitly such a scheme may have been devised and carried out, with what technical precision each step may have been taken, or with what forms of law it may be surrounded; all this will avail the defendant nothing, if it appears that by his fraud and deception the rights of an innocent party have been invaded. A court of equity will swiftly overthrow the barriers behind which fraud has intrenched itself, no matter with what pains they may have been set up, or how broad and deep may be their foundations. If the testimony of Walden is to be believed, there can be no doubt that Throop was an active participator in the scheme to deprive Herrick of his horse. But Walden is discredited, and his testimony, were it not supported by other evidence, both direct and presumptive, would be wholly inadequate to sustain a charge of fraud. It is hardly possible, however, that his story is fabricated.

I cannot avoid the conclusion, after reading this record, that Throop knew that Herrick did not intend to part with his interest in the horse. Throop's relations with those who were the active agents in the conspiracy were of such a character that it is inconceivable that he was kept in ignorance of the manner in which the complainant was entrapped. That a gross fraud was perpetrated no one denies. Upon what theory can the defendant be exculpated? He knew that Herrick had a right to redeem the horse. He had seen and read the agreement of October 7th. He knew that the horse was worth more than the amount loaned upon him. He knew that if Herrick was to be despoiled of his interest it could make no possible difference to him whether Throop or Haggerty reaped the benefit. He knew, moreover, that not a dollar was paid by him, or any one else, to Herrick for the papers of February 13th. And yet Throop now insists that he actually believed that Herrick intended to pass the title irrevocably to him. Even though Haggerty were as unfriendly as he was represented, the complainant still had a valuable interest so long as the horse remained with him. What possible motive could have actuated Herrick to throw away this chance of redemption and profit in the future and convey his interest to a total stranger without one farthing of consideration? Throop must have known that no sane man would act in so irrational a manner. But when to the positive testimony and the presumptions arising from undisputed facts is added the evidence of Throop's repeated recognition of Herrick's title and his failure to assert his own, of his admissions that Herrick had the right to redeem, and of his agreement to return the horse upon

being paid the amount expended by him, the conviction becomes irresistible that Throop knew that he was not the absolute owner of the horse.

Although the case is *sui generis*, I cannot doubt that the court has jurisdiction. An action at law could not afford the relief which the complainant seeks. When the suit was commenced in the state court, the horse was in the possession of the defendant Throop. The legal title was in him. The chattel, which is the subject of the action, had no fixed market price. The horse had a peculiar worth, hardly capable of estimation in damages. He was valuable not only for what he had done in the past, but for what he might do in the future. The complaint demands relief as follows: *First*, for a construction of the contract of October 7th; *second*, for an accounting; *third*, for a specific performance; and, *fourth*, (though not in terms demanded,) that the receipt and order of February 13th be set aside as having been obtained by trickery and fraud. All these are matters of equitable cognizance. *Mechanics' Bank v. Seton*, 1 Pet. 299, 305; *Johnson v. Brooks*, 93 N. Y. 337, 343; *Cushman v. Thayer Manufg Co.* 76 N. Y. 365; *Mitchell v. Great Works M. & M. Co.* 2 Story, 649; *Bischoffsheim v. Baltzer*, 22 Blatchf. 281; S. C. 20 FED. REP. 890; *Pacific R. Co. v. Atlantic & P. R. Co.* 20 FED. REP. 277; Story, Eq. Jur. §§ 716-726.

The value of fast-trotting horses depends upon so many contingencies, is so theoretical, uncertain, and speculative that it is thought the court would not be justified in fixing the value here at a greater sum than \$8,000.

The record does not furnish all the evidence necessary to enable the court to state the account correctly. The defendant was not required to anticipate that an account would be required, and it would be an anomalous proceeding, against his objection, to make a final adjudication upon this branch of the case. Unless, therefore, the parties can agree upon the amount, there must be a reference to a master for an accounting. Whether "a reasonable recompense" should be allowed depends somewhat upon the profits already received under the contract. This question is also referred to the master for his opinion, and can be finally determined upon the coming in of his report. There should, therefore, be a decree in favor of complainant for a return of the horse, or for \$8,000, his value, in case a return cannot be had, upon payment to defendant of whatever sum may be found due upon the accounting. If, however, it should be found that the defendant is indebted to the complainant upon the account, the sum so found due should be added to the judgment in complainant's favor.

The complainant should recover costs.

GLENN v. DORSHEIMER and others.¹

SAME v. HUNT.¹

SAME v. LIGGETT.¹

SAME v. FOY.¹

SAME v. PRIEST.¹

SAME v. DAUSMAN.¹

SAME v. VON PHUL.¹

SAME v. SCOTT and another.¹

SAME v. TAUSSIG and another.¹

SAME v. TRIPLETT.¹

SAME v. DIMMOCK and another.¹

SAME v. NOONAN and others.¹

SAME v. LUCAS and others.¹

(Circuit Court, E. D. Missouri. July 15, 1885.)

1. CORPORATION—STATUTE OF LIMITATIONS—LIABILITY OF STOCKHOLDERS IN CORPORATION WHICH HAS CEASED TO DO BUSINESS.

Where an insolvent corporation assigns all its property, including unpaid stock subscriptions, to trustees for the benefit of its creditors, and ceases to do business, the liability of stockholders upon their subscriptions becomes absolute at once, "or at least within a reasonable time thereafter," and the statute of limitations begins to run in their favor as against the trustees.

2. SAME—WHEN CALL SHOULD BE MADE.

Seemle, that where such an assignment is made of the assets of a corporation, organized under the laws of a state under which the liability of stockholders only becomes absolute after a call, the trustees are bound to make the necessary call within a reasonable time, and the statute of limitations will begin to run from the expiration of that time, if no call is made.

3. SAME—BREACH OF TRUST—TRUSTEES AND SUCCESSORS ON SAME FOOTING.

Where, in such cases, the original trustees are removed by a court of chancery, and new ones appointed in their place, the latter stand in the same position that the former would have occupied if unremoved, and the new trustees cannot excuse a failure to bring suit within the statutory period, in a suit against an innocent stockholder, on the ground that their predecessors willfully betrayed their trust, and confederated with the company's officers to secrete the company's books, conceal the names of stockholders, and impede the enforcement of creditors' claims.

4. SAME—LACHES.

Seemle, that where such trustees fail to proceed against estates fully administered upon, or in the course of administration, until between three and four years after a call is made, they will be guilty of laches, and cannot recover in a court of equity.

Demurrers to amended petitions and bill. For opinion upon demurrers to original bills and petitions, see 23 FED. REP. 695.

¹Reported by Benj. F. Rex, Esq., of the St. Louis bar.

The amended bills and petitions state, as excuses for the delay, that a receiver of the National Express Company's property was appointed by the United States circuit court for the district of Virginia under a bill filed September 8, 1866; that said receiver gave bond, and that the decree was not annulled until December 11, 1880, until which time it lay dormant; that the trustees did not take possession under the trust deed until November, 1866, until which time the corporation remained a going concern; that in 1866, soon after the execution of said deed, the assignees were enjoined by two courts, in suits by stockholders, from taking any action under the deed; that by a decree of the circuit court of the city of Baltimore, passed December 15, 1866, said trust deed was declared void, the trustees enjoined from proceeding under it, and a receiver appointed; and that the president of said company and its other officers, and the original trustees, combined among themselves to impede, delay, and prevent the enforcement of the claims of creditors of the company against its stockholders; and for that purpose all of the books and papers of said company were by one of said trustees carried beyond the limits of the states of Virginia and Maryland, where they had previously been kept, and beyond the reach of said creditors, and secreted, and the names of the Missouri stockholders were never learned by the present trustee or the stockholders until the suit in chancery in the circuit court of Richmond was revived.

T. K. Skinker, for plaintiff.

W. H. Clopton, for Dorsheimer, Foy, Priest, and Lucas and others.

C. M. Napton, for Hunt.

Smith & Harrison, for Liggett and Dausman.

Walker & Walker, for Von Phul.

Wilbur F. Boyle, for Scott and others.

Geo. W. Taussig, for Taussig and others.

Thos. C. Fletcher and *Geo. D. Reynolds*, for Triplett, Noonan, and others.

Dryden & Dryden, for Dimmock and others.

Noble & Orrick, for Lockwood and others.

TREAT, J. At the former hearing of the demurrers in these cases the judges did not overlook the fact that the plaintiff was suing as assignee, and not as a creditor, but, in order to illustrate their views, considered briefly what would, under the circumstances, be the rights of creditors for whom the assignee was charged to act, if said assignee were negligent or false to his trust. Those views were *arguendo* in order to show that even the creditors of the defunct corporation had no just right of complaint against these debtors, even if the assignee had been faithless to his trust. The deed of assignment in 1866 by the corporation vested in the assignees thus appointed authority, and made it their duty, to proceed against the several stockholders to collect what was due on their respective subscriptions in order to meet the just demands against the corporation. That deed of assignment

was judicially upheld by the decree in Virginia, on which the plaintiff strenuously relies. He is merely successor in the trust of 1866, and his position is no better than that of his predecessors, and no worse. If, through neglect or laches, obligations had been discharged by lapse of time, the removal of the original assignees and the appointment of a successor could not revive them. When the statute of limitations began to run, it continued to run. As held in the former opinions, the causes of action against these defendants accrued at the date of the original assignment, in 1866, or at least within a reasonable time thereafter, and, consequently, unless some excuse is presented in the amended proceedings for the failure to sue prior to 1884,—that is, a valid excuse in law or equity,—the plaintiff's alleged causes of action are barred.

Many abstruse and complicated propositions have been presented in argument, with great learning and ability, concerning which cited cases are not fully in accord, but their decision is not necessarily involved in this case. The court discovers in the amended petitions and bills no averments taking the cases out of the rulings originally made. If it be that no cause of action accrued, technically, until a formal call was made, it is equally true that the assignees should have made the call in a reasonable time after the assignment, or caused the same to be made. They were charged with the duty, adversely to these defendants, to collect unpaid subscriptions, or so much thereof as their trust required; and whether the power to make the call remained in the moribund corporation, or was vested directly in themselves, or needed the aid of some chancery court, it was an essential part of their duty to proceed in the execution of their trust with due diligence. The various excuses for the long delay do not rest upon any concealment, fraud, or interference by defendants, and consequently they are not to be affected by what happened without their knowledge or consent. The conclusion is that the statute of limitations applies to all of these actions, legal or equitable.

If this were not so, the cases in equity would present the doctrine of laches as to the administration of decedents' estates. Suppose no cause of action accrued until the call made by the Virginia court in 1880. Why, then, the delay to proceed against estates theretofore fully administered, or in the course of administration, until the period prescribed by the Missouri statute had expired, to-wit, two years? The case of *Morgan v. Hamlet*, 113 U. S. 449, S. C. 5 Sup. Ct. Rep. 583, goes further than the requirements of these cases in equity, and is necessarily conclusive of the rights of the parties thereto.

Under any view as to the cases, either at law or in equity, the plaintiff's right of recovery is barred. Demurrers sustained.

BLAIR v. ST. LOUIS, H. & K. R. Co. (WELLMAN and others, Intervenor.)¹

SAME v. SAME. (POLLARD and another, Intervenor.)¹

SAME v. SAME. (GRISHAM, Intervenor.)¹

SAME v. SAME. (YAEGER, Intervenor.)¹

(Circuit Court, E. D. Missouri. July 15, 1885.)

1. RAILROAD COMPANY—RIGHT OF WAY—STATUTE OF LIMITATIONS.

Where a railroad company enters upon land under color of title, and constructs its road across it, and remains in uninterrupted possession for more than 10 years, a suit for compensation for the right of way either by the original owner of the property, or by one who has purchased with notice that the road is in possession, will be barred by the statute of limitations.

2. SAME—CLAIM FOR DAMAGES ASSESSED IN CONDEMNATION PROCEEDINGS.

Where the value of a right of way is judicially ascertained in condemnation proceedings, the finding is in the nature of a judgment, and the claim will be barred if not enforced within 10 years.

3. SAME—ESCROWS—VALIDITY OF RELINQUISHMENT OF RIGHT OF WAY TO A RAILROAD COMPANY AFTER EXECUTION BY GRANTOR OF AN ESCROW.

A., the owner of a tract of land, executed and delivered a deed as an escrow, which purported to convey an undivided two-thirds interest in the property to his two children. Upon the back of the deed the following provision was indorsed, viz.: "The foregoing deed is not to be delivered, recorded, or take effect, except in the event of the death or the written order of the said A., and is placed in the hands of B. as an escrow. [Signed] A." This deed was not recorded until after A.'s death, which occurred in 1872. After the execution of said escrow, A. executed a deed of relinquishment of a right of way over the property described in the escrow to a railroad company, and the company went into possession under the deed of relinquishment in 1870, and it and its successors have held possession ever since, but the deed was never recorded. *Held*, that said deed was valid, and that the grantees in the escrow took subject to the railroad's right of way.

In Equity. Exceptions to master's reports.

The claims of the intervenors herein are all for compensation for rights of way over their land, and they all ask that they be decreed to have a first lien on the land claimed by them which the defendant occupies.

In the *Wellman Case* the facts were found by the master to be substantially as follows, viz.:

That on the seventh of April the property in question was conveyed to Sarah J. Wellman; that on November 17, 1868, she and her husband, H. C. Wellman, conveyed an undivided two-thirds interest in the property to their two children, intervenors herein, by a deed, upon which there was an indorsement to this effect:

"The foregoing deed is not to be delivered, recorded, or take effect, except in the event of the death or the written order of the said Henry C. Wellman, and is placed in the hands of Eli W. Southworth as an escrow.

[Signed]

"SARAH J. WELLMAN.

"H. C. WELLMAN."

¹Reported by Benj. F. Rex, Esq., of the St. Louis bar.

—that H. C. Wellman died September, 1872, and said deed was recorded November 26, 1872; that on July 9, 1870, Sarah J. Wellman and her husband relinquished the right of way over the property in controversy to the St. Louis & Keokuk Railroad Company by a deed which has never been recorded; and that said company entered upon and took possession of the right of way so conveyed; and that it and its successor have held continuous possession ever since. One of the grantees named in the deed of November 17, 1868, is a minor.

The facts concerning the claim of Pollard and others are, so far as they need be here stated, as follows: The right of way over the land in question was originally marked out by the Pike County Short Line Railroad Company, but the parties being unable to agree upon its value, condemnation proceedings were had in the circuit court of Pike county, Missouri, and \$300 damages assessed, but the amount of the damages was never paid. Said railroad company subsequently assigned all its rights, including said right of way, to the St. Louis, Hannibal & Keokuk Railroad Company, which took possession and constructed its road over the land in 1876. The intervenors having presented their claim for compensation to the receiver herein, the latter agreed orally with them that, in consideration of a deed for the right of way, he would build a depot on the intervenor's property, and the depot has since been erected, but no deed has been executed.

In the other cases the intervenors knew that the road was in possession and operation at the time they received their deeds. In both the Grisham and Yaeger cases the master found that the defendant had received deeds of relinquishment.

Jas. Carr, for intervenors.

John O'Grady, for receiver.

T. G. Case, for complainant.

TREAT, J. Several intervening petitions have been filed pertaining to the right of way which, with one exception, rest on the statutes of limitation. It appears that as early as 1872 an effort was made to secure the right of way through intervenors' property, with a view of securing railroad communications. There were many informalities as to conveyances, the parties often resting on oral understandings. In the mean time the railroad corporation proceeded in its work with full knowledge of all concerned, and evidently with the desire of claimants and those whom they represented. After a lapse of some 13 years or more these various intervenors appear, seeking to avail themselves of many technical objections, concerning what theretofore occurred, regardless of interests which subsequently accrued. The railroad corporation could not take possession, for its purposes, of private property without just compensation. After the lapse of 13 or more years, it is impossible to ascertain, through defective or lost agreements, what each of the original owners of the property assented to, for their obvious benefit, in securing proposed railroad accommo-

dations. In some of these cases resort has been had to written transfers, which are lost, and in others to supposed verbal agreements.

In these cases it is obvious that all in interest, respectively, knew that the railroad was being constructed and operated. They should be charged with actual notice of the possession by the railroad of the property in question, so that, whether there was an unrecorded relinquishment or otherwise, they would be held bound under the statute of limitation, or by estoppel *in pais*. It is well known that in railroad enterprises parties along the line of said proposed road are importunate to secure the benefits thereof, and consequently offer many inducements with respect to the right of way, and otherwise. No question often arises, except as in these cases, until some party, through derivative title, acquired long after, seeks, despite the original understanding or acquiescence, to present claims on mere technical grounds. Such claims should be received with special disfavor, and no other than overruling propositions of law should be heard against the manifest intent and interest of the original parties. If the owners of the property over which this road was established did not assent thereto by formal or informal relinquishment, they should have asserted their demands within the period prescribed by the statute of limitations. This court knows of no rule that excepts parties thus negligent from observing what statutes of repose demand. They saw a railroad being constructed over their property, the same being part of a continuous line for long distances, of which the particular sections were an essential part. They never objected thereto, and now, after this long lapse of time, they appear,—the original evidence being lost,—to have this court assert that the railroad company has been a continued trespasser without any right in the premises. Why should not such parties be held to the ordinary rules of law, and consequently be barred?

If the ordinary doctrine of estoppel *in pais* is to obtain, these cases seem to fall within them with special force. It is contended that, inasmuch as the right of condemning property for public use is dependent on just compensation made, the statutes of limitation do not apply. Why should not the possession in such a case as where trespass is had on private property be governed by the same rule?

The case of the intervenors Wellman and others presents an interesting question. The court suggested to counsel their further aid with respect to the powers of the grantor after escrow, and prior to second delivery. That question has been examined, and it appears that the *usufruct* remains with the grantor. Hence any act by the grantor beneficial to the estate cannot, under any circumstances, be held void. If we look at the interests of the Wellman estate, it is obvious that the arrangements made by the grantor were such as gave new and increased value to the property. There is no equity or technical rule of law depriving the defendant corporation of its rights under the statutes of repose. Hence the exceptions to the master's re-

port in the intervening claim of Wellman and others are overruled, and petition dismissed.

The intervening claim of Pollard and others rests on the same general propositions. The measure of compensation having been determined, and the amount thereof judicially ascertained, was in the nature of a judgment, and should have been enforced within 10 years thereafter. Besides, it appears that the intervenors had, in satisfaction of their expired demand, agreed for an adjustment thereof with the receiver herein, the terms of which have been complied with.

Exceptions overruled; petition dismissed.

In the intervening claim of Grisham, exceptions overruled and petition dismissed.

The intervening claim of Yaeger falls within the rules above stated, especially when considered in connection with prior relinquishments of the right of way, however informal, but followed by possession and use for railroad purposes known to the claimant and his grantor.

Exceptions overruled. Master's report confirmed, except as to the decree of title.

In re RINDSKOPF.

(Circuit Court, S. D. New York. July 29, 1885.)

DEPOSITION DE BENE ESSE—ARRESTING PROCEEDING—ATTACHMENT OF WITNESS.

A party who has initiated proceedings to take a deposition *de bene esse*, has no power, after a witness has been examined in chief and an adjournment taken, to withdraw the proceedings, and a party in interest may, by attachment, compel such witness to appear and submit to cross-examination.

At Law.

George Zabriskie, for the motion.

Stern & Myers, in opposition.

WHEELER, J. This is a motion for an attachment to compel the appearance of a witness for cross-examination whose deposition had been taken *de bene esse*, pursuant to notice, to be used in a cause pending in the district of Minnesota to which the witness is a party, and on appearance by the opposite party, through an examination in chief, and who refused to appear for cross-examination at a time to which the examination had been adjourned for that purpose, because the proceedings for taking the deposition had been attempted to be withdrawn by the party initiating them, and notice of the withdrawal had been given to the attorney of the opposite party. The only question argued is whether the party who commenced the taking of the depo-

sition had the power to stop it at that stage. The statute provides that the witness may be compelled to appear and depose in the same manner as witnesses may be compelled to appear and testify in court. Rev. St. § 863. Whether the power of compulsion is to be found with the authority taking the deposition, or in the courts of the district in which it is taken, is not clearly shown by the statute. The learned author of Conkling's Treatise inclined to the latter view, and no book or case has been observed to the contrary. Conkl. Treat. 414.

As the counsel have not questioned the propriety of this mode of procedure, it is assumed, for the purposes of this motion, to be correct, without further expression of opinion.

The testimony is to be carefully reduced to writing by the authority before whom it is taken, or by the witness in that presence, (section 864;) and it is to be personally delivered, or transmitted under seal, to the court itself before which the cause is pending. The party who started the taking of it appears to have no right to its custody or to its suppression. The authority taking it appears to represent the court *pro hac vice*, for the purpose of authenticating the testimony of the witness, and preserving it for the trial, according to its admissibility and weight. When taken, it is taken in the cause for the use of either party according to its relevancy and competency. The party making this motion was interested in the testimony that was taken, and seemed to have the right to have it affected by cross-examination, as it might be, whether used by one party or the other. It seems, therefore, that the witness should appear, and the examination be completed. As the refusal appears to have been made under a claim of right, in good faith, no more than this is now required. Motion granted accordingly.

SATTERTHWAITE v. ABERCROMBIE.

(Circuit Court, S. D. New York. August 4, 1885.)

1. **INSOLVENCY—NON-RESIDENT CREDITORS.**

A creditor who is a non-resident, and in no way made a party to insolvency proceedings under a state law, is not affected thereby.

2. **STATUTE OF LIMITATIONS—ABSENCE FROM STATE—CODE CIVIL PROC. N. Y. §§ 38J, 401.**

A. executed a note that fell due, with grace, on January 4, 1874, and being unpaid, suit was brought against him in New York, where he resided, on February 16, 1884. From the time he executed the note to December, 1877, he stayed with his uncle in New Jersey, when he came to the New York Hotel in New York city. He was a gentleman of leisure, and until 1882 an unmarried man, without a permanent home or place or business. Between December, 1877, and the commencement of the suit, he was not continuously absent from the state for the space of one year, but he spent his summers in New Jersey

and a part of one winter in Washington, D. C. *Held*, that the action was not barred by the statute of limitations prescribed by Code Civil Proc. N. Y. §§ 380, 401.

At Law.

P. V. R. Van Wyck, for plaintiff.

George V. H. Baldwin, for defendant.

WHEELER, J. The note in suit was dated November 1, 1872, and made payable 14 months after date; consequently it fell due, with grace, January 4, 1874. This suit was commenced February 16, 1884. The defenses are the statute of limitations, and a discharge in a species of insolvency proceedings under what is called the "Two-thirds Act" of the state of New York. The cause has been tried by the court upon a waiver of a jury. The plaintiff is, and was at the time of the insolvency proceedings, a non-resident of the state of New York, and did not in any way become a party to those proceedings. They did not, therefore, affect him in his right to recover on his note. *Ogden v. Saunders*, 12 Wheat. 213; *Cook v. Moffat*, 5 How. 309; *Savoie v. Marsh*, 10 Metc. 594; *Clark v. Hatch*, 7 Cush. 455; *Pratt v. Chase*, 44 N. Y. 597.

According to the testimony of the defendant,—which is all there is in the case upon the subject of his residence,—he was staying with his uncle in Jersey City, in New Jersey, at the time of giving the note, and continued to stay there until December, 1877, when he came to the New York Hotel, in New York. Nothing is shown about him previously, except that before he was at his uncle's at this time, he was visiting his sister, at Elizabeth, New Jersey. He states now that he is a gentleman of leisure, 48 or 50 years old, and was married in 1882. From this it is understood that he was a single man, without a family, or permanent home, or place of business, until after his marriage, since about the time of which he has had a residence in the city of New York. As no other domicile is shown, his place of residence must be taken to have been where he was. It cannot be assumed, without any evidence at all, to have been elsewhere. He was without the state of New York when the cause of action accrued.

The statute of limitations of New York provides that actions like this must be commenced within six years after the cause of action accrued, (Code Civil Proc. § 380,) and that if the defendant is without the state when the cause of action accrued the action may be commenced within the time limited therefor after his return into the state. Section 401. The six years commenced to run, therefore, upon this cause of action in December, 1877, six years and about two months before the action was commenced. The statute of limitations further provides that if, after a cause of action has accrued against a person, he departs from and resides without the state, or remains continuously absent therefrom for the space of one year or more, the time of his absence is not a part of the time limited for the commencement of the action. Section 401. The evidence shows that he was

not continuously absent from the state for the space of one year, between December, 1877, when the time commenced to run, and the commencement of the action. The case does show that from December, 1877, to the winter of 1880 and 1881, he spent the winters in New York, staying at the New York Hotel, and the summers at Mendham, New Jersey; that in February, 1881, he went to Washington, D. C., and stayed several months there, then returned to New York, without showing to what place, intending to go to Mendham, where he soon went for the summer; and that late in 1881 he returned to New York and stayed at different hotels, among them the New York, until he went to his present residence. It is not clear to which hotel he went when he returned to New York late in 1881. Nothing is shown as to what quarters he had, or under what arrangement he stayed, at the New York, or other hotels, except that he stayed there; and he testifies that the books of the New York Hotel would show when he was there. It can only be found from this that he was there as a guest or boarder, and that his arrangements for staying only covered the time when he was actually a guest or boarder there, and not the intervals when he was absent for a summer season, and especially not the long interval in 1881, from February till late in the year, when it does not, in fact, appear that he did return there at the end of the interval when he returned to New York. At such times he had no home or abode there, nor any right there, so far as appears, beyond or different from the right of all persons to become guests there. When he left, under such circumstances, he would not leave any place there at which process could be served,—he would take his abode with him; and a general intention to reside in the city of New York would not make his home, nor give him a domicile, there. How he provided for himself at Mendham does not appear, but, however it may have been, it is not probable that it was by any arrangement less permanent than being a guest or boarder at a hotel. And if it was only that, it would be equally permanent with his arrangement at the hotels in New York when he was there. Especially when he left New York and went to Washington, he does not appear to have left any home or place of abode to return to in New York. When at Washington his home and domicile was there, because he had none elsewhere, so far as appears. As said by Lord THURLOW, in *Bruce v. Bruce*, 2 Bos. & P. 231, note: "A person being at a place is *prima facie* evidence that he is domiciled at that place, and it lies on those who say otherwise to rebut that evidence." The defendant does not show enough to make a residence in New York while he was at Washington or Mendham. *Atty. Gen. v. Dunn*, 6 Mees. & W. 511; *Jamaica v. Townshend*, 19 Vt. 267; *Bell v. Pierce*, 51 N. Y. 12. So, when he went to Washington in February, 1881, he departed from and commenced to reside without the state of New York, and continued to reside without the state until he returned late in 1881. The time of his residence without the state, taken from the six years and two or three months

v.24F,no.9—35

between the time when the statute began to run and the commencement of the action, will leave less than six years to be reckoned towards the statute bar. The statute is not understood to mean, as has been assumed in argument, that residence without the state must continue for a year, not to be a part of the time limited; but that if the person departs from the state and resides without it for any length of time, that time is to be taken out, although absence for less than a year not accompanied by residence without the state is not. If this were not so the first alternative would be useless, for residing without the state would be included in absence from it. And there is good reason for the distinction. Service might be made if his residence was within the state during his absence from the state, while it could not if his residence was without the state. Therefore it might well be provided that no mere absence of less than a year should be deducted, but that any permanent residence without the state should be.

These conclusions make it unnecessary to decide the question much discussed in argument, whether putting this note in the schedule of debts due by the defendant in the insolvency proceedings was a sufficient acknowledgment to take the debt out of the statute. Judgment for plaintiff.

CARTER v. TOWN OF OTTAWA.

(Circuit Court, N. D. Illinois. July 22, 1885.)

MUNICIPAL BONDS—BONA FIDE PURCHASER—KNOWLEDGE OF ATTORNEY AS TO INVALIDITY.

M. and her agent having acquired certain town bonds, with knowledge of facts which made them invalid, placed them in the hands of her attorney, MacV., who sold them to C. It appeared that at the time of the purchase by C., MacV. was his legal adviser, and was one of the attorneys retained by him in the prosecution of the suit on the bonds against the town. *Held*, that C. was not a *bona fide* purchaser of the bonds, and could not recover.

At Law.

Chas. E. Towne and Wayne MacVeagh, for plaintiff.

Mayo & Widmer, for defendant.

GRESHAM, J. The plaintiff brought this action on the twelfth day of August, 1884, as the holder and owner of 40 bonds of \$500 each, issued by the defendant on the second day of August, 1869, payable to bearer 15 years after date. The defense is that the bonds were issued for an unauthorized purpose, and that the plaintiff is not an innocent holder for value. The supreme court of the United States, at the October term, 1882, in *Ottawa v. Carey*, 108 U. S. 110, S. C. 2 Sup. Ct. Rep. 361, held that a number of bonds of the same issue were void in the hands of a holder who acquired them with knowledge of the circumstances under, and the purposes for, which they were

issued, and at the October term, 1878, in *Hackett v. Ottawa*, 99 U. S. 86, that court held that bonds of the same issue were valid in the hand of an innocent purchaser for value.

The bonds in this suit belonged to Mrs. Louise Mather when the above decisions were rendered, and she and her agent, L. H. Eames, both citizens of the city of Ottawa, knew, at and before the alleged sale to the plaintiff, the grounds upon which the municipality resisted payment. Thus advised, and knowing that payment could not be enforced by her, Mrs. Mather, through her agent, placed the bonds in the hands of Wayne MacVeagh, an attorney at Philadelphia, for collection. The plaintiff was a successful business man of large means, engaged in mining and selling coal, and in manufacturing pig-iron, and MacVeagh had been his attorney and general legal adviser since 1877 or 1878. The plaintiff had inquired of MacVeagh, shortly before the latter's employment by Mrs. Mather, if he knew of opportunities for investment. The plaintiff had previously made investments through MacVeagh, and the latter was still the plaintiff's legal adviser. Under these circumstances, MacVeagh telegraphed the plaintiff at his country place, calling him to Philadelphia, where they met, and it is claimed the plaintiff bought the bonds in suit. The plaintiff testified that at this interview MacVeagh informed him he had the bonds for sale; that they had been issued by the city of Ottawa; that the municipality was able to pay them; that they were good beyond all question, and would certainly be paid at maturity; that they contained the proper municipal clauses; that, without seeing or knowing anything more about them, he made the purchase, relying upon MacVeagh's advice, and gave the latter his checks for \$20,000, with the understanding on his (the plaintiff's) part that the bonds were to be purchased by MacVeagh for him; that they certainly were so purchased; that he did not ask MacVeagh whether their validity had been disputed; and that he had no agreement with any one that his money should be returned if he failed to collect the bonds.

Eames testified that he went to Philadelphia and placed the bonds in MacVeagh's hands for collection; that he did this on the advice of Franklin MacVeagh, of Chicago, who is related by marriage to Mrs. Mather, and who is Wayne MacVeagh's brother; that he was Mrs. Mather's agent in the management of her estate, and that neither Wayne MacVeagh nor any one else had paid to him or to his principal, with his knowledge, any money arising from the sale of the bonds.

Wayne MacVeagh testified that Eames advised with him as to the best method of securing the money due upon the bonds, and employed him to bring suit or take any other course that he might think best to collect the money; that in negotiating the sale to the plaintiff he did not act as the latter's agent or attorney; that he told the plaintiff he had the bonds for sale; that he had made inquiries and had satisfied himself the municipality was abundantly able to pay its debts,

and that the bonds would be paid at maturity; that they showed upon their face they had been issued for a municipal purpose; that he sent for the plaintiff because he was an investor; that there was no occasion for acting as counsel for the plaintiff; that he still retained the money he got from the sale of the bonds; and that he was one of the plaintiff's counsel in prosecuting this suit.

Mrs. Mather acquired the bonds, with knowledge of the facts which made them invalid. Her agent and her attorney, Mr. MacVeagh, both knew that collection could not be enforced in her favor; and the plaintiff is therefore equally unfortunate if his purchase was made upon Mr. MacVeagh's advice as his counsel or agent, as in that case knowledge of the counsel or agent was the plaintiff's knowledge. If the plaintiff's testimony is to be credited, he certainly understood the purchase was so made. Was he justified by the facts in assuming, in the interview with Mr. MacVeagh, that the relation of attorney and client existed between them, and that Mr. MacVeagh was advising him as his counsel as to the character of the securities? Mr. MacVeagh had been the plaintiff's attorney and general legal adviser for five or six years, during which time he had represented the plaintiff in litigation in the courts, and had given him legal advice, as occasion required, in connection with his large business interests. This relation still existed, and the confidence naturally incident to it remained unshaken. The plaintiff was not even cautioned against relying, at this time, upon Mr. MacVeagh as his counsel in making the purchase. If the plaintiff had been so cautioned, it is probable he would have gone to some other attorney for advice. It cannot be presumed that the plaintiff, a citizen of Philadelphia, was willing to invest \$20,000 in bonds, issued by a municipality in Illinois, without the opinion of an attorney that they were valid.

Mr. MacVeagh advised the plaintiff, in effect, if he did not do so in terms, to buy the bonds; and the plaintiff relied upon this as the advice of his counsel. It was natural and reasonable that he should do so. It is significant in this connection that in his argument of the motion for a new trial Mr. MacVeagh frankly stated that, while talking to the plaintiff about the bonds, he had in his mind the importance of keeping the latter ignorant of the facts which would prevent a recovery in his favor as an innocent holder for value. It is true, Mr. MacVeagh testified as a witness that he did not act as the plaintiff's attorney or agent in this instance, but that was an expression of his opinion rather than the statement of a fact. The evidence, fairly considered, shows that whatever interest the plaintiff has in the bonds he acquired upon the advice of Mr. MacVeagh as his attorney, or through him as his agent; and that, notwithstanding Mr. MacVeagh's secret intention to the contrary, he was in law and fact such attorney and agent.

A material part of the evidence remains to be considered. Mr. MacVeagh collected the money two years ago on the checks which

the plaintiff gave him, and still retains it in his hands. There is no evidence that Mrs. Mather ever demanded this money, or that it is withheld without her consent. Mr. MacVeagh is still the plaintiff's general legal adviser, and one of his counsel in this case. Why should the money be permitted to remain in his hands unless there is an understanding, tacit perhaps, that it shall be returned to the plaintiff if he is unsuccessful in this suit? That it is held for this purpose there can scarcely be a doubt. Any other theory would make Mr. MacVeagh unmindful of his duty to Mrs. Mather as her attorney.

The foregoing are my reasons in brief for holding that the plaintiff is not an innocent holder of the bonds for value.

The motion for a new trial is overruled.

BITTINGER v. PROVIDENCE WASHINGTON INS. CO.

(Circuit Court, D. Colorado. August 3, 1885.)

FIRE INSURANCE—PLEADING PERFORMANCE OF CONDITIONS OF POLICY—ANSWER—EVIDENCE.

Where, in an action on a policy of fire insurance, plaintiff alleges generally that he has fulfilled the conditions of the policy, and the insurance company answers generally that he did not observe all the conditions of the policy, without pleading specially the breach of such conditions, plaintiff is not bound to prove affirmatively that he has fulfilled all of such conditions, nor can the company show that some of such conditions were not fulfilled.

At Law.

Sam. P. Rose, for plaintiff.

Patterson & Thomas, for defendant.

HALLETT, J., (*orally*.) Mr. George W. Bittinger brought an action against the Providence Washington Insurance Company, on a policy of insurance. He alleged in general terms that he fulfilled the conditions of the policy; I believe set out the policy also. The defendant answered in the like general terms that he did not observe the conditions of the policy. "Defendant, further answering, denies that on the first day of November, 1883, or at any other time, said Atkinson gave notice of proof of loss, as provided in said policy, and denies that said Atkinson performed all and singular the conditions of said policy on his part to be performed."

At the trial the defendant contended that upon this state of the pleadings, the plaintiff was bound to prove affirmatively that he had fulfilled and executed all the terms of the policy; and if that was not true, that the defendant was at liberty to offer evidence to the point that some of the conditions had not been fulfilled; as, that the property was allowed to remain vacant and unoccupied for some time, and that it was not kept in operation, the property being a mill and

furnace and the like; that no watchman was kept on the premises, as required by the terms of the policy, and perhaps some other things of the same character. This evidence was excluded, on the ground that such defense must be pleaded specially. The question has been argued on motion for new trial, and I see no reason to reverse the ruling which was made at the trial. It is laid down in the books that it is not necessary to set forth in the complaint a condition subsequent, and that a defendant relying upon it must plead it. This is true under systems of pleading which admit of more general defenses than ours. Under the Code of this state it is provided that the answer shall be special. No doubt is entertained that this requires a specific denial to each allegation in the complaint; and if it be said that the plaintiff has declared only generally, (there is some doubt upon that, inasmuch as he has set forth the policy in his complaint,)—if the defendant accepted that method of declaring,—he was still bound to plead his defense specially. In section 586, May, Ins., the rule is so laid down. I think there can be no doubt as to its correctness. It would be extraordinary if a plaintiff, coming into court with one of these policies of insurance, should be bound to have witnesses to everything that is set down in the policy; to prove everything which may be set up as a defense. I say that would be most remarkable, and nobody would have greater reason to complain of it than the insurance company itself, because, if plaintiff should be fortified in all points with an extraordinary number of witnesses, the cost would be very great. The rule is that in respect to all such matters the insurance company must plead its defense specially, in order that it may put the matter in issue.

The motion for new trial will be denied, and judgment on the verdict.

In re GRAVES, a Bankrupt.

(District Court, N. D. New York. June 27, 1885.)

1. BANKRUPTCY—OBJECTIONS TO DISCHARGE—FAILURE TO KEEP PROPER BOOKS—EVIDENCE—CASH-BOOK.

Where the specification filed by creditors in opposition to a bankrupt's discharge is in the exact language of Rev. St. § 5110, it is too broad to sustain a finding withholding a discharge on the ground that the bankrupt's cash-book was kept upon an incorrect theory.

2. SAME—AMENDING SPECIFICATIONS.

After issue has been joined on the specifications, and evidence taken, without an intimation that the allegations are insufficient, it is too late to permit an amendment of the specifications which would introduce an entirely new ground of objection and present a separate and distinct issue for the consideration of the court.

3. SAME—BOOKS, WHEN SUFFICIENT.

Where a competent person, upon examination of the books and papers kept by a merchant, would be able to reach a substantially correct conclusion as to the state of the merchant's affairs, such books will be held sufficient.

4. SAME—MANNER OF KEEPING CASH-BOOK.

A merchant who did a retail business of \$40 to \$50 per diem kept a memorandum ledger, order-book, and so-called cash-book, in which he made no entries of the goods sold for cash during the day or any particular time, but arrived at the amount of his cash sales by subtracting what money he had on hand in the morning, or at the beginning of the period, from what money he had on hand at night, or at the end of the period. *Held* that, under the circumstances, this manner of keeping his cash-book would not prevent his obtaining his discharge as a bankrupt.

In Bankruptcy.

George W. Adams, for the bankrupt.

Edgar P. Glass, for the creditors.

COXE, J. One of the specifications filed by creditors in opposition to the bankrupt's discharge, and the only one now in question, is, *mutatis mutandis*, in the exact language of the statute, viz.: "That being a merchant and tradesman, he has not, subsequently to the passage of the bankrupt act, and its amendments, kept proper books of account." Rev. St. § 5110. To sustain this allegation evidence was adduced, some being given under objection, tending to show that the bankrupt did not keep his cash-book properly. The learned register to whom it was referred found with the creditors upon this issue. The matter is now before the court upon exceptions filed to his report. The main propositions to be determined are—*First*, can proof of irregularities and defects in the manner and system of keeping a certain book be given under the general language of the specifications? *Second*, are the irregularities disclosed by the testimony of a character sufficiently grave to warrant the withholding of a discharge?

The authorities appear to be numerous and uniform that, under a broad, indefinite allegation, like the present, the creditor may prove that the bankrupt kept no books at all, or that he failed to keep any one of the books necessary for the transaction of the business in question. Having failed in this, however, he cannot enter into an examination of the books themselves for the purpose of showing that they were carelessly kept, or kept on a wrong principle. If such an issue is to be raised, the bankrupt must be advised of it by distinct, specific and definite statements in the pleading. In *Condict's Case*, 19 N. B. R. 142, the court says:

"It has been the uniform practice under the bankrupt act to consider all specifications as too vague and general which charge the offense in the words of the act. The particulars in which the bankrupt has offended should be so set forth that he may be apprised of the precise matters wherein he is alleged to have transgressed."

In *Frey's Case*, 9 FED REP. 376, the court says:

"The objection being, therefore, to the *manner* in which the books were kept, and to imperfections or omissions therein, general objections like those above stated are not sufficient. The particular irregularities or omissions must be pointed out in the specifications to entitle them to be considered. In *re Littlefield*, 3 N. B. R. 57; *Hammond v. Coolidge*, Id. 273." See, also,

In re Smith, 16 FED. REP. 465; *In re Butterfield*, 14 N. B. R. 147; *In re Rathbone*, 2 Ben. 138; *In re Eidom*, 3 N. B. R. 106; *In re Burk*, Id. 296, 300; *Bump, Bankr.* (9th Ed.) 279.

But it is said that it is now too late to urge this objection; that the bankrupt should have demurred, or he should have moved to strike out, or to have the specifications made more definite and certain. The short answer is that none of those remedies would have proved availing. The specification was well drawn; under it proof could be given that no books were kept, or that no cash-book, for instance, was kept. *Non constat*, this was the very omission which the creditors intended to allege, and expected to prove. It is obvious that the bankrupt had no other remedy except to confine the proof to the pleadings. The register had no power to pass upon any of the objections interposed by the bankrupt, and he did not assume to do so. General Order No. 10; *Bump, Bankr.* (9th Ed.) 198, 644; *In re Levy*, 1 N. B. R. 136; *In re Patterson*, Id. 147; *In re Mawson*, Id. 265; *In re Puffer*, 2 N. B. R. 43; *In re Bond*, 3 N. B. R. 7.

The question, therefore, is now to be determined by the court; and, within the authorities cited, it must be held that the language of the specification is too broad to sustain a finding withholding a discharge on the ground that the bankrupt's cash-book was kept upon an incorrect theory. It is suggested by the creditors that an amendment should be allowed, but the court is referred to no case in which such a radical amendment has been permitted, after the cause has been argued and submitted. The specifications were filed in 1876, issue was joined, and the evidence taken, without an intimation that the allegations were insufficient, and the court, at this late day, would hardly be justified in permitting an amendment which introduces an entirely new ground of objection, and presents a separate and distinct issue for the consideration of the court. *In re Smith*, 16 FED. REP. 465. But, upon the merits, it is thought that the discharge should not be withheld. The counsel for the creditors fairly and accurately states the matter in controversy, as follows:

"The books kept by the bankrupt * * * were a memorandum ledger, order-book, and what he calls 'a cash-book.' That these books, if they had been properly kept, were 'proper books of account,' within the meaning of the statute, I do not question; but what I do urgently contend for in behalf of the opposing creditors is that the manner in which he kept his so-called 'cash-book,' according to his own testimony, precludes it from being treated as a 'cash account' within the meaning of any of the decisions cited by the bankrupt's counsel, and from being considered a 'proper' book of account. The manner in which the bankrupt kept his cash-book, * * * briefly stated, * * * was by taking the 'amount of cash on hand in the morning from the amount on hand at night.' In other words, he adopted no means of keeping track of how many goods he sold for cash during the day or month, or whatever time he did pretend to balance his cash account, but arrived at the amount of his cash sales by subtracting what money he had on hand in the morning, or at the beginning of the period, from what money he had on hand at night, or at the end of the period."

If the bankrupt had been doing a large business, requiring the employment of an army of employees, where vast sums of money are daily received and disbursed, it may be conceded at the outset that the system above described would be wholly inadequate. But such was not the case. He was a small retail dealer, receiving between \$40 and \$50 per day. He employed but one clerk. The whole business was transacted directly under his eye. It was hardly possible that he could have been deceived or cheated. At the close of the day, in a business so small, his memory would doubtless have recalled all the transactions of any magnitude, for they must have been few. It is said that he should have noted every item of cash received, no matter how infinitesimal. It is not pretended that he was required to enter the name of the customer or the article sold, but simply the amounts of cash received. How such a system, in a business so modest in its dimensions, could materially aid the investigator is not explained, and it is not easy to perceive. To a dishonest man this system offered the same opportunities for fraud as the other; to an honest man its advantages over the one adopted are not entirely obvious. It would furnish an additional check, it is true; but without it the merchant's present condition could at any time be ascertained, mistakes of any magnitude corrected, and fraud discovered. It is not intended to say anything in approval of the system of keeping his cash-book adopted by this bankrupt; it may, undoubtedly, as an abstract proposition, be denounced as unwise and defective. But we are dealing here with strict statutory rights. No fraud or dishonesty is charged, and it would seem not to be the policy of the courts to keep a young man under the harrow for years, when the only accusation against him is that he failed to insert in his cash-book the items of his daily sales. Congress has not attempted to prescribe any particular system or principle of book-keeping. If a competent person, upon an examination of the books and papers kept by the merchant, is able to reach a substantially correct conclusion as to the state of a merchant's affairs, it is enough. The accounts may, where the business is small, be found in one book or in 20 books; the system may be double entry or single entry,—the form and manner in which the books are kept is unimportant so long as the true financial condition of the merchant or tradesman is shown. In the case of *In re Marsh*, 19 N. B. R. 297, the specification alleged that no cash-book had been kept by the bankrupts. The court says:

"The grounds are confined to whether they kept proper books in respect to the receipt and payment of cash. What would be proper in this behalf must depend upon the nature of the business, and the mode in which it was conducted. They bought hemlock bark and lumber, each taking charge of each branch, and forwarded it to customers by public conveyance. They kept bank accounts showing what money each received, and each kept a book professing to show what amounts, and to whom, each paid. * * * The statute requires that they (the books) should be proper, that is, for their purpose, which includes being honest; but does not go so far as to require that books

shall show where losses occurred, or how. The same provision was in the act of 1841 and in the English statutes, and was construed as requiring that the books should not, in what they showed or failed to show, be fraudulent."

In *Townsend's Case*, 2 FED. REP. 559, the court, at page 565, says:

"The degree of accuracy and particularity required will depend, in a great degree, on the circumstances of each case. Books which show an honest attempt to throw such light on his business transactions as will make them reasonably plain of themselves, or capable of being made plain by explanation, are sufficient, within the meaning and intention of the bankrupt law."

In *Antisdel's Case*, 18 N. B. R. 289, it was held that—

"The requirement that the bankrupt shall keep proper books of account is satisfied, if his creditors can gather from them a correct understanding of his business and financial condition."

In *Winsor's Case*, 16 N. B. R. 152, the court held that—

"Keeping proper books of account, within the meaning of the bankrupt act, is the keeping of an intelligent record of the merchant's or tradesman's affairs, and with that reasonable degree of accuracy and care which is to be expected from an intelligent man in that business, and a casual mistake therein will not prevent a discharge."

See, also, as bearing upon the question involved, *In re Frey, supra*; *In re Smith, supra*; *In re Jewett*, 3 FED. REP. 503; *In re Reed*, 12 N. B. R. 390; *In re Archenbrow*, Id. 17; *In re George*, 1 Low. Dec. 409; *In re Brockway*, 12 FED. REP. 69; *In re Solomon*, 2 N. B. R. 285.

It is thought, therefore, that the cash-book of the bankrupt, though imperfect, inartistic, and inaccurate, in a strictly commercial sense, was not, within the cases cited, so improperly kept as to justify the court in withholding the discharge. Discharge granted.

In re PROUTY.

(Circuit Court, S. D. New York. July 10, 1885.)

1. BANKRUPTCY—JURISDICTION OF CIRCUIT COURT—ORDER REMOVING ASSIGNEE.

The superintendence and jurisdiction of the circuit court conferred by Rev. St. § 4936, are revisory of cases and questions arising in the district court, and contemplate a review of what is presented to that court for consideration and decision; and if an order of the district court, removing an assignee, was right when made, it cannot be reversed.

2. SAME—ASSIGNEE REMOVED.

On examination of the circumstances of this case, *held*, that the assignee was properly removed by the district court on account of his dilatory and unwise course, and that the order should be affirmed.

Petition for Review.

W. F. Scott, for respondent.

Robert Sewell, for appellant.

WALLACE, J. By an order of the district court, made on the twenty-seventh day of December, 1884, the assignee of the bankrupt was removed upon the petition of certain creditors of the estate. The case has been brought here by the assignee upon a petition of review, seeking a reversal of that order. The argument of counsel for the assignee has largely been addressed to the point that some of the creditors, upon whose petition the proceeding was put in motion, did not have the requisite standing in the court below to entitle them to move; one of them being a secured creditor, who had proved without relinquishing his security, and another being a creditor who had been divested of his claim by a transfer after he had proved his debt. It is conceded, however, that Schermerhorn and Cox were creditors whose debts were proved, and who were in a position to move, at the time they joined in the petition, for the removal of the assignee. It is represented, however, that since the case has been brought here for review they have withdrawn from the proceedings. Inasmuch as they were competent parties to the proceeding when the order of the district court was made, all objections which rest upon the ground that there were no competent adverse parties to the proceedings to authorize the removal of the assignee, are unavailing.

The superintendence and jurisdiction of this court conferred by section 4986 are revisory of cases and questions arising in the district court, and contemplate a review of what is presented to that court for consideration and decision. *Re Bininger*, 7 Blatchf. 159, 164. If the order was right when it was made, it cannot be reversed now. For this reason it is not deemed necessary to consider whether the court of its own motion did not have ample power to remove the assignee, if, upon facts brought to its notice, it seemed proper that he be removed, or whether it was not the duty of the court to do so, although no creditor asked for such action. The order was made upon the petition of creditors, and the answer of the assignee, without proofs in support of the petition or answer, except such exhibits as were made part of the record. Without attempting an extended review of the facts as they appear by the petition and the answer, it is sufficient to refer to one transaction, in respect to which the inferences are so clear as abundantly to justify the order of the district court.

In July, 1883, the assignee was in a position to realize over \$20,000 in cash for the estate upon an adjustment with Mr. Sage, by which the latter proposed to take certain securities of the bankrupt in his hands at their fair value, and pay over the amount after deducting certain liens upon it. Mr. Sage's proposition was to allow \$67,760 for the securities, deduct his own claim at \$27,000, retain \$20,000 to satisfy a lien claimed upon the securities by Messrs. Birdseye, Cloyde & Bayliss, and pay the balance, \$20,760, to the assignee in cash. The lien claimed by Messrs. Birdseye, Cloyde & Bayliss was for legal services as attorneys for the bankrupt, and its validity

was disputed by the assignee. If the price offered for the securities by Mr. Sage was a fair one, the clear duty of the assignee was to apply to the court for an order authorizing him to accept it, and making provision for the alleged lien of Messrs. Birdseye, Cloyde & Bayliss. Recognizing this, the assignee petitioned the court for such an order. He represented in his petition that the bankrupt's estate was greatly involved; that it had many thousand acres of unproductive land, largely incumbered by taxes, tax titles, and adverse claims; and that he, as assignee, had no money, or means to realize money, with which to protect in any manner the interests of the estate. He further represented that the proposed settlement would supply him with ready money with which to protect the interests of the estate; that unless he could be so supplied the estate would suffer immense loss; and that there was no other source from which money could be obtained.

The court referred the petition to a referee to take proofs and report, and on the twenty-fourth of July, 1883, the referee reported, substantially recommending the settlement proposed. In his report the referee stated that the assignee was in urgent need of funds to enable him to protect the interests of the estate; that the price offered for the securities by Mr. Sage was the highest the assignee could procure, after diligent effort; and that it was both advisable and necessary that the securities be sold, and the proceeds, after satisfying the lien, be paid to the assignee, for the use and benefit of the estate. He recommended an order that the assignee be authorized to sell the securities at a specified sum, at public auction, at the Exchange sales-room, in the city of New York, and that in default of a bid for that amount he accept the offer of Mr. Sage; and that out of the proceeds the lien of Mr. Sage be paid, and \$20,000 be deposited in the registry of the court, to await the determination of the validity of the claims of Messrs. Birdseye, Cloyde & Bayliss.

It appears by this report that Mr. Sage consented to such a sale. The confirmation of such a report would seem to have been almost a matter of course, if the assignee had applied for it. He attempts to excuse his neglect by the statement that exceptions were filed by Messrs. Birdseye, Cloyde & Bayliss, and by another creditor whose name he does not give, and says: "He had reason to believe that before a sale could be effected considerable time, labor, and expense might have to be incurred by him." He does not state what grounds were assigned by the parties opposing a confirmation, or that he believed there were any tenable objections, or that he had any doubt of a favorable issue. In view of his urgent need of funds it is remarkable that he should lie by supinely and let this favorable opportunity slip. His conduct cannot be vindicated by such loose and meager reasons as he assigns for not attempting to obtain a confirmation of the order. If it were intimated that he contemplated some more expedient sale of the securities, or a different adjustment of the liens

claimed upon them, this might suggest a satisfactory explanation of his conduct; but his subsequent action in regard to the securities is utterly inconsistent with any such theory. In September, 1883, he entered into a stipulation with Messrs. Birdseye, Cloyde & Bayliss, authorizing them to pay to Mr. Sage the amount of his lien as claimed by him, and authorizing Mr. Sage to transfer the securities to Messrs. Birdseye, Cloyde & Bayliss, together with his lien upon them, and authorizing Messrs. Birdseye, Cloyde & Bayliss to hold and retain the securities until the amount of their own lien should be determined. He consented to an entry of an order by the court, upon the application of Messrs. Birdseye, Cloyde & Bayliss, carrying out the terms of this stipulation.

The result of this action upon his part was to transfer the securities to creditors whose lien upon them was contested, and to put it beyond his power to realize anything from them for an indefinite period of time. From that time until the order for the removal of the assignee was made, the securities remained in the hands of Messrs. Birdseye, Cloyde & Bayliss, and the litigation over the validity of their claim had been dragging its weary length along with no prospect of a speedy conclusion. There is no aspect of this transaction which suggests a theory that is consistent with the exercise of a proper discretion on the part of the assignee. There had been no change in the pressing necessities of the estate, and the assignee, in his answer, attempted to explain his failure to realize anything from the large amount of real estate which came to his possession, by the allegation that he has been without funds to clear off the liens and adjust questions affecting the title, and therefore had been unable to sell it. Seven years have elapsed since he was appointed assignee, and although a very large amount of assets came to his possession, nothing has been realized of consequence. Without impugning the intentions of the assignee to administer his trust honestly, and with reasonable diligence, it suffices to say that the creditors had just cause to be dissatisfied with the dilatory and unwise course he has pursued, and that the court below had sufficient grounds to consider his removal imperative in the interests of a prudent and energetic management of the estate.

THAYER v. HART, Jr.

(Circuit Court, S. D. New York. July 29, 1885.)

PATENTS FOR INVENTION—COSTS—ENFORCING PAYMENT—RECEIVER.

When a bill for infringement of a patent has been dismissed, with costs to defendant, for which an execution has issued and been returned wholly unsatisfied, a receiver will not be appointed, on motion of defendant, to take possession of the patents as equitable assets, to be disposed of for the satisfying of the decree.

In Equity.

Josiah P. Fitch, for plaintiff.

Frederic H. Betts, for defendant.

WHEELER, J. The bill in this case, which is for infringement of patents, has been dismissed, with costs to the defendant, taxed at \$950.92, for which execution issued and has been returned wholly unsatisfied. The defendant now moves for a receiver of the patents as equitable assets, to be disposed of for the satisfying of the decree. This decree, so far as it is for the payment of this sum for costs, is not different from a judgment for the recovery of money. Execution issues upon it under the rule of the supreme court made pursuant to statute the same as upon judgments for money. Rev. St. § 917; Equity Rule, 8. There is no connection between the decree for costs and the relief sought; neither is it of any equitable nature otherwise. The costs are recovered because the bill was not sustained, as costs are in actions at law when the suit is not maintained. The satisfying of the decree is no more equitable relief than the satisfying of any money judgment is. Courts of equity have power to aid in the satisfaction of judgments at law by reaching assets which courts of law cannot reach. This is done upon bill brought to reach particular property; and the bill is to be answered, or proceeded upon for want of answer, as in other cases; and the decree is founded upon the case made in respect to the property, although the right to proceed against the property rests upon the prior judgment. Here the defendant has got no further than to become a judgment creditor of the plaintiff. These patents, as equitable assets, cannot be taken to satisfy a money judgment except upon a decree for that purpose, which can only be had upon bill and answer, or failure to answer, in due course. The remark of the learned judge in *Shainwald v. Lewis*, 6 FED. REP. 779, relied upon in support of the motion, is not to the contrary of these views, as that remark is understood. Motion denied.

INSURANCE CO. OF PENNSYLVANIA v. PROCEEDS OF THE SALE OF THE
BARGE WAUBAUSHENE.

(Circuit Court, N. D. New York. July 21, 1885.)

MARINE INSURANCE—CONTRACT, WHERE MADE—LIEN FOR UNPAID PREMIUMS—
MARITIME LIEN.

No maritime lien exists in favor of underwriters for unpaid premiums of marine insurance. Opinion of district judge (22 FED. REP. 109) affirmed.

Appeal from District Court. See 22 FED. REP. 109.

Williams & Potter, for appellant.

Marshall, Clinton & Wilson, for appellee.

WALLACE, J. In deciding against the application of the insurance company to be paid the premium due upon the marine policy issued by it upon the barge out of the proceeds arising from her sale in the registry of the court, the learned judge of the district court held that the contract for insurance was made in Canada, and the rights of the parties to a lien were controlled by the *lex loci contractus*. He also held that such a lien is not recognized by our jurisprudence, and that the statutes of this state creating a lien for premiums in favor of underwriters do not apply to foreign vessels. He therefore held that as the company had no lien by the law of Canada, it could assert none here. These conclusions are fully approved, and it seems superfluous to attempt to re-enforce the reasoning of the very able and careful opinion of the district judge further than briefly to indicate the reasons, which have led this court to deny the existence of the maritime lien for insurance premiums. As early as 1815 Mr. Justice STORY decided, in *De Lovio v. Boit*, 2 Gall. 398, that a policy of insurance upon a vessel was a maritime contract, in an opinion which has been characterized as "a learned and elaborate essay on admiralty jurisdiction, and one of the most luminous views of the subject extant." 2 Hoff. Leg. Stud. (2d Ed.) 465. Although the doctrine of that case was not uniformly accepted, (*Ramsay v. Allegre*, JOHNSON, J., 12 Wheat. 638; *Jackson v. The Magnolia*, CAMPBELL, J., 20 How. 335,) the jurisdiction over such contracts was always maintained subsequently in the First circuit, and was generally approved by commentators of authority. *Gloucester Ins. Co. v. Younger*, 2 Curt. 322; *Hale v. Washington Ins. Co.* 2 Story, 176; Dunl. Adm. Pr. 43; 1 Kent, Comm. 370, note; Ben. Adm. § 294; Conkl. Pr. 13. Yet until the decision in *The Dolphin*, 1 Flippin, 580, as is conceded in the opinion of the court in that case, the general understanding of the profession was adverse to the existence of a lien for the premium secured by such a contract. In that case, reasoning from analogies, and influenced by the views recently declared by the learned judge of the Sixth circuit, that every maritime agreement, upon principle, should bind the ship as well as the owner, (*The Williams*, Brown, Adm. 208,) the court held that the lien should be recognized as extending to the premiums for insurance. It was said by Mr. Justice CURTIS, (*The Kiersage*, 2 Curt. C. C. 424,)—

"To be a settled rule that privileged liens, constituting a *jus in re* accompanying the property into the hands of *bona fide* purchasers and operating to the prejudice of general creditors, are matters *stricti juris*, which cannot be extended from one case to another argumentatively, or by analogy or by inference."

And he cites Pardessus, (3 Droit, Comm. 597, 598,) when reasoning on the policy of allowing a privilege for premiums of insurance:

"Analogy cannot afford a decisive argument, because privileges are a strict right. They are an exception to the rule by which all creditors have equal rights in the property of their debtor, and an exception should be declared and described in express words; we cannot arrive at it by reasoning from one case to another."

The same citation is quoted with approbation by Mr. Justice GRIER in *Vandewater v. Mill*, 19 How. 89. Although the proposition is generally true that maritime contracts import an hypothecation of the ship for their performance, the important qualification must not be overlooked that the lien does not extend to contracts which do not aid the vessel, but are merely for the personal benefit of the owner. One reason why the master of a vessel, clothed as he is with almost plenary powers to represent the owner, extending even to the authority to sell the ship, when necessity justifies a sale, cannot enter into a contract for insurance, is because such a contract does not aid the vessel. It inures solely to the personal interest of the owner. Unlike contracts and engagements in which every lienholder has an interest, because they fortify his security, the contract of insurance contributes to no fund for the general benefit, and its fruits are monopolized by the owner. It has been held in this court that he is not required to surrender the insurance to a trustee, under the statutes limiting the liability of a vessel-owner for the benefit of those having claims against the vessel when the vessel is lost after liability accrues, (*In re Norwich & N. Y. Transp. Co.* 17 Blatchf. 221; *Thommesen v. Whitwill*, 21 Blatchf. 45; S. C. 12 Fed. Rep. 891,) because it is not an "interest" in the ship.

For the reasons, therefore, that a lien should not be extended to a contract to which it has not generally supposed to adhere, even if the analogies should justify recognizing it, and also because the contract of insurance is peculiarly distinguishable from the class of maritime engagements which import a lien, the court cannot follow the decision in the case of *The Dolphin*. The question of a maritime lien was not involved or discussed in the case of *The Guiding Star*, 9 Fed. Rep. 521, affirmed, 18 Fed. Rep. 263, cited as an authority in favor of the lien. The note of Mr. Flippin to the case of *The Dolphin* presents all the arguments for denying the existence of the lien, and for following the case of *The John T. Moore*, 3 Woods, C. C. 61, to which it is necessary to refer.

The decree of the district court is affirmed.

NEW YORK EXHAUST VENTILATOR CO. v. AMERICAN INSTITUTE OF
NEW YORK and another.

(Circuit Court, S. D. New York. August 7, 1885.)

INJUNCTION—AWARDING MEDAL OF SUPERIORITY TO OWNER OF MACHINE.

When the owners of machines have submitted them to a competitive examination and test before judges appointed by an institute for the promotion of arts and manufactures, and the judges have determined that one of such machines is entitled to a medal showing its superiority to the others, an unsuccessful exhibitor cannot, by injunction, prevent the delivery of such medal to his rival.

In Equity.

James A. Whitney, for plaintiff.

J. A. Davenport, for Simonds Manufacturing Company.

Alexander & Green, for American Institute.

WHEELER, J. According to the bill of complaint, the plaintiff manufactures a machine for ventilating, called the "Blackman Fan," and the defendant manufacturing company manufactures a machine of different construction for the same purpose, known as the "Wing Disc Fan." The defendant institute is engaged in the promotion of arts and manufactures by making provision for submitting machines to tests and experiments conducted by judges appointed by its officers, and makes award of merit of different degrees, upon the reports of the judges. These fans were submitted for competition by their respective manufacturers, and were subjected to a series of tests by judges appointed for that purpose, who recommended an award of a medal of superiority to the Wing Disc fan, and of excellence to the Blackman fan. The delivery of the medal of superiority to the defendant manufacturing company is sought to be restrained by injunction, and a decree for its delivery to the plaintiff asked for, upon the ground principally that, upon the tests which were arranged for, the Blackman fan showed the best results, and that the recommendation of award was made upon tests at high speed, and adjustability of the blades of the Wing Disc fan, which were not contemplated when the competition was entered into. The cause has now been heard upon a motion for a preliminary injunction to restrain the delivery of the medal of superiority of the Wing Disc fan.

The medals themselves are not alleged or understood to be of any intrinsic value, nor to be the property of any one but the institute. Their only importance is derived from their being statements, in an attractive form, of the award of the degree of merit found. They are the expressions of the opinion, formed upon the exhibition made, of the power and utility of the machines; and in them there is nothing derogatory to the plaintiff's machine. In the statement made, or to be made, on the medal of superiority, it is not understood that anything is stated about that machine, but only an ex-

pression of opinion that the other machine is of itself a superior machine, without naming any standard of comparison. The arrangements for the trial of the machines were entered into through correspondence, which, as argued for the plaintiff, amounted to an agreement as to the terms upon which the competition was entered into. But the terms did not involve anything as a result but the expression of opinion, formed upon the tests and experiments, as to the comparative merits of the machines; not of such an opinion as would satisfy the parties concerned, or their friends, or such as a court on review of the proceedings should adjudge to be right, but such opinion, right or wrong, as should in fact be formed of the machines. No reason is seen why the institute through its officers, or any other body or individual, might not, without violating any legal right of any one interested in any of the machines, express such an opinion, with trial or test or experiment, or without, by word, writing, print, or medal, or in any other manner, freely and openly, so long as the expression should be commendatory of either, and not a misrepresentation of faults or bad qualities in either. This does not appear to be anything more than ordinary freedom of speech or of the press. If this medal of superiority should be delivered to the defendant manufacturing company, the merits of the plaintiff's machine would not be detracted from by it; that machine would fail of the commendation of the institute desired by the plaintiff, and the other machine would receive it, and this would be all.

The institute was situated somewhat like an arbitrator, although it was not to, and is not alleged to be about to, award anything to be paid or done by either of the others to or for the benefit of the other. What it was to award was to proceed wholly from itself. It is argued that the delivery of the medal showing the award of superiority to the defendant manufacturing company's machine should be restrained until final hearing, so that it may be delivered to the plaintiff if an award of superiority should be decreed to the plaintiff. But, although courts of equity do make decrees setting aside awards of arbitrators for various causes, no case is known in which an arbitrator has been decreed to make an award, and it is said by a great authority that this is never done. Story, Eq. Jur. § 1457. Much less could it be said that an arbitrator chosen by the parties could be compelled by decree to make any particular award. An award so compelled would be the award of the court and not of the arbitrator. And, as the case now stands for consideration upon this motion, there is in reality nothing which can justly be said to impeach the fairness of the judges, or the justice of the award. The plaintiff must stand upon the case made by the bill. The action of the judges and officers of the institute is many times characterized by the bill as fraudulent, wrongful, and unjust, but this does not amount to an allegation of facts in which the fraud and wrong consist. These should be set forth so that they may be answered and judged of, to determine whether they amount to

such fraud as to give a right to relief. The defendants have, however, answered the bill as it is, and the answers are, for the purposes of this motion, to be taken to be true. Testimony cannot properly be received to show that they are not true. That must be left to final hearing. The tests made are set forth, with their respective results. These were not all in favor of either machine. Their bearing upon the practical utility of the respective machines was to be weighed and considered by those charged with the duty of determining the comparative merit of the machines. It is not understood from the bill, and exhibits annexed as a part of it, that the machines were to be viewed solely with reference to the tests. The institute stood somewhat between the public and the manufacturers of the machines, to set forth the qualities of the machines for practical use, under varying conditions and circumstances, as the wants of the public might require. It was not confined within the narrow limits of particular tests, the results of which alone as the basis of an award might deceive, instead of truly informing, the public. The machines, for the purposes of such an award, were to be considered in all aspects affecting their adaptability to use, as well as their working powers; therefore the amount of space required, the capacity of operating at high rates of speed, and the adjustability of the machines to varying wants, were proper to be considered in connection with the results of the tests in coming to a conclusion. That these were considered, instead of being guided solely by the very tests arranged for, is the principal ground of complaint urged in the argument of this motion against the award. Other judges might have come to a different conclusion, and might not; but whether they would or not, the opinion of such judges as should be selected by the institute and act was what was sought, and has been had. No just reason for restraining the promulgation of their opinions and conclusions in this summary proceeding now appears.

Motion denied.

BARTHET v. CITY OF NEW ORLEANS.¹

(*Circuit Court, E. D. Louisiana. July, 1885.*)

1. CONSTITUTIONAL LAW—MONOPOLIES—LOUISIANA CONSTITUTION.

The Louisiana constitution forbids monopolies; the prohibition cannot be avoided directly or indirectly by state or city laws.

2. SAME—SLAUGHTERING CATTLE IN CITY OF NEW ORLEANS—CITY ORDINANCE.

The limits within which complainant's lawful business—that of slaughtering cattle—may be carried on having been fixed by the city in pursuance of article 248, state constitution, the city is without power to pass an ordinance requiring her consent to be given complainant before he can proceed with his business at the place selected, and already built upon by him, within the said limits.

¹Reported by Talbot Stillman, Esq., of the Monroe, La., bar.

3. SAME—FOURTEENTH AMENDMENT.

The fourteenth amendment, Const. U. S., forbids any state to make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, and prohibits a state from denying to any person within its jurisdiction the equal protection of the laws. The right assumed by the city in this case, to grant permission to A. to carry on his lawful business, carries with it the right to deny permission to B. to exercise the same privilege. The power to deny permission to A., B., and C. to carry on the slaughtering business at the several locations selected respectively by them within said limits would enable the city to allow the favored suitor to establish a monopoly.

4. SAME—EQUITY JURISDICTION—REMEDY AT LAW.

To forbid the interference of equity in a case like this, it must appear clearly that complainant has a remedy at law which is plain and adequate, and as practical and efficient to the ends of justice and its prompt administration as the remedy sought for in equity.

5. SAME—RIGHT TO INJUNCTION.

The complainant, in the view of the city, has erected costly buildings for the purpose of carrying on his trade, and is now proceeding to carry it on within said limits. He has complied with all the regulations. It would not now be a prompt or efficient administration of justice to allow the city, in the exercise of an unconstitutional ordinance, to stop him, and leave him to sue at law for compensatory damages. The act complained of is not a mere trespass upon property.

6. SAME—SIXTEENTH SECTION OF JUDICIARY ACT.

The sixteenth section of the judiciary act prohibits suits in equity when there is a plain, adequate, and complete remedy at law. This prohibition is merely declaratory on the subject of legal remedy; it does not appear that the adoption of that statute has impaired the jurisdictional powers of the equity courts of the United States for the protection of the property of individuals, or for the protection of the privileges that belong as a common right to all persons to whom the courts are open for the administration of justice.

7. SAME—DEPRIVING CITIZEN OF RIGHT TO EXERCISE LAWFUL TRADE.

In a government like ours it may be said that any act which would deprive a citizen of the power to exercise his lawful trade or privilege must be considered as working an irreparable injury, particularly when the wrong-doer is attempting to do an act clearly forbidden by the state and federal constitutions; and the protection of the writ of injunction should be allowed.

Rule to Show Cause why an Injunction *pendente lite* should not issue.

A. H. Leonard and E. Sabourvin, for complainant.
W. H. Rodgers, for the City.

BOARMAN, J. Article 258 of the constitution of Louisiana prohibits any monopoly. Article 248 invests the defendant city with power to regulate the slaughtering of cattle, etc., within its limits, provided no monopoly or exclusive privilege exist within the state. Nor shall such business be restricted to the land or houses of any individual or corporation; and provided, further, the place designated for slaughtering is approved by the board of health. By several ordinances, approved by said board, the city designated the place at which the slaughtering of cattle may be carried on, and prescribed in detail the regulations under which such business should be conducted.

The complainant, a citizen of France, whose trade and business is the slaughtering of cattle for food, desiring and intending to engage in such business in New Orleans, leased, with the privilege of buying, 'two squares of ground situated within the limits defined by said ordi-

nances, and proceeded to repair such buildings, and construct on said ground other buildings and improvements suitable for the trade in which he is engaged, investing in said improvements a considerable sum of money. Subsequently, on May 19th, an ordinance was passed by the council which is styled "An ordinance amending ordinance 7,336, as passed September 13, 1881, designating the places for slaughtering animals intended for food under article 248 of the constitution." The original ordinance provided that "it shall be lawful for any person or corporation to keep and maintain slaughter-houses, etc., within certain limits, under certain regulations." The amendment mentioned makes it *unlawful* to keep and maintain slaughter-houses within said limits prescribed in original ordinance, and under said regulations, "except permission be granted by the council of the city of New Orleans."

It appears that defendant corporation intends actively to enforce, or attempt to enforce, as against Barthet, the amended ordinance; that it is about to obstruct, hinder, and prevent him from carrying on his legal business in the limits already laid out in pursuance of article 248.

The complainant, alleging that, acting on the good faith of said articles and ordinances, he has acquired vested rights, and that the ordinance of May 19th is unconstitutional, brings a bill for injunction to enjoin and restrain the defendant from interfering in any manner with him in carrying on his business. Complainant prays, on final hearing, for an injunction absolute, and in the mean while has taken this rule to show cause why an injunction *pendente lite* should not issue. Defendant has filed no answer or made any denials, even in argument, of complainant's allegations.

The amendment of May 19th is, we think, unconstitutional, in the fact that if it is carried out, as the city attorney admits it will be, it will make Barthet's right to engage in a lawful business dependent on the arbitrary will of an individual or a body of individuals acting for the city. The city has no governmental or special power to prevent any one, who complies with the law regulating such business, from engaging in any lawful business he prefers.

The fourteenth amendment to the United States constitution forbids any state to make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, and prohibits a state from denying to any person "within its jurisdiction the equal protection of the law." That amendment does not enlarge the rights of persons; it clearly recognizes and emphasizes principles imbedded in the common law, and which underlie the structure of all free governments.

The right to grant permission to A. to carry on his lawful business carries with it necessarily the power to deny permission to B. to exercise the same privilege. The complainant is entitled, in common with all persons, to equal protection. Applying this principle to this case,

as it is made up by the bill and admissions of the city's counsel, Barthet is entitled to carry on his trade within the limits already laid out by the city in pursuance of the articles herein cited. If the city council, as the matter now stands, can prevent him from so doing simply because he has not their permission, then he has not that equal protection of the law guarantied in the constitution. The ordinance of May 19th transcends not only the limitations on legislative authority presented in the constitutions of the federal and state governments, but in our opinion it transcends those limitations, also, which spring from the very nature of free government.

The city council has the right, generally, in the exercise of governmental powers, such as belong to municipal corporations, to regulate the business of slaughtering animals for food; but under the articles 248, 258, state constitution,—responsive as those articles are to a public sentiment long offended in this city by oppressive monopolies in the slaughtering of cattle for food,—it must be apparent that the city cannot, directly nor indirectly, prohibit the business of this complainant under the pretense of exercising an ordinary governmental police power. It is clear that those articles were intended to prohibit all monopolies, and to limit rather than to enlarge the police powers of the city in relation to slaughtering cattle, etc., and if the city can refuse to permit Barthet to carry on his business, it can adopt the same course with others. By giving its permission to an individual or to a corporation, and refusing it to all others, a monopoly could be established by the favored suitor. An ordinance which permits one person to carry on an occupation within municipal limits, and prohibits another who had an equal right from pursuing the same business, is void. So, also, is an ordinance which alleges the rights and privileges conferred by the general law of a state. Cooley, Const. Law, 243, 245-247, 155, 202, 491.

If the amendment of May 19th becomes operative as a law, the investment made by Barthet, on the faith of the law existing when he erected his buildings, will be lost or greatly diminished in value, and his privilege, which is of more value, may be wholly destroyed by the refusal of the city. It is urged in argument that the corporation is a legislative body, endowed with police powers, to be exercised with absolute discretion; that this court has no power to control or limit its action in directing when, and upon what particular lot in the territory laid out and defined by the city, Barthet, or any other person following the same business, may locate and carry on his business of slaughtering animals for food. The proposition of the city attorney, in view of the many cases that have been decided by the state and federal courts, in which just such assumptions of power have been contended for and denied to municipal authorities, need not now be considered, further than to say that the court does not think the proposition maintainable under the law and facts found on the hearing of this bill.

The city does not deny the equity of the bill, nor does she deny that she intends to hinder and prevent Barthet from carrying on his business in the territory laid out; but it is contended that in these proceedings an injunction will not be allowed because the complainant has an adequate remedy at law; that if he is damaged he can recover fully at law. It is true that the sixteenth section of the judiciary act prohibits suits in equity when there is a plain, adequate, and complete remedy at law; but in *Boyce's Exr's v. Grundy*, 3 Pet. 210, the court said, referring to that section, that "it is merely declaratory on the subject of legal remedy. It is not enough that there is a remedy at law; it must be plain and adequate; or, in other words, *as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.*" It does not appear that the adoption of the statute mentioned has impaired the jurisdictional powers of the equity courts of the United States for the protection of the property of individuals, or the privileges that belong, as a common right, to all persons to whom the courts are open for the administration of justice. The jurisdictional power of these courts is certainly not less now than it was in England at the time of the adoption of the constitution. The English authorities show that the granting or continuance of an injunction cannot be controlled by any inexorable rule, but that such orders must rest largely in the sound discretion of the court, to be governed in each case by the equitable rights of all parties, as well as by the nature and effect of the relief sought in the particular case. To grant such writs to prevent an irreparable injury is quite common.

The defense of the city is not based upon any denial that she is going to do the thing complained of; but she seems to rely wholly upon some several petitions, signed by several citizens living in the neighborhood of the place where Barthet has begun his business, protesting against allowing him to proceed with his business. These petitions, if they had been seasonably presented to the council, might have caused the particular place occupied by Barthet's buildings to be not included in the limits; but the counsel for the city would hardly be considered serious should he rest the city's defense on the merits of the bill, upon such petitions or papers. An injunction, however, is not, in the federal courts, issued as a matter of course; and it may be well to consider more definitely the matter as to the jurisdictional power of the court to issue the injunction prayed for. The buildings and improvements were erected in the view of the city for the well-known purposes of Barthet's trade. Would it not be inequitable, and violative of a proper, efficient, and practical administration of justice, to allow the city now to stop him in the exercise of his lawful business, in the gratification of his legal rights, and to turn him over to an action at law, against whoever should become instrumental in executing the city's unconstitutional ordinance, for the recovery of damages. If such is the effect of the sixteenth section of the judiciary act, the courts of the United States will find themselves often without

power to afford to suitors a practical and efficient administration of justice.

We do not think the act complained of is an attempt at a mere trespass. The mischief and injury it would work in this case cannot be repaired as efficiently or as adequately by an action at law for damages as in the case of a mere trespass upon property. This is not a case where the city may or will have an ultimate right to do the thing complained of, as sometimes happens when a city is attempting to do a thing lawful to be done, but prematurely; like, for instance, the taking of property for streets before making the compensation required by law; but the city can never do the act complained of without violating Barthet's constitutional rights. In a government like ours it may be said that any act which would deprive a citizen of the power to exercise his lawful trade or privileges must be considered as working an irreparable injury, particularly when the wrongdoer is attempting to do an act clearly forbidden by the state and federal constitutions.

Our opinion will be better understood when we say that the city authorities have no power, legislative, judicial, or administrative, to pass the ordinance complained of; because the power, by whatever name it may be called, delegated to the city in articles 248, 258, as far as Barthet is now concerned, was exhausted when the city officials laid out the limits in which it was declared lawful to slaughter animals for food. The bill shows that an unlawful act is threatened against the privileges of complainant. In our opinion, such an act, if carried out, would not only work an irreparable injury to Barthet, but would be a decided step, whatever may be the motive, causing the council to move in the matter, in the direction of allowing a monopoly in the slaughtering of animals for food in this city.

The injunction will be operative *pendente lite*.

UNITED STATES v. IRON SILVER MIN. CO.¹

(Circuit Court, D. Colorado. July 28, 1885.)

1. MINERAL LAND—FRAUDULENT PATENT—EVIDENCE.

Before a court will set aside a patent to mineral land on the ground of fraud, it must appear, not merely that the applicant was mistaken as to the character of the land, but that the representations in regard thereto were falsely and fraudulently made; and this fact must clearly appear.

2. SAME—WHAT WORK IS TO BE CONSIDERED IN ESTIMATING AMOUNT ACTUALLY DONE.

Work done for the purpose of discovering mineral, whatever the particular form or character of the deposit which is the object of the search, is within the spirit of the statute.

¹Reported by Robertson Howard, Esq., of the St. Paul bar.

On Final Hearing.

A. W. Brazee, U. S. Dist. Atty., for the United States.

C. G. Symes, for defendant.

BREWER, J. This is a proceeding in equity to set aside patents for two placer mines, known, respectively, as the Stinson and the Fanchon placer mines. On demurrer the bill was sustained. See 5 McCrary, 266; S. C. 16 FED. REP. 810. See, also, supporting the opinion therein expressed, *U. S. v. Minor*, 5 Sup. Ct. Rep. 836, decided in the supreme court, March 30, 1885. Answer was thereupon filed, and the case is now submitted on pleadings and proof. The charge in the bill is fraud in obtaining these patents. It is charged that the ground embraced within these patents was not placer mining ground; that several valuable leads or lodes containing mineral in rock or placer existed thereon; that both of these facts were known to the applicant and patentee; that the ground was covered with valuable timber; that he falsely and fraudulently represented to the land-officers that there were no veins, leads, or lodes, and that it was placer mining ground, and that he had done the requisite work.

The testimony discloses that in 1879 Sawyer, the patentee, prospected on this ground and located, having claimed to have discovered some four mineral veins. After he had filed and recorded his location certificate he became embarrassed financially, and called on Mr. Stevens, now one of the principal owners of the Iron Silver mine, for assistance. There was a fine growth of timber on the premises. Mr. Stevens went over with him and examined. Upon his suggestion Sawyer determined to disregard the locations already made, and to file an application for a patent upon an enlarged territory as placer mining ground; Mr. Stevens promising to advance him money upon an agreement that when the patents were obtained the property should be conveyed to him, less certain specified portions. In pursuance of this determination applications were made, in which it was set forth, that there were no known leads or lodes, proofs were duly made, and in due course of time patents issued, and thereafter conveyance of the ground to the Iron Silver Mining Company, in accordance with the prior arrangement.

I think it obvious from the testimony that the main object of Stevens was to secure the timber. As the proofs were duly and legally made, the proceedings apparently all regular, and no adverse claims presented to the ground finally patented, I take the rule to be that, before a court will set aside a patent, it must appear, not merely that the applicant was mistaken, but that the representations were falsely and fraudulently made, and that this fact must clearly appear. Of course the first question is, was this placer mining ground? It appears from the testimony that before Sawyer was on the premises, during some two or three years, a little placer mining had been done in Buffalo gulch, which runs up through part of this territory. There was but a limited supply of water in the gulch, flowing par-

tially from a spring, and partially fed from the melting snow. This supply was exhausted before the summer was ended, so that the amount of placer mining done was small, and the proceeds slight.

It appears, also, from the testimony that water could be brought by digging a ditch of some considerable length, and probably at considerable expense. As a matter of fact, since the patent was issued there has been but a trifling amount of placer mining done. Of the many witnesses examined, some call it placer mining grounds, others say that it is not. Witnesses differ, also, as to length and expense of the ditch necessary to bring water into the ground. In view of this conflicting testimony, I do not think that it can be fairly said that it is satisfactorily proved that the ground was not placer mining ground, or that the supply of water was so remote as to make it financially impracticable to bring enough into the ground for mining purposes.

I should have much less hesitation in finding for the defendant on this, were it not for the evident fact, hereinbefore referred to, that the main interest that Stevens, who furnished the money, had in the matter, was in securing the title to this timber. Still, though the parties evidently considered the timber of the most immediate value, it does not follow that they did not in good faith regard this as placer mining ground, and believe the water could be obtained at a reasonable expense.

Again, it is argued by the learned counsel for the government that the fact that Mr. Sawyer had sunk these prospect holes, and filed and recorded location certificates, estopped him from saying there were no known veins, leads, or lodes in the premises. I am not willing to accept this proposition as law, and I am satisfied from the testimony that in these prospect holes he had not discovered any well-defined leads or lodes, but was simply experimenting, hoping by further work, from the indications, to reach such veins. The testimony of the deputy surveyor who surveyed the premises and examined these holes is very clear and positive.

One other question remains. The applicant represented that over \$500 worth of work had been done, and the deputy surveyor certified to this fact, and I see no reason, from the testimony, to doubt that this was correct. But I think that included in this work was that done in sinking these prospect holes, when the applicant was evidently trying to find veins, leads, and lodes, and it was earnestly contended that no work done in that direction and with that purpose ought to be counted in the application for the ground as placer mining ground. As counsel for the government well says, suppose the applicant had built on each tract a dwelling-house at a cost of over \$500, having done no work of any kind looking to the discovery of mineral; would that come within the spirit of the law? Does it not rather contemplate work done for the purpose of discovering mineral? and, if so, may work done in the hope of discovering a vein or lode be counted as work done for the purpose of securing a placer mine? With some

hesitation I think it may fairly be held that work done for the purpose of discovering mineral, whatever the particular form or character of the deposit which is the object of search, is within the spirit of the statute; and as evidently more than \$500 worth of such work was done, it cannot be said that the representation made in this respect was false and fraudulent.

In conclusion, while perhaps at times frauds are perpetrated on the government, and the title to lands improperly taken, yet when, as in this case, the facts as to the character of the ground, the kind of work, as well as the amount done, are fully known to the officers of the government, I think that the courts should be slow in disturbing the title conveyed; and before they do, they should be clearly satisfied that the applicant has intentionally concealed material facts, or made false and fraudulent representations. Questions of doubt should be resolved in favor of the applicant. Entertaining these views, I am constrained, upon the testimony, to order a decree dismissing the bill.

ROBERTS, Receiver, etc., v. HILL, Adm'r, etc.

(Circuit Court, D. Vermont. August 5, 1885.)

1. NATIONAL BANK—CONTEMPLATION OF INSOLVENCY.

A bank is in contemplation of insolvency when the fact becomes reasonably apparent to its officers that the concern will presently be unable to meet its obligations, and will be obliged to suspend its ordinary operations.

2. SAME—FRAUDULENT PREFERENCE—INTENT.

The intent to give a preference is presumed when a payment is made to a creditor by a bank whose officers know of its insolvency, and therefore that it cannot pay all of its creditors in full.

3. SAME—MOTIVE FOR GIVING PREFERENCE.

Where property is transferred by a bank to a creditor to avoid paying him the amount due him, and thus postpone the failure of the bank, it is none the less fraudulent and void.

4. SAME—ROBERTS v. FIRST NATIONAL BANK OVERRULED.

On rehearing, former opinion (23 FED. REP. 311) is overruled, and transfer held fraudulent and set aside.

On Rehearing. See S. C. 23 FED. REP. 311.

Roberts & Roberts, for orator.

Jed. P. Ladd and Henry C. Adams, for defendant.

Before WALLACE and WHEELER, JJ.

WALLACE, J. Upon the rehearing of this cause, ordered by the judge who heard it originally, we have reached the conclusion that the transfer which is assailed by the bill should be set aside. The suit is brought by a receiver of the bank to set aside the transfer of a note for \$8,031, the property of the bank, made to one McGregor, the defendant's intestate, on the twentieth of February, 1884. It is founded on section 5242, Rev. St., originally section 52 of the act of

June 3, 1864, to provide a national currency, etc., commonly known as the "National Bank Act," which is as follows:

"All transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages; * * * and all deposits of money, bullion, or other valuable things for its use, or for the use of any of its shareholders or creditors; and all payments of money to either,—made after the commission of an act of insolvency, or in contemplation thereof, with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view of a preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void," etc.

The scheme of the act, of which this section is one of the provisions, contemplates a ratable distribution of the assets of national banks among their creditors in the event of insolvency; and the intention of congress, to secure equality among creditors by the appropriation of all the assets of an insolvent bank for a ratable division, is so dominating that the courts have held that a creditor cannot obtain a preference by adversary proceedings against the bank after insolvency has taken place. Accordingly, it has been adjudged that a creditor cannot acquire a lien upon the property of a national bank, after it has become insolvent, by a suit and an attachment of its property, although no receiver of the bank has been appointed; and that the attachment should be vacated upon the application of a receiver subsequently appointed, because it would be subversive of the theory of the national currency act to permit the creditor to obtain a preference thereby over the other creditors of the bank. *National Bank v. Colby*, 21 Wall. 609; *Harrey v. Allen*, 16 Blatchf. 29.

To effectually secure this equality among creditors the section in question substantially declares that all preferences made from the time when insolvency actual or potential occurs, shall be void. We are therefore to inquire whether the bank here had committed an act of insolvency, or was in contemplation thereof, and whether the transfer of the note in controversy was made with a view to give a preference to the creditor receiving it over the other creditors of the bank. The proofs show that the bank was insolvent at the time of the transfer and had been for a long time, but had succeeded in meeting all its obligations and in maintaining its credit, without any apparent embarrassments, until January 12, 1884, when a run occurred, which continued during that day and the following business day. The officers of the bank were able to borrow between \$50,000 and \$60,000, and met all the calls upon the bank and the run substantially subsided. From that time until early in April following, when the bank failed, its business was continued ostensibly as usual; but some of its depositors were apprehensive and withdrew their deposits; and in a number of instances securities were transferred by the officers of the bank out of its assets to depositors, who were willing to accept them in lieu of their money. The officers always represented that the bank was solvent, and always paid depositors who insisted upon being paid,

and undoubtedly supposed that there was no immediate danger of a suspension if the confidence of the depositors could be regained. Nevertheless, they knew that the situation was extremely critical and that the bank was hopelessly crippled; and although they supposed a failure might be deferred for a considerable period, they knew it might be precipitated at any time. The capital of the bank, \$100,000, had been wholly absorbed in losses, represented, in part, by over \$60,000 of the paper of the president, \$38,000 of the paper of the cashier, and the paper of one Marshall for between \$70,000 and \$80,000. The debt of the president accrued in 1880. The Marshall debt, as early as in the spring of 1879, was from \$40,000 to \$50,000, and was then known by the officers of the bank to be precarious; but the bank had attempted to carry it for Marshall, and it gradually augmented. At the time of the failure the provable debts against the bank were about \$290,000, and its whole available assets were \$115,618, exclusive of the paper of Marshall, which was good for about \$5,000, and the paper of the president and cashier, both of whom were insolvent, and of about \$20,000 of other doubtful assets.

Mr. McGregor held certificates of deposit, bearing interest, for the aggregate sum of \$8,850. He became solicitous in consequence of the run, and shortly before the transaction in question, he called upon the officers of the bank with his certificates. They told him he could have his money if he wanted it, and that the bank was all right. He went away satisfied, but returned on the twentieth day of February, and they then prevailed upon him to take the note in suit as security for the payment of his principal, paying him the interest then due upon his certificates. The circumstances which indicate that he supposed the bank to be insolvent, or in contemplation of insolvency, are that he knew there had been a run upon the bank, and was unwilling to allow his money to remain without security, although the affairs of the bank had apparently resumed their normal condition, and the officers represented the bank to be solvent, and were ready to pay him his deposits if he insisted upon payment.

Insolvency, as ordinarily defined, is that condition of affairs in which a merchant or business man is unable to meet his obligations as they mature in the usual course of his business. *Thompson v. Thompson*, 4 Cush. 127; *Vennard v. McConnell*, 11 Allen, 555; *Wager v. Hall*, 16 Wall. 599. An act of insolvency takes place when this state of affairs is demonstrated and the merchant has actually failed to meet some of his obligations. A bank is in contemplation of insolvency when the fact becomes reasonably apparent to its officers that the concern will presently be unable to meet its obligations, and will be obliged to suspend its ordinary operations. It is not open to fair doubt but that the officers of the bank here contemplated failure as imminent. They doubtlessly hoped to defer the event indefinitely by concealing the real condition of affairs; but they took counsel of their hopes, and not of their judgment, when they contemplated any pro-

longed postponement. The question, then, is whether the transfer was preferential, and made with that view. An intent to give a preference is presumed when a payment is made to a creditor by a debtor who knows his own insolvency, and therefore knows that he cannot pay all his creditors in full. A preference is the natural and probable consequence under such conditions. Here the active and paramount motive on the part of the officers of the bank was to avoid having to pay McGregor his money, and thus to postpone the failure of the bank; but this circumstance does not alter the legal quality of the act. They made the transfer with a view to give him a preference, if, in view of the situation, they supposed it would result in a preference to him, notwithstanding that they were mainly influenced by considerations of self-interest. In the language of SHAW, C. J., in *Denny v. Dana*, 2 Cush. 172: "The intent to prefer is essential, but every person is to be presumed to intend the natural and probable consequences of his own acts. It does not rebut this intent to show that the debtor has also another motive to the proceeding, namely, an expectation of pecuniary or other benefit to himself by means of further loans of money, and being enabled thereby to continue his business."

The proofs indicate that McGregor took the transfer with a view of obtaining a preference over the other creditors of the bank. He took it with this view, if he supposed the bank to be insolvent. It was held in *Case v. Citizens' Bank*, 2 Woods, 23, in a case arising under this statute, that it is not necessary, in order to invalidate the transfer, that the party to whom it is made knows of or contemplates the insolvency of the bank which makes the transfer. This decision was based upon a decision of Mr. Justice STORY in *Peckham v. Burrows*, 3 Story, 544, in which it was held, under the bankrupt act of 1841, that, to constitute a conveyance "in contemplation of bankruptcy," it was not necessary that the creditor should know of the debtor's insolvency, or should co-operate with him to obtain a priority of payment. It is not necessary to adopt the doctrine of *Case v. Citizens' Bank* for present purposes, and there are good reasons why it should be adopted with great reluctance. A case may be supposed where a bank is hopelessly insolvent, and is known to be so by its officers, and when any payment made by it will, as they know, necessarily result in a preference to the person receiving it; and yet, if made in the ordinary course of business, as for instance to a customer, who, in ignorance of the condition of the bank, continues his dealings and makes daily deposits, and draws out checks daily, it would be extremely inequitable to compel the latter to pay it back. Under such circumstances the bank or its creditors would receive the benefits of his deposits, while he would be compelled to repay what he had drawn out innocently, and in the usual course of business. It would be a harsh statute which would compel a creditor or depositor, under such circumstances, to yield up the payments he received in good faith. A construction which would give such an effect to this statute ought not to be indulged, in the ab-

sence of clear and explicit language requiring it. But the transaction on the part of McGregor was not an ordinary one. It is extremely unusual for a depositor of a bank to demand security as a condition of allowing his money to remain. Such a demand suggests at once the belief in his mind of the existence of an exceptional state of affairs in a financial institution. A bank ordinarily represents financial *stamina* of the first order. It is trusted, without security, as the safest custodian or debtor that can be selected. Its resources consist of cash, or securities which can readily be converted into money, in order to meet instantly any demands which may be made upon it. Even when it is subjected to the strain of an extraordinary emergency, like a run, it is supposed that a solvent bank will be able to provide itself with funds to carry it safely through. When a depositor asks a bank to give him security for the payment of his deposit, the inference is almost irresistible that he distrusts the solvency of the bank. The only reason why McGregor called for his deposits was because he feared the bank was not safe. He could not be reassured of its solvency by the representations of the officers. He could be satisfied by nothing except the money or adequate security.

Following the decisions under the analogous provisions of the bankrupt act, invalidating preferential transfers by insolvent debtors to creditors, it should be held here that the transaction was one outside of the ordinary course of business, and the circumstances such as to impute to McGregor reasonable cause to believe that the bank was insolvent.

WHEELER, J. To avoid this transfer it must have been made after the commission of an act of insolvency, or in contemplation thereof, and with a view to prevent the application of the assets of the bank to the redemption of its circulating notes and ratable distribution among its creditors, or to the preference of the defendant's intestate to other creditors. Rev. St. §§ 5242, 5236. There is no limitation of time within which the transfer must have been made; nor requirement of reasonable cause of the transferee to believe in the insolvency of the bank; nor provision that the fact that the transaction is out of the usual course of business, should be *prima facie* evidence of fraud, applicable to this transaction, as there was to transfers of a bankrupt's property under the late bankrupt act. Sections 5128, 5129, 5130. Insolvency is not enough; the statute does not make transfers after insolvency void. There must be an act of insolvency; or such a state of insolvency, as an existing fact, as to make it apparent that the creditors cannot be paid in full, and that a distribution of the assets among the creditors under the statute will take place. Less insolvency than this could not fairly be said to be capable of being contemplated and acted upon to prevent such distribution. There had been no act of insolvency at the time of this transfer. The bank had met and satisfied all its creditors up to that time. The case must turn upon the

fact of insolvency and its imminence. That the bank was, in fact, insolvent, appears very clearly. Whether it was so desperately insolvent that the officers could not help seeing that failure must come, and a distribution of assets follow, is to be determined upon the evidence. The reported cases do not furnish any very clear guide for a case like this. In none of them was there any doubt about the fact that all knew that the bank must go down.

In *Bank v. Colby*, 21 Wall. 609, the bank was already in the custody of the secretary of the treasury. In *Case v. Citizens' Bank*, 2 Woods, 23, a sudden disaster by the failure of others had broken the bank at once, to the knowledge of all; and in *Harvey v. Allen*, 16 Blatchf. 29, the circulating notes of the bank had gone to protest, and this fact had been certified, and proceedings to close the bank taken upon it. There was no question, nor room for any, but that those whose acts were in question knew that they were not dealing with the assets of a bank in a continuing business, but with a wreck. Here the bank was doing a large business, which continued for months; its insolvent condition had come upon it gradually, without any striking thing happening to at once command attention, except the run upon it, which showed that its reputation for soundness was affected. When the condition that would avoid preferences once existed, it would avoid all payments in diminution of assets made afterwards as well; and such fact, reaching so far and so many, ought not to be found except upon signal proof, so clear as not to be liable to be found one way as to some to be affected, and in another way as to others, producing inequality where the whole object is equality. Not that current business transactions, which would not affect the volume of assets, are necessarily to be opened; but all applications of the assets, either in reduction or security of existing debts, are placed by the statute upon the same footing of being utterly void.

The officers of this bank were largely interested in it as stockholders and otherwise, and were largely indebted to it personally. The insolvent condition of the bank rested largely upon their own inability to pay what they owed it. They were very anxious to save the bank, and put forth every effort to do so, and hoped to succeed. They transferred the note in question to the defendant's intestate to quiet him, because he insisted upon security, and not because they had any desire to pay him in preference to others. They did this to save the bank, and not to prefer him. This was before thought to be decisive in favor of the validity of the transfer. *Roberts v. Hill*, 23 Fed. Rep. 311. But the available assets of the bank were so small in comparison with its liabilities that, had the officers stopped and considered its situation, they must have seen that ultimate failure was inevitable. Impelled by their interest and desire to save the bank and themselves in standing and credit so long as they could, they bent all their efforts to that end. Still, the hopeless insolvency of the bank was within their contemplation, if they would contemplate it. That they

did not, should not, it seems, take the case out of the statute. The insolvency of the bank was before them, and, with it before them, they gave this creditor a preference. This now appears to be within the statute. I concur, therefore, in the entry of a decree for the plaintiff setting aside the transfer of this note.

UNITED STATES v. CENTRAL NAT. BANK.

(Circuit Court, S. D. New York. July 24, 1885.)

1. INTERNAL REVENUE TAX—NATIONAL BANK—TAX IMPOSED BY STATE LAW ON STOCKHOLDERS.

When the taxes imposed by a state law are imposed upon the stockholders of a national bank, and not upon the corporation, the failure of the bank to return or pay a tax upon such portion of its dividends declared within the year as was represented by the amount paid for such state tax, will not entitle it to exemption to that extent from the internal revenue tax imposed by the act of congress of July 13, 1866, (14 St. at Large, 138.)

SAME—DIVIDENDS—MISTAKE—DEFALCATION OF CASHIER.

When a bank has declared a dividend as of earnings for the current year, and paid it as such to stockholders, whether in money or in scrip, proof, for the purpose of avoiding the tax, that no earnings had, in fact, been made, because of a defalcation by the cashier that was afterwards discovered, is not admissible.

On Writ of Error.

Elihu Root, for plaintiff.

Martin & Smith, for defendant.

WALLACE, J. This is a writ of error brought to review the judgment of the district court overruling the plaintiff's demurrer to the answer of the defendant. The plaintiff sues for internal revenue taxes imposed by section 120 of the act of congress of June 30, 1864, as amended July 13, 1866, (14 St. at Large, 138,) on dividends declared and paid by the defendant to its stockholders. That section provides:

"That there shall be levied and collected a tax of five per centum on all dividends in scrip or money, thereafter declared due, * * * to stockholders, * * * as a part of the earnings, income, or gains of any bank, trust company," etc.

The complaint contains four counts or separate causes of action, differing only in respect to dates and amounts, and setting out respectively the declaration of the dividends by the defendant to its stockholders in each of the years 1866, 1867, 1868, and 1870, whereof no return was made to the assessor, and whereon no tax was ever paid to the collector. The answer, as is permitted by section 500 of the Code of Civil Procedure of this state, consists of several defenses by way of new matter to each count of the complaint, except to the fourth count, as to which a single defense is alleged. The second de-

fense to each of the first three counts, as well as the single defense to the fourth count, avers that in the year mentioned in the count the defendant was required by the laws of the state of New York to retain from the dividends paid to its stockholders the amount of the municipal tax levied by the state against such stockholders upon the value of their shares of the capital stock of the defendant, and to pay the same over to the proper authorities of the state, and deduct the amount from the dividends paid to its stockholders. It then states the amount thus retained and paid, and alleges that the defendant did not include the same in its statement of dividends because the same was a legitimate expense of its business, and no part of its dividends. The third defense to each of the counts (except the fourth) alleges that in the year mentioned in the count the defendant paid dividends to its stockholders out of what it then supposed to be profits, but what was in reality its capital, because it had sustained losses through the embezzlement of its funds by its cashier in an amount specified, which losses were concealed by the cashier and hence unknown to its officers when the dividends were paid; and that the defendant erroneously returned the amount thus paid as dividends declared within the year, and paid the dividend tax thereon, and thereby the defendant actually paid to the plaintiff a large sum as a tax due from it upon dividends when nothing was due. The defense then avers that if defendant was not entitled to treat the amount paid for municipal taxes as a legitimate expense of its business, it is entitled to have deducted from the amount of the tax chargeable to it the amount of tax which it paid through ignorance of the embezzlement of its cashier.

Concise stated, the substance of the second defense is that the defendant did not return or pay a tax upon such portion of its dividend declared within the year as is represented by the amount it paid for municipal taxes against its stockholders under state laws during the year; and the substance of the third defense is that, although the defendant declared and paid dividends during each year to its stockholders, it ought not to have done so, because no dividends were earned in fact, although its officers supposed otherwise. The second defense is not good, because the sum paid by the defendant for municipal taxes was in no sense taxes of the defendant, or a legitimate item of its expenses, during the year. The averments show that the taxes imposed by the state laws are imposed upon stockholders and not upon the corporation, and the provisions of the state law which require the corporation to retain the amount assessed as a tax against each stockholder merely provide a mode of collecting the stockholders' tax. The plaintiff is not concluded by the averments of the answer in respect to the force and effect of the state laws, or the duties imposed upon the defendant thereby. These are conclusions of law, and as such are not admitted by a demurrer. This court takes judicial notice of state statutes, and they need not be proved. Chapter

761, Laws 1866, which were in force during the years in question, authorizes the taxation of stockholders of banks upon the value of their shares of stock, and makes it the duty of every bank to retain so much of any dividend or dividends belonging to its stockholders as shall be necessary to pay any taxes assessed in pursuance of that act. In legal effect the retaining by the bank of the amount of the taxes assessed against the stockholders is the same as though the bank should pay the whole dividend to the stockholders, and the stockholders should then hand back to the bank the sum due from them for municipal taxes, and authorize the bank to pay it.

The third defense is not good, because section 120, by which the taxes sued for are imposed, does not permit an inquiry into the facts whether a dividend which has been declared was actually earned or not. The tax is laid upon the dividend as declared, and the declaration concludes the corporation in respect to the amount for which it is liable to be taxed. The amount declared by the corporation to be due to its stockholders as dividends, furnishes the obvious standard and the only safe criterion for the assessment of the tax in order to prevent fraudulent evasion. The same construction is to be placed upon this section which is to be given to section 122 of the same act, imposing a tax upon dividends declared by railroad, canal, and other companies to their stockholders as part of the earnings, profits, and income or gain of such companies. In respect to that section, it was said by the supreme court in *Bailey v. Railroad Co.* 106 U. S. 109, 115, S. C. 1 Sup. Ct. Rep. 62, MATTHEWS, J., delivering the opinion:

"We have no hesitation in saying that, in reference to a dividend declared as of earnings for the current year, and paid as such to stockholders, whether in money or in scrip, no proof would be admissible for the purpose of avoiding the tax that no earnings had, in fact, been made. The law conclusively assumes, in such a case, that a dividend declared and paid is a dividend earned."

For these reasons it must be held that the court below erred in overruling the demurrer to both classes of the defenses. The judgment is therefore reversed, with costs, and the case is remanded to the district court with instructions to enter judgment for the plaintiff sustaining the demurrer.

HENNEQUIN and others v. BARNEY.

(Circuit Court, S. D. New York. July 25, 1885.)

1. STATUTE OF LIMITATIONS—CODE CIVIL PROC. NEW YORK, §§ 91, 100—ABSENCE FROM STATE.

When a collector of customs has departed from and remained out of the state of New York, where he has been sued to recover certain duties illegally exacted, for several successive periods after some of the causes of action for duties accrued, and before the commencement of the suit, which, taken together, amount to 12 months, such period of 12 months is to be added to the six-years limitation prescribed by the New York Code of Civil Procedure, §§ 91, 100, within which the action is barred.

2. ACTION TO RECOVER CUSTOMS DUTIES ILLEGALLY EXACTED—FORMER ACTION FOR PART OF DEMAND.

A plaintiff cannot split up a single and entire cause of action, and make it the subject of different suits. *Bartells v. Schell*, 16 FED. REP. 341; *Secor v. Sturgiss*, 16 N. Y. 548; and *Baird v. U. S.* 96 U. S. 430, followed and applied.

Exceptions to Findings of Referee.

A. W. Griswold, for plaintiffs.

Elihu Root, for defendant.

WALLACE, J. Exceptions have been filed by both parties to the findings of the referee to whom this action was referred under an order of the court upon the consent of the parties. The action was brought to recover alleged excessive duties on "charges and commissions" exacted by the defendant, as collector of customs at the port of New York, upon importations made by the plaintiffs between March 21, 1861, and June 30, 1864. The action was commenced in a state court by the service of a summons on the defendant, April 16, 1868, and was thereupon removed to this court. The defendant pleaded (1) the general issue, and (2) the statute of limitations. The plaintiffs replied that defendant departed from and resided out of the state for several successive periods, amounting in the aggregate to 12 months, and that the suit was brought within six years, and 12 months after the cause of action accrued. Defendant rejoined, denying that defendant departed from and resided out of the state for several successive periods, amounting in the aggregate to 12 months, etc. It appears by the bill of particulars and the evidence that plaintiffs' cause of action for the recovery of part of the duties in controversy accrued more than six years prior to the commencement of the action, but within six years, and 12 months prior. The referee has reported in favor of the plaintiffs as to these duties, and the first question raised by the defendant's exceptions to his report relates to the correctness of this finding.

As is conceded by counsel for both parties, the case turns as to this point upon the construction and meaning of the state statutes of limitation enacted in 1851, and being sections 91 and 100 of the Code of Procedure of that year. Section 91 provided that an action upon a contract, obligation, or liability, express or implied, (except a judg-

ment or decree, or a sealed instrument,) should be commenced within six years after the same had accrued. Section 100 provided that if, when the cause of action accrued against any person, he should be out of the state, the action might be commenced after the return of such person into the state; and if, after such cause of action should have accrued, such person should depart from and reside out of the state, the time of his absence should not be deemed or taken as any part of the time limited for the commencement of the action. Under the last section it was well settled by the decisions of the state courts that successive residences out of the state could be accumulated. The evidence shows that the defendant did depart from and remain out of the state for several successive periods after some of the causes of action for duties accrued, and before the commencement of the suit, which, taken together, amounted to the period of 12 months; that these absences were not a temporary departure, followed by an immediate return, but that he was not absent with any intent to change his domicile, and his domicile was, during these periods, at Kingsbridge, in this state. The question is whether it was not incumbent upon the plaintiff to show more than this, and whether, within section 100, a person resides out of the state during the period when his domicile is within it. It was held in *Harden v. Palmer*, 2 E. D. Smith, 172, 175, that, although the statute distinguishes between simply departing from and residing out of the state, it was not intended to apply only to cases where a party has lost his legal residence here for all purposes, and that the word "reside," as there used, means a material absence from the state, as contradistinguished from a temporary departure followed by an immediate return.

Whatever view might be reached if the question were an open one in this court, its consideration is foreclosed by the decision of this court, BLATCHFORD, J., in *Dale v. Barney*. No opinion was written in that case, but the question was presented, as it is here, upon exceptions to a referee's report, and the referee had carefully considered it and expressed his views at large. The court apparently adopted the opinion of the referee. The facts, the findings, and the exceptions were precisely those now before the court, and the decision then made, holding that the defendant's absences were to be added to the six years, must be deemed controlling in the present case. It is stated by counsel for the defendant that the case of *Kaupe v. Barney* presented the same question, and was decided by the same judge in a different way. This is not apparent from the record in that case, which has been handed up by counsel, and it would seem, from the recitals of the order entered in that case, that the exceptions were only presented for a *pro forma* disposition of the case.

The plaintiffs have excepted to the finding of the referee that they are barred from recovering certain of the duties sued for in the present suit by a recovery in a former suit against the defendant for a part of the duties on charges and commissions exacted by the de-

defendant upon the same importations and liquidated upon the same entries as those in the present suit. In *Bartells v. Schell*, 16 FED. REP. 341, it was held by this court that a plaintiff cannot split up a single and entire cause of action and make it the subject of different suits, and that in cases like this the liquidation upon each entry was the foundation of a single and entire cause of action against the collector. Following that decision, the referee correctly ruled that when the plaintiffs brought their action and recovered judgment for a part only of an entire and indivisible demand, they estopped themselves from subsequently bringing another action for another part of the same demand. See *Secor v. Sturgis*, 16 N. Y. 548; *Baird v. U. S.* 96 U. S. 430. The defense was permissible under the general issue. *Young v. Black*, 7 Cranch, 565.

The conclusions thus reached dispose of all the exceptions of the parties which are material for present purposes. Exceptions were raised upon the hearing before the referee to the admission of evidence, which it may be proper to consider in order to indicate the course to be pursued in similar cases which are now pending before the referee. Considerable evidence was introduced by the plaintiffs for the purpose of showing that during the pendency of the action the United States attorney, with the consent or acquiescence of the secretary of the treasury, made an agreement with the plaintiffs' attorney by which, in substance, it was stipulated that the defense of the statute of limitations should not be raised in this case, and a number of other cases of a similar character. All this related to matters quite outside the issues presented by the pleadings, and for this reason, and without passing upon the question of the validity of such an agreement or its effect, it should be held that the objections and exceptions to the admission of this evidence are well taken. It is apparent, however, that in all the negotiations and correspondence between the attorneys and the treasury department, looking towards an adjustment of this and the other pending actions, the United States attorney only assumed to represent the department, and did not assume to represent the defendant personally. The defendant had long ceased to be a collector, but he was something more than the nominal defendant; and, within the case of *Andrae v. Redfield*, 12 Blatchf. 407, he could not be prejudiced by anything said or done by the government or its officials without his concurrence.

HOWE SEWING-MACHINE CO. v. ROSENSTEEL and others.

(Circuit Court, W. D. Pennsylvania. August 4, 1885.)

1. CONTRACT—EFFECT OF DEATH OF PARTY.

Where a contract creates between the parties merely a personal relation, the death of either party dissolves that relation.

2. SAME—CASE STATED.

A written contract between a sewing-machine company and W. recited a sale by the former to the latter of 100 Howe sewing-machines, for the price of which W. had given a series of notes; the company stipulating to accept, on or before their maturity, the amount due thereon in notes of sub-purchasers drawn to the order of W. and guarantied by him. The company was to ship to W. a specified number of the machines monthly, and W. agreed to sell them within a specified territory at the regular retail prices established by the company, and to deal only in its machines. After 15 machines (which have been paid for) were delivered, W. died. *Held*, that his undertaking was personal to himself, and the duty of further performance did not devolve on the administratrix of his estate.

At Law. *Scire facias quare executionem non.* Sur rule for judgment.

S. W. Cunningham, for plaintiff.

George C. Wilson, for defendant.

ACHESON, J. Conceding that the relationship between the Howe Sewing-machine Company and T. T. Wherry was not that of principal and agent, it still remains to be determined whether the agreement of February 11, 1884, established between them anything more than a personal relation which the death of the latter dissolved. This is the controlling question. The agreement recites that the company has sold to Wherry 100 Howe sewing-machines for \$2,500, and received in settlement his 11 specified notes, running from 6 to 16 months; the company stipulating to accept, on or before the maturity of said notes, the amount due thereon in notes taken in payment for sewing-machines sold by Wherry, on certain conditions, one of which is that the notes so applied shall be drawn to his order, and the prompt payment of the same guarantied by him; and the company agrees to ship to Wherry a specified number of the said machines monthly, beginning with February and ending with December, 1884. Then follow these provisions:

"The said T. T. Wherry agrees * * * to sell the said machines at the regular retail prices established by said the Howe Sewing-machine Company in the following territory, viz., Indiana, Pa.; and, further, * * * that he will not sell or deal in any other machine but the Howe."

Wherry died on April 26, 1884. Fifteen of the machines had then been delivered, and they have been paid for. Did the contract, in so far as it remained wholly executory at the time of Wherry's death, survive against the administratrix of his estate? This is quite unlike the case of *Wentworth v. Cock*, 10 Adol. & E. 42, in which it was held that the vendee's administrator was bound to receive and pay for

certain slate, for there the contract was simply an ordinary sale of goods deliverable at stated periods. But here the agreement contemplates and provides for the resale of the sewing-machines by Wherry. In principle our case is much nearer that of *Robson v. Drummond*, 2 Barn. & Adol. 303, where a contract by a coach-maker to furnish a carriage for five years and keep it in repair, was held to be personal to him, and therefore not assignable by him. How can the administratrix comply with the provisions of this agreement? How is the right to substitute the notes of purchasers for Wherry's notes to be exercised? In her representative capacity the administratrix cannot enter into the new engagements which such substitution involves, and she is not bound to assume any personal liability. The scheme throughout is incompatible with the official duties of the administratrix. The property would be withdrawn from the regular course of administration by force of that clause of the agreement which prescribes that the sale of the machines shall be at a particular place and at retail prices fixed by the sewing-machine company. The agreement, if obligatory upon the administratrix, would constitute her a vendor of sewing-machines for an indefinite period, and the settlement of the estate of the decedent might thereby be unduly postponed. Moreover, it is not difficult to perceive that while in form there was a sale by the plaintiff company to Wherry of 100 sewing-machines, yet the real intention of the parties was that the machines should be retailed for the benefit of the company, whose interest it is to extend the use of the Howe machine and multiply customers. The above-quoted clause of the agreement regulating resales is not restrictive merely, but Wherry expressly covenants "to sell the said machines at the regular retail prices," etc., in the territory named; and it is not a strained inference that he was selected for this service by reason of his peculiar fitness. Indeed, it seems to me that his personal performance of the agreement is of its very essence. In *Dickinson v. Calahan's Adm'rs*, 19 Pa. St. 227, where a lumber manufacturer contracted to sell to a lumber merchant all the lumber to be sawed at his mill during five years, the quantity to average 300,000 feet a year, for which he was to be paid as the lumber was delivered, and he died before the time had elapsed, it was held that his administrators were not bound to fulfill the contract for the remainder of the time. That was a well-considered case, and it furnishes a sound principle for adoption here. The principle is that where a contract creates between the parties merely a personal relation, the death of either party dissolves that relation. I am of opinion that the undertaking of Wherry was of a strictly personal nature, and that the duty of performance did not devolve upon his administratrix.

The rule for judgment is discharged.

CELLULOID MANUF'G Co. and others v. CEROLITHIAN COLLAR & CUFF Co.

(Circuit Court, S. D. New York. August 4, 1885.)

CONTEMPT—VIOLATION OF INJUNCTION—EVIDENCE.

An adjudication that a party is in contempt for violating an injunction is in its nature somewhat criminal, and the proof of such violation must be clear.

In Equity.

Frederic H. Betts, for plaintiff.

John P. Adams, for defendant.

WHEELER, J. The affidavits of the officers and agents of the defendant raise sufficient doubt as to violation of the injunction to make an adjudication that the defendant is guilty of contempt, which is in its nature somewhat criminal, and ought to be shown by clear proof, appear to be unwarranted.

Motion denied, without prejudice.

UNITED STATES v. FISH.

(Circuit Court, S. D. New York. June 26, 1885.)

1. NATIONAL BANKS—REV. ST. § 5209—MISAPPROPRIATION OF FUNDS.

The misappropriation of the funds of a national bank by an officer in the honest exercise of official discretion, in good faith, without fraud, for the advantage, or supposed advantage, of the bank, is not punishable; but if official action be taken, not in the honest exercise of discretion, in bad faith, for personal advantage, and with fraudulent intent, it is punishable.

2. SAME—LOAN MADE IN GOOD FAITH.

So far as the question of guilt or innocence of an officer under the statute is concerned, there is no distinction between a loan in bad faith for the purpose of defrauding the bank, and an application of money with like intent in a form other than a loan.

3. SAME—LOAN, WHEN MISAPPLICATION OF FUNDS.

A known abuse by an officer of discretionary power in making a series of loans which it is known the directors would not sanction, will constitute a criminal misapplication of funds of the bank, if done in bad faith, for private gain, and not in the exercise of honest judgment.

4. SAME—FALSE CREDITS.

Where an officer of the bank makes false credits in favor of a firm of which he is a member, and causes the money represented by such credits to be paid to his firm by being drawn out of the bank by his partner in pursuance of an understanding had with him that the money should be so drawn, the credit having been made for that purpose, he will be guilty of a violation of the statute.

5. SAME—PERSONAL TAKING OF MONEY.

It is not necessary to show that the officer personally took any money from the bank, or was personally present when any other person took away money, to render him criminally liable.

6. SAME—CREDIT OF GREATER SUM THAN CHARGED NOT A VARIANCE.

Where a count in an indictment charges an officer of a national bank with

having misapplied \$25,000 of the money of the bank, "by causing the said sum of \$25,000 to be credited to G. & W. on the books of the bank," etc., and the evidence shows a credit by a single entry of \$105,000, \$25,000 of which the jury found was a misapplication, *held*, not a material variance, and that he may be convicted on that count. BROWN, J., dissenting.

7. SAME — ALLOWING PARTNERS TO OVERDRAW ACCOUNT WITH INTENT TO DEFRAUD BANK.

Where an officer of a national bank, with an intent to defraud the bank, allows a firm, of which he is a member, to overdraw its account, he is guilty of a misapplication of the moneys of the bank, within the meaning of Rev. St. § 5209.

Motion for New Trial.

Elihu Root, U. S. Atty., for the United States.

Stanley, Clarke & Smith, for defendant.

Heard by WALLACE, BENEDICT, and BROWN, JJ.

BENEDICT, J. The defendant was indicted under section 5209 of the Revised Statutes. Having been convicted, he moved for a new trial. His motion has been heard before the three judges, and is now to be decided. The indictment contains 25 counts, upon 11 of which there was a conviction. Of these counts, the first, the fourth, and the twenty-second, each charges a separate misapplication of the money of the Marine National Banking Association by the defendant, who was president of the association. The remaining eight counts contain charges of making false entries in the books of the association. Of these, the eleventh and twelfth relate to the same entry: one count charging the entry as made with intent to deceive the bank examiner; the other, charging the entry as made with intent to defraud the association. The same is true of counts 13 and 14.

The charge in the first count, in substance, is that on the fifteenth day of February, 1884, the accused, being the president of the association, with intent to injure and defraud the association, for the benefit of himself and one Ferdinand Ward, did misapply of the money of the association the sum of \$25,000. The manner in which the misapplication was accomplished is stated substantially as follows: That the defendant, as president, caused to be credited on the books of the association, to the firm of Grant & Ward, of which the defendant and one Ferdinand Ward were members, the sum of \$25,000, when the firm was not entitled to be credited with the same or any part thereof, as the defendant then knew; and thereby the defendant placed at the disposal and subject to the order of his firm the said sum of \$25,000, fraudulently devising and intending to enable his firm to obtain and convert to its own use the sum of \$25,000. And this sum thereafter, by reason of the said credit, that firm did draw from the money of the bank and convert to its own use. The fourth count charges the misapplication of \$160,000 in a similar manner.

The twenty-second count charges the misapplication of \$350,000 on the fifth day of May, 1884, accomplished by the defendant, as president, with intent to defraud the bank, causing to be paid to the firm of Grant & Ward, out of the money of the bank, \$350,000 in

excess of the sums which the firm was entitled to draw and have paid, the defendant intending that the firm should appropriate to the use of that firm \$350,000 of the money of the bank to which they had no right.

The objections taken to the conviction upon these counts will be first considered. In order to an understanding of these objections some of the facts proved must be stated. The accused was president of the Marine Bank, and also a member of the firm of Grant & Ward. Grant & Ward kept two accounts in the Marine Bank, one of which was known to the directors and appeared in the average balance book; the other was designated "Grant & Ward Special," and did not appear in the average balance book. A separate pass-book was kept for this special account, and most of the entries in this book were made by the accused. He also made most of the deposits to the credit of this account. The credits charged in the first and fourth counts were credits to this account, and were entered in the special pass-book by the accused himself.

From time to time Fish and Ward arranged between themselves to obtain money from the bank for the use of their firm, outside the firm loans and discounts which went before the directors and were credited to the general account, and then Ward would prepare a series of notes for \$40,000 or less, amounting in the aggregate to the sum which Fish and Ward had arranged to obtain from the bank. These notes Ward procured to be signed by different persons,—Spencer, Armstrong, Doty, etc.,—who were clerks and messengers of Grant & Ward. The notes in form were ordinary stock notes. Each expressed a promise by the person whose name was signed to the note to pay the sum specified on demand, with interest at 6 per cent. per annum, to the Marine Bank, and recited that such person had deposited with the bank, as collateral security, bonds and stock described in the note. The notes thus procured were handed by Fish to Nathan Daboll, the assistant cashier of the bank, with a direction to enter up loans in conformity with the notes, and to credit the amounts to Grant & Ward, and in most instances Fish himself credited the amount in the special pass-book of Grant & Ward. Thereupon Daboll made in the loan and collateral book of the bank entries of loans to the signers of the notes, in conformity with the notes, the entries stating the maker of the notes as borrower, the time of the loan, and the deposit as collateral of the bonds and stock described in the stock note. A ticket for the amount was then prepared and signed by the cashier, the same being a direction to the note-teller to charge the sums specified in the ticket to loans, and to credit the same to Grant & Ward special. From the entries made in the note-teller's book in accordance with the ticket, the book-keeper, in the ordinary discharge of his duties, entered in the ledger a credit to the special account of Grant & Ward, and the sums were thereafter paid out on checks drawn by Grant & Ward.

By the indictment it was charged that the defendant was guilty of misapplying the moneys of the bank, because he, as president of the bank, with intent to defraud the bank, caused these sums to be credited on the books of the bank to his firm, knowing that his firm were not entitled to such credits, and the firm had drawn these sums from the bank when not entitled thereto. The defendant's answer was that his firm was entitled to have these sums credited, and to draw out these moneys, because he, in the exercise of his authority, as president of the bank, had loaned these sums to his firm.

Upon this motion it is first contended that the defendant was improperly convicted of misapplying these moneys, because what was done by him he did as president, and his acts, therefore, were mere maladministration. The decisions of the supreme court of the United States in the *Britton Cases* are cited as authority for this position. But the *Britton Cases* do not support this contention. In the *Britton Case*, reported in 107 U. S. 668, S. C. 2 Sup. Ct. Rep. 512, it is pointed out that an officer of a bank, having an intent to defraud the association, may by an official act misapply the moneys of the association, when the misapplication is not a mere application of the money for the benefit of the association to a purpose forbidden by law, but a criminal misapplication by which the association may be defrauded.

In the discount case, (108 U. S. 193, S. C. 2 Sup. Ct. Rep. 526,) attention is called to the omission from the indictment of an allegation that the discount was procured by fraudulent means, and the implication is that an official act done in bad faith, with intent to defraud the association, is punishable under section 5209. The conspiracy case (108 U. S. 199, S. C. 2 Sup. Ct. Rep. 531) contains nothing to the contrary of this. The proper conclusion to be drawn from the *Britton Cases*, taken together, seems to be this, viz.: that the honest exercise of official discretion in good faith, without fraud, for the advantage, or supposed advantage, of the association is not punishable; but if official action be taken, not in the honest exercise of discretion, in bad faith, for personal advantage, and with fraudulent intent, it is punishable. So understood, the *Britton Cases* afford no support to the position taken here, that whatever is done by a bank officer in his official capacity, however wrongful or fraudulent as against the bank, is mere maladministration, and not a crime. Such a position cannot be assented to.

It is next said, in behalf of the accused, that, although it may be a misapplication to deliver or take the moneys of the bank without making any loan, to make an irregular, unsafe, reckless loan is maladministration only; that in the charge to the jury the question of the character of the loans was submitted to the jury, instead of the question of the existence of the loans, and error thereby committed, because "the attention of the jury was directed to an irrelevant question and diverted from the true one." This argument assumes that

the charge was calculated to confine the attention of the jury to the question of good faith. If such had been the effect of the charge, it is not seen that error would have been committed. So far as the question of guilt or innocence under this statute is concerned, there is no distinction between a loan in bad faith for the purpose of defrauding the bank, and an application of money, with like intent, in a form other than that of a loan. A loan of the moneys of a bank by the president of the bank in bad faith, for the purpose of defrauding the bank, is no loan in the sense of the law. It is simply a fraud. If, then, as the argument under consideration assumes, the sole question submitted to the jury upon the counts for misapplication had been whether the transactions were or were not loans in good faith, such an instruction would have been the same in legal effect as submitting to them the question whether the accused had allowed his firm to take the money without making any loan. There may be such a thing as an unwise loan. But a loan made in bad faith, with the intent to defraud the bank, is not an unwise act, but a fraudulent act, and, strictly speaking, no loan at all.

In the charge the jury were carefully instructed that the accused was not to be convicted for making an irregular, unsafe, or reckless loan. Moreover, they were permitted to consider the precise question which, in the argument under consideration, is termed the true question of the case; for the jury were instructed "that the defendant had authority between the meetings of the board to make loans of the money of the bank, to make such loans to his firm without security, and to cause sums duly and honestly loaned to be placed to the credit of his firm." They were also instructed that "the mere form of a loan adopted as a cover and pretense to conceal a fraudulent transaction, would not entitle the firm to credits like these." They were also instructed that "the question was whether there was a *bona fide* agreement between the accused and Ward to loan these moneys, or whether the form of a loan was adopted by the accused to cover a different transaction." Elsewhere in the charge the question is stated to be whether the accused "was loaning money to a borrower on that day or not." Again, the language is: "If these were not loans in good faith, but the forms of loans only, used to cover a different transaction, the question arises at once, if they were not loans, what were they?" And the jury were then invited to consider whether these transactions were "part of a scheme devised or operated by the accused and Ward to get the money of this bank into their possession by fraud, by false pretenses, in order to defraud the bank." They were also invited to consider whether the accused, "believing that profits could be made by the bank, by the use of the bank's money in government contracts held by his firm, and induced by the hope of profit for the bank as well as himself, concluded to transfer moneys of the bank to the possession of his firm, to be invested in government contracts for the benefit of the bank as well as

of the firm, and in pursuance of such determination made the transfers and credits described in these counts under cover of the forms of loans, but really to enable the bank, without the knowledge of the board of directors, to share with Grant & Ward in the profits to be derived from the use of the bank's money in such contracts."

Under the charge the jury must have found that the transactions in question were fraudulent applications to the use of Grant & Ward, of the money of the bank, put into the form of loans in order to conceal a fraud. Such a finding compelled a conviction of the accused upon the first and fourth counts.

But if, as the counsel for the defendant contends, the transactions in question were loans, the conclusion drawn, that they did not constitute misapplications within the meaning of the statute because the president was authorized to make loans between the meetings of the directors, by no means follows. It is a mistake to suppose that there cannot be a criminal misapplication of the moneys of a national bank by means of a loan. The decisions of the supreme court in the *Britton Cases* countenance no such idea. If the transactions in question were loans, the question still would be whether they were such loans as amounted to a misapplication. Under the by-laws of the bank the president had a large discretionary power to make loans. But his authority in this respect was not unlimited. He had no right to make loans which he knew or believed would not be approved by the board of directors if the circumstances were known; much less had he any right to continue a series of transactions as loans wholly peculiar, exceptional, and dangerous in character, without communicating to the board of directors what knowledge he had respecting these transactions, and when he knew that such knowledge by the board of directors would have prevented a repetition of the loans. Such conduct on his part would be a clear abuse of the discretionary power, not the lawful exercise of it contemplated by the by-laws. A known abuse of discretionary power in making a series of loans which it is known the directors would not sanction, will constitute a criminal misapplication, if found to have been done in bad faith, for private gain, and not in the exercise of honest judgment.

The charge to the jury, therefore, if capable of being understood as supposed in the argument under consideration, would not be incorrect. And, if so understood by the jury, the conviction upon the first and fourth counts would be proper; for, so understanding the charge, the finding would be that the accused loaned the moneys of the bank to his firm, not in good faith, within the scope of his authority under the by-laws, and in the honest exercise of his judgment, but in bad faith, by an abuse of his authority, for the advantage of himself and the firm of which he was a member.

The charge, however, as the above extracts show, was not as restrictive as the counsel assumes, but permitted the jury to pass upon the question in the very form here contended for in behalf of the ac-

cused, and to say whether the transfers in question were loans or transactions of a different character. The charge upon the first and fourth counts, therefore, cannot be held to have directed the attention of the jury to an irrelevant question, and to have diverted the attention of the jury from the true one.

Next will be considered the point that the accused was improperly convicted upon the first and fourth counts, because the acts done by the accused amount to no more than making entries of false credits. Here it is sufficient to say that the accused did more than cause his firm to be credited with the sums. He caused the money represented by the credits to be paid to his firm, and the money was drawn out of the bank by his partner, in pursuance of an understanding had with the accused that the money should be so drawn; the same having been credited by the president for the sole purpose of enabling the money to be so drawn. The defendant's position requires him to maintain, not only that no fraudulent abuse of official power can be punished under the statute, but that no misapplication, which is effected in any part by means of such an abuse, can be a criminal misapplication. The counts are bad, it is said, because the false credit is stated to have been caused by the defendant as president. But the credit was only one of the means by which the misapplication was effected. The presentation of the checks of the defendant's firm under his authority, and chargeable to him as his act, and the payment of these checks by the bank by his authority, and pursuant to his instructions, also constituted part of the means charged. The argument, then, must be that because one of the means was an act done by the defendant as president, the result was not criminal. Such a position is untenable.

The next point is that the accused was improperly convicted upon the first and fourth counts, because there was no evidence that he personally took any money from the bank, or was personally present when any other person took away money; and it is contended that a personal taking of money of the bank is the act made punishable by the statute. The statute is not so understood. It says, "embezzles, abstracts, or wilfully misapplies." Each of these words must be given effect. The word "misapply" was intended to include acts not covered by the previous words "embezzle" or "abstract." To give to the word "misapply" the same meaning as the word "embezzle" is to eliminate a word from the statute. This cannot be done. Nor can the provision that the acts prohibited shall be deemed a misdemeanor, be disregarded. By this provision the law in ordinary cases of misdemeanor is made applicable, and by that law the officer who causes or procures the money of the bank to be misapplied is a principal offender, and may be charged as such. Aiders and abettors who are not officers of the bank are covered by the last clause of the section.

Next will be considered the point that the proof in support of the first count varies from the charge made in the count. The first count

of the indictment charges the accused with having misapplied \$25,000 of the money of the association. It then proceeds to set forth the means employed to accomplish the misapplication charged, and states, as part of the means, that the accused caused to be credited upon the books of the association, to the firm of Grant & Ward, the sum of \$25,000. The proof was that the defendant credited in the pass-book of Grant & Ward three sums, viz., \$25,000, \$40,000, and \$40,000. He also handed to the assistant cashier three stock notes,—one for \$25,000, one for \$40,000, and one for \$40,000,—with instructions to enter up loans in conformity with them, and to credit Grant & Ward with the amounts. In pursuance of these instructions three loans—one for \$25,000, and two of \$40,000 each—were entered in the loan-book; but in entering the credit to Grant & Ward in the ledger the three sums were lumped, and the credit there appeared as for \$105,000. The two sums of \$40,000 were afterwards refunded; the \$25,000 was not.

The jury were charged that the evidence showing that a larger sum than \$25,000 was credited in the ledger, presented no legal objection to a conviction upon the first count. In this there was no error. The count in question contains no description of any writing, nor any description of any entry in any particular book. It simply avers that on a certain day the accused caused \$25,000 to be credited to his firm upon the books. That averment was proved by evidence showing that he caused more than \$25,000 to be then credited to his firm upon the books. A charge of embezzling \$25,000 would be proved by showing the embezzlement of a larger sum, and it is not seen why a charge of causing to be credited the sum of \$25,000 is not proved by showing a credit exceeding that amount.

Another point of variance is made in respect to all the counts for misapplication, viz.: That while the indictment alleges a credit upon the books of the bank to "a certain copartnership of which the said James D. Fish and Ferdinand Ward were then and there members," the proof showed that other persons besides James D. Fish and Ferdinand Ward were members of the co-partnership. The proof corresponded exactly with the allegation. The indictment simply said that Fish and Ward were members of the firm of Grant & Ward, and the proof showed the allegation to be true.

All the objections taken to the conviction upon the first and the fourth counts, worthy of attention, have now been considered; and, none of them having been found valid, the conviction upon these counts is sustained.

The defendant is also convicted of the misapplication charged in the twenty-second count. In this count the misapplication of \$250,000 is alleged to have been accomplished by causing this sum to have been paid upon checks drawn upon the bank by Grant & Ward in excess of the amount which the firm was entitled to draw and have paid by the bank. In regard to the conviction upon this count, it

is said that the evidence showed that these checks came through the clearing-house, and all that the accused did was to pay to the clearing-house a lawful debt due the clearing-house. Therefore, it is said, his act was not an act done to defraud the bank, but to fulfill an obligation of the bank to the clearing-house. But the checks, when presented to the bank, were recognized by the accused. By his direction they were not returned to the bank which had presented them at the clearing-house, as might have been done, and by his direction they were retained by the Marine Bank and charged to Grant & Ward in their account with the bank, constituting an overdraft to that amount. This overdraft on the bank by the defendant's firm the defendant permitted, as the jury have found, with the intent to defraud the bank of the money. The fact that the checks came to the bank by way of the clearing-house, and that they were charged against the account of Grant & Ward after the bank had settled its account with the clearing-house, does not change the character of the transaction, so far as the defendant is concerned. The checks were paid out of the moneys of the bank as the indictment charges. What the defendant did was to allow his firm to overdraw its account under circumstances warranting a finding of the jury that he did this act with intent to defraud the bank of the money. Such an act, done with such an intent, is misapplication of the moneys of the bank within the meaning of section 5209, and the conviction upon the twenty-second count was proper.

In the remaining counts the indictment charges the accused with having made eight false entries in the books of the association, each entry being particularly described in a separate count. Counts 11 and 12 charge the same act. In one count the intent charged is to deceive the bank examiner. In the other, the intent charged is to defraud the association. The same is true of counts 13 and 14. The jury convicted upon the counts 5, 11, 12, 13, 14, 15, 17, and 19. The conviction, therefore, is of six offenses of this character. In regard to those counts the court was requested to charge the jury that the defendant could not be convicted of making a false entry unless it was made by him individually. The court declined so to charge, and instructed the jury as follows: "It is not necessary, in order to convict the defendant of making false entries in the books of the bank, that it be shown that the entries were made by his own hand, or in his presence. It is sufficient if you are satisfied that the entries were in fact false in the particulars charged, and made by Daboll, the assistant cashier, as part of the regular and usual course of book-keeping pursued in the bank, in conformity with directions to that effect given Daboll by the accused for the purposes of fraud and deceit, he knowing that the collaterals named in the entry were not in the possession of the bank."

The finding of the jury, therefore, is that the entries set forth in the counts under consideration were made by the assistant cashier,

according to the usual course of book-keeping pursued in the bank, and that the defendant, for the purpose of fraud and deceit, gave directions which he knew would cause the assistant cashier to make, in the loan and collateral book of the bank, entries stating that the bank had loaned these several sums of money to the persons named, (Spencer, Armstrong, Doty, etc., the clerks and messengers of Grant & Ward,) and that the bank held as security for such loans the bonds and stocks named in the entry, when the bank held no collateral security for the moneys named, and had never made such loans, as the defendant knew. Such a finding compelled a conviction upon the counts now under consideration.

It is contended that according to the evidence all the defendant did was to authorize the loans referred to in these counts. The evidence was that the accused personally gave or sent to the assistant cashier, the pretended stock notes, knowing that the assistant cashier, upon so receiving the notes, would cause the entries to appear in the loan and collateral book, which would falsely state that the bank had the collaterals mentioned in the notes, and also knowing that the bank had not made loans to the persons named in the stock notes as borrowers of the moneys. It was no part of the duty of the assistant cashier to make loans. All he had to do was to make entries in the books of the bank. Under the evidence as to the course of book-keeping in the bank, the jury would have been justified in finding the entries in question to have been made by the accused, from the conceded fact that the accused delivered the stock-notes to the assistant cashier. But the defendant's own testimony went further, and compelled a finding that he caused the entries to be made, knowing that when made the entries would be false in the particular charged. It was not necessary to show that the particular form of statement employed by the assistant cashier in making the entry was directed by the prisoner. It is sufficient if he gave directions which he knew would result, and which did result, in an entry asserting that the bank had certain bonds as collateral security for certain loans, when the fact was otherwise. In *Van Campen's Case*, 2 Ben. 419, Mr. Justice BLATCHFORD says: "In regard to the charge of making false entries it is objected that the person did not personally make the false entries, but that they were made by a clerk in the bank, by a direction of the prisoner." This is sufficient to make the prisoner a principal in the offense, and to constitute the making of the entries by him. In *U. S. v. Gooding*, 12 Wheat. 460, it is said: "Proof of the command or procurement may be direct or indirect, positive or circumstantial, but it is a matter for the jury, and not of legal competency."

Nor was it error to charge the jury that the entries might be found to be false, notwithstanding the testimony of the assistant cashier that the absence in the entries of the serial numbers of the bonds described would indicate to him that the bonds had never been delivered to the bank. The entry might have stated more than it did, but what it

might have contained is immaterial so long as what it did contain was a false statement that the bank had the collaterals specified, when it had none. It was in accordance with the defendant's request that the jury was charged that it was for them to say whether the entry, as made, was false in the respect charged.

Another point made is that the court erred in declining to charge that "loans to Grant & Ward would constitute a sufficient and valuable consideration for the promissory notes of third persons given to enable Grant & Ward to effect said loans. The notes would be the valid and binding obligation of the signers, and collateral to the loans." This request was properly refused. As the case stood, the question in regard to the liability of Spencer, Armstrong, Doty, etc., to the bank upon the stock notes was wholly immaterial.

In addition to the objections which have now been noticed, there were numerous exceptions taken to the admission and exclusion of evidence, in regard to which it seems sufficient to say that all have received careful attention; but none have been found which would justify the granting of a new trial.

The motion for a new trial is therefore denied.

WALLACE, J., concurred in the above opinion.

BROWN, J., also concurred in the above opinion, excepting what is said upon the question of variance presented by the evidence in support of the first count. Upon that point the opinion of Judge Brown was as follows:

BROWN, J. No conviction should have been had, in my opinion, on the first count, because of a variance between the averment of the indictment and the proof. The first count alleges the misapplication of \$25,000, in a particular way. It must, therefore, be proved as laid. The averment of this count is that the defendant "caused to be credited on the books of the bank, to the credit of Grant & Ward, the said sum of \$25,000." The proof shows no credit to Grant & Ward of the sum of \$25,000, but only the credit of the sum of \$105,000 in a single entry, of which it is claimed that the \$25,000 referred to in the first count formed a part. All the judges agree that if the averment of this count necessarily meant to describe a particular entry of the specific sum of \$25,000, it would be a material variance from the proof. The majority are of opinion that the averment does not necessarily mean anything more than that the defendant caused the firm to be credited with \$25,000, to which it was not entitled, without reference to any particular entry or number of entries by which that credit might have been made up.

This construction seems to me to disregard that part of the averment which states that the defendant caused to be credited "the said sum of \$25,000." This \$25,000 is here treated as a single sum, and

the averment is that *that sum* was credited; not that various sums making up the aggregate of \$25,000 were credited, nor that a larger sum was credited, of which this \$25,000 formed a part. There could be no credit on the books except by some written entry; and an averment of such a credit of "the said sum of \$25,000," means, as it seems to me, an *entry* of that particular *sum*. Such an averment would not be satisfied by proof of 25,000 entries of the sum of one dollar each; nor by proof of 105,000 entries of one dollar each, out of which the government might pick at random enough to make 25,000. In this case the credit entry of \$105,000 was founded upon three loans to third parties on their stock notes: two for \$40,000 each, and one upon an unsigned note of \$25,000. The indictment doubtless intended to refer to the last part of this transaction; but in the only entry "on the books of the bank" that exists to the credit of Grant & Ward there is nothing that indicates any division of the one sum of \$105,000 credited to them. There is no entry that corresponds with the averment of this count of the indictment. Had the conviction been upon the first count only, I should, therefore, have thought the defendant entitled to a new trial.

SEWING-MACHINE CO. v. FRAME.

(Circuit Court, E. D. Pennsylvania. May 19, 1884.)

1. PATENTS FOR INVENTIONS—INVENTION—CHANGE IN OLD DEVICE.

A change in an old device which produces a new and useful result. involves the exercise of invention.

2. SAME—REISSUE—DEFECTIVE DESCRIPTION.

A patent that is invalid or inoperative for want of a proper description may be corrected by a reissue.

3. SAME—INFRINGEMENT—DIFFERENCE IN STRUCTURE.

A structural difference in the form and size of an alleged infringing machine will not avoid infringement, when the same work is done in the same manner and by substantially the same means.

In Equity.

Charles Hewson and Wayne MacVeagh, for complainant.

Baldwin, Hollingsworth & Fraley, for defendant.

BUTLER, J. The plaintiff, having acquired title to Shorey's patent for cutting and trimming attachment for sewing-machines, issued March 28, 1882, charges the defendant with infringement. The claim of the patent is in the following language: "The combination, substantially as herein described, with stitch-forming mechanism, of a rotary cutter having its cutting edge or edges eccentric." The specifications indicate the state of the art and the result sought by the inventor, and describe the invention reached, so well that we cannot do better than to adopt and insert the language here:

"Cutting or trimming attachments have been applied to some extent to sewing-machines for the purpose of cutting off the edge of the work on a line equidistant from the seam, such attachments being particularly useful in machine-stitching leather. For such attachments a vertically reciprocating cutter has sometimes been used, sometimes a rotary disk-cutter at the end of a horizontal shaft turning in stationary bearings, and sometimes a rotary disk-cutter having intermittent vertical movements, the cutter moving up just before the cloth is fed and remaining up during the feed; it having been found that the cutter was a hinderance to the feed, and not so effective in its cutting operation if in contact with the work during the feed.

"My invention has reference to the employment of a rotary cutter at the end of a horizontal shaft, and to such an arrangement of the mechanism as shall throw the cutting-edge out of action during feeding of the work. I journal my cutter-shaft in stationary bearings, (or bearings that are stationary while the machine is operating,) and I form the cutter with intermittent cutting-edges at one or more breaks in the circular periphery, and I so arrange the parts and so time them in their respective movements that when the feed-bar moves laterally to feed the work a break of the cutter-wheel shall be in juxtaposition to, but not in contact with, the work, so that there shall be no obstacle to the feed and no drag of the work against the rim of the cutter; the cutting or trimming being effected between the feed movements of the feed-bar, or while the work is stationary.

"My invention consists, primarily, in combining with the stitch-forming mechanism a rotary cutter having the cutting part or parts of its periphery eccentric to its axis of rotation."

Aware of the defects in rotary disk-cutters, (which, nevertheless, seemed to have advantages over all others then in use,) Shorey started out to remove it. His object was to construct a machine that would cut the fabric, and not interfere with feeding. Others were laboring in the same direction. Springer had invented a contrivance for raising and depressing the cutter, adding to its rotary motion an intermittent vertical movement. It was not, however, satisfactory. Shorey conceived the idea of accomplishing the desired result without the awkward, disadvantageous vertical movement, by changing the form of the cutter and combining it in such relation to the feeding mechanism that contact with the fabric would be avoided while the latter was moving. How he accomplished this is described by the language quoted, and illustrated by the drawings and model filed. The change made in the old device was simple but effective. It produced a new and useful result. That invention was involved in accomplishing it, is manifest. Other intelligent and skillful mechanics, working towards the same end, failed to discover it.

What does the patent cover? Reading the claim in connection with the specifications, we find it to be for the combination with the stitch-forming mechanism of the ordinary sewing-machine of a rotary cutter, (journalled in stationary or fixed bearing,) not of the exact form or pattern of that described in general terms, but substantially, in effect such; that is to say, a rotary cutter having a break or breaks, or a certain part or parts of its periphery nearer the axis of rotation than the part or parts which does or do the cutting, such breaks or parts nearest the axis being so placed and controlled in operation, as

not to come in contact with the fabric while it is in motion, to the end that the sewing-machine with this attachment may be used for simultaneous sewing and trimming.

Sufficient has been said to indicate our judgment (and the reasons for it) that the matter covered by the claim is novel, useful, and patentable. Elaboration would serve no useful purpose. The original patent having been surrendered on account of inaccuracy of description, and the reissue which is before us taken, is this valid? While the question may be serious, and its proper solution involved in some doubt, our judgment is with the plaintiff. We do not think such reissues fall within the rule promulgated in *Miller v. Brass Co.* 104 U. S. 350. The court was careful to note the distinction between these and such as were before it. That "the correction of a patent by means of a reissue, where invalid or inoperative for want of full and clear description of the invention, cannot be attended with such serious results as follow the enlargement of claims," is obvious. Here, we think, no more was done than to make such a correction. The single claim of the original patent is inserted in the reissue without enlargement. There is no material variation in terms, and the effect, we think, is identical. The drawings and model, as originally filed, show the precise invention described and claimed in the reissue. While the description was not entirely accurate, and might, possibly, have been misunderstood, an intelligent mechanic would, probably, if not certainly, have constructed the machine as shown and claimed in the reissue. It cannot justly be said, therefore, that any one was misled, or that anything was abandoned to the public. On the question of necessity for such a reissue, or the propriety of granting it, the judgment of the patent-office is entitled to weight. That the invention intended to be secured originally was that covered by the reissue, seems to be rendered manifest by one of the defendant's exhibits. Constructed to illustrate the machine described in the original patent, the exhibit conforms minutely to the description and claim of the reissue. Little importance is attached to the testimony intended to show that Shorey manufactured machines which did not conform to his patent.

The question of infringement does not seem difficult. The defendant's machine, as originally constructed, was, we think, in plain disregard of Shorey's patent. The defendant appears to have so considered it; or, at least, to have believed it might be so considered, for, on complaint being made, he sought a license. Subsequently (and after the plaintiff's acquisition of title) he commenced the manufacture of machines in the form here complained of. We are unable, however, to see any material distinction between these and the machines originally constructed. They do the same work in the same manner and by substantially the same means. In our judgment, the last, as well as the first, infringe the patent. The structural difference in form and size of the cutter, is not important. Shorey did

not confine himself to any particular form or size in this respect. That adopted by the defendant is as well described by the patent as the one shown by Shorey's drawings and model. The object sought by Shorey, as we have seen, was such a rotary cutter as, when combined with the stitch-forming mechanism, in the manner he indicated, would sever the fabric without obstructing its passage in feeding. This he accomplished by so constructing the cutter that a part or parts of its periphery should be nearer the axis than the remainder, and so combining and operating it as to escape contact with the fabric while the latter is in motion. The object of the defendant was the same, and he has accomplished it virtually in the same manner and by the same means. The circumstance that his machine is so operated as to do a fractional part of the cutting while the fabric is in motion, is not deemed important. The movement is so nearly completed when the cutter reaches the fabric that its contact presents no perceptible or serious interference. This, therefore, must be regarded as an immaterial difference. If not, the evasion of the patent, and, indeed, of all patents, would be easy. Nothing more would be necessary than to waive an immaterial part of the benefit derived from the invention. If the defendant had constructed his machine in precise accordance, in all respects, with Shorey's model, but so connected it with the sewing mechanism that the cutter would reach the fabric an instant before the feeding is completed,—which, doubtless, is practicable,—it would hardly be urged that this would not have been an infringement. The manner in which the machine is used does not affect the question. The manner of using does not characterize a machine. This is done by its structure and capabilities. The defendant's machine is capable of a different use from the one described, and is as well adapted to it. A slight change of cogs will allow the feeding to be completed without interference, making the operation and effect identical with that of Shorey's invention. This change may be made in a few seconds, with no greater effort than is required to loosen and tighten two screws.

Several less material points of defense, which were urged with earnestness and ability, we will not discuss. They were well worthy of consideration, and have been carefully considered. It is sufficient to say that a patient examination of the entire defense has left a conviction that the bill should be sustained.

A decree may be prepared accordingly.

McDONALD v. WHITNEY and others.

(Circuit Court, D. Massachusetts. August 4, 1885.)

1. PATENTS FOR INVENTIONS—NOVELTY—PATENTS NOS. 200,078 AND 210,797—INFRINGEMENT.

Patent No. 200,078, dated February 5, 1878, and patent No. 210,797, dated December 10, 1878, issued to James W. McDonald for machines for unhairing and scouring hides and skins, *held* valid, and infringed by defendants.

2. SAME—USE OF INFRINGING MACHINE BY SUPERINTENDENT—PARTNERSHIP.

When an infringing machine is used by a father and son, and it is not shown that they were partners, but it appears that the son was a superintendent in the shop where the machine was used, no action for infringement will lie against the son.

In Equity.

T. W. Clarke and B. S. Parker, for complainant.

J. H. Millett, for defendants.

COLT, J. This bill in equity is brought upon two patents issued to the complainant, James W. McDonald, for unhairing and scouring hides and skins. The first patent is dated February 5, 1878, and numbered 200,078. The second patent is dated December 10, 1878, and numbered 210,797. The defendants are charged with infringing the first and second claims of the last patent, which are as follows:

(1) In a machine for unhairing and scouring hides or skins, the combination, with feed-rolls and a supporting roll, of a lever and intermediate mechanism, whereby, by a single movement of the lever, the feed-rolls are separated and the supporting roll is adjusted with reference to the scouring-roll, all substantially as set forth. (2) In machines for unhairing, working and scouring skins and hides, the combination of the feed-rolls, DD¹, one of which can be separated and held apart from the other, and a scouring-roll and a supporting roll, G, which can be moved and held from said scouring-roll, all arranged to operate substantially as and for the purposes described.

It can readily be seen that in machines for unhairing hides, owing to the inequalities of thickness in the hide, some means of adjusting the roll are necessary. In McDonald's second patent, by means of one motion of a treadle, the operator applies a system of leverage whereby the feed-rolls are separated, and the supporting roll is adjusted with reference to the scouring-roll. The feed-rolls are pressed towards each other by spring pressure, and the supporting roll is pressed towards the scouring-roll by spring pressure; by a single movement of the lever, and against the spring pressure, the separation of the feed-rolls and the adjustment of the supporting roll, with reference to the scouring-roll, takes place. The first of the above claims covers the combination of feed-rolls, supporting roll, and intermediate mechanism, by means of which this adjustment takes place. The second is simply for the combination of the feed-rolls, one of which can be separated, and a scouring-roll, and a supporting roll which can be moved from the scouring-roll. Owing to the distance between the feed-rolls and the supporting and scouring rolls, we find a bed, H,

(which serves to support the hide during its progress from the feed-rolls to the scouring-roll,) set out in the specification and forming part of the fourth claim. As the bed, H, is necessary to the practical operation of the machine, it is urged that we must consider it as constituting one of the elements described in claims 1 and 2. We do not find the bed, H, included in those claims, by any proper construction of language; nor do we think the claims should be held to be void because the machine, as a whole, may not be practically operative without the bridge, or that the claims become a mere aggregation of old devices, because the bridge is excluded from the combination. The gist of McDonald's invention, as described in claims 1 and 2, is the separation and adjustment of the rolls held together by spring pressure, by means of a treadle and levers.

It is further urged, as a ground of defense, that, owing to the prior state of the art, McDonald cannot claim broadly the combination with feed-rolls and a supporting roll, of a lever and intermediate mechanism, whereby, by a single movement of the lever, the feed-rolls are separated and the supporting roll is adjusted with reference to the scouring-roll, because this is old.

We cannot consider the Townsend patent, dated April 23, 1872, No. 126,105, for improvement in leather boarding and graining machines, as anticipating the McDonald device. The machine is for a different object, and it has no cylinder of knives; nor are the rolls spring pressed towards each other; and there are other differences in construction and mechanism. The adjustment of the rolls in the Townsend machine, by means of a treadle and lever, for the purposes described, is quite different, as it seems to us, from the adjustment of the rolls in a machine for unhairing hides with a knife-cylinder revolving 1,200 to 1,400 times a minute.

It is clear, also, that the Larabee patent, dated July 24, 1877, and the Sheldon patent, of October 22, 1878, both for unhairing hides, do not describe a device where, by one motion of the treadle, the feed-rolls are separated and the supporting roll adjusted with reference to the scouring or work roll. The movement of the pressure-roll towards or from the knife-cylinder in the Larabee machine, and the lifting of the feed-roll from the pressure-roll in the Sheldon machine, by one movement of the treadle, do not, in our opinion, cover the McDonald device. There is also testimony going to show that, from all that appears, the McDonald invention was prior in time to Sheldon's.

It is further contended that McDonald was not the inventor of the lever mechanism for operating two sets of rolls, but that Benjamin B. Bradford, assisted by one David H. Pratt, as early as 1877 or 1878, altered over a Roberts machine, so that by means of levers the two sets of rolls were simultaneously adjusted upon pressure being applied to the foot-treadle connected with the levers. Without entering into a review of the testimony, it is sufficient to say that, after a very

careful examination, we are satisfied that the defendants have not clearly established that Bradford, assisted by Pratt, made the improvements claimed prior to the invention of McDonald.

The patent carries with it a presumption of novelty, and the burden of rebutting that presumption is upon the defendants. The evidence to establish prior knowledge or use must be clear and satisfactory, and beyond a reasonable doubt. In view of the conflict of evidence which the record presents, we cannot say that the defendants have made out this defense. *Hawes v. Antisdel*, 2 Ban. & A. 10; *Wood v. Mill Co.* 4 Fish. 550, 560; *Parham v. American Button-hole Co.* Id. 468, 482.

Upon the question of infringement we entertain no doubt. In the Tidd machine, so called, upon which work was done by the defendants, there are but three rolls, the pressure-roll taking the place of the under feed-roll and of the pressure-roll in the McDonald machine. By one movement of the treadle, however, the feed-roll is separated from the pressure-roll, and the pressure-roll is adjusted to the scouring or work roll. The feed-roll is spring pressed towards the pressure-roll, and the pressure-roll spring pressed towards the scouring-roll. The only difference is that on moving the treadle the movement of the pressure-roll is lateral with respect to the scouring-roll, instead of vertical as in the McDonald machine.

We find the substance of the McDonald invention in the Tidd machine.

This suit is brought against Joel Whitney and Arthur E. Whitney, doing business under the style and name of Joel Whitney, and also under the style and name of Arthur E. Whitney. The father, Joel Whitney, swears that he employs his son as superintendent in his shop at three dollars a day, and the son states that he has been employed by his father for 18 years. We find no proof of partnership. The fact that the work on the Tidd machine was done at Whitney's shop under the direction of Arthur E. Whitney, acting as superintendent, would not make him liable. It is not shown that Arthur E. Whitney has any interest in the business, but he is only employed by his father. Under these circumstances no action will lie against him. *United Nickel Co. v. Worthington*, 13 FED. REP. 392.

A decree may be entered against the defendant Joel Whitney, and the bill dismissed as to the defendant Arthur E. Whitney.

WALKER GLASS CO. v. SOUWEINE and others.

(Circuit Court, S. D. New York. July 25, 1885.)

PATENTS FOR INVENTIONS—POCKET-COMB CASES—PATENT No. 184,310—NOVELTY.

Patent No. 184,310, granted to Charles W. Walker, November 14, 1870, for an improvement in pocket-comb cases, *held* not void for want of novelty.

In Equity.

M. B. Andrus, for complainant.

Henry F. Goken, for defendants.

WALLACE, J. The invention specified in the complainant's patent (No. 184,310, granted to Charles W. Walker, November 14, 1876, for improvement in pocket-comb cases) is shown by the proofs to have been perfected by the patentee in the spring of 1875, although the application for the patent was not filed until October, 1876. No reason is shown for the delay that intervened between the time when a patent might have been applied for and the time when the application was made. In the absence of any explanatory facts, evidence offered to carry back the date of the invention to a period considerably anterior to the application for a patent, in order to save the patent from being defeated for want of novelty, should be critically examined. Here, however, a disinterested and intelligent witness was produced, whose testimony was clear and decisive to the point, and no attempt was made to controvert or impair the accuracy and truthfulness of his narrative.

The only defense interposed is want of novelty, predicated upon the public use and sale in this country of the comb-cases manufactured by Probst, in Nuremburg, Germany. It is entirely clear that the Probst comb-cases were imported by dealers in this country and sold here in 1876, and it is not doubted that such comb-cases were substantially the comb-case of the patent. But there is not evidence showing the public use or sale of similar articles prior to 1876, of sufficient cogency and conclusiveness to overthrow the presumption of novelty arising from the grant of the patent. When record or written evidence, such as the invoices from the files of the custom-house, is produced, the importations of the article are not shown to antedate 1876. The case of the defendants is left to rest upon the unaided recollection of several witnesses, some of whom are evidently mistaken as to dates, and none of whom are able to fortify by any corroborative circumstances their statement of the general fact that such articles were in the market here prior to 1876.

A decree is ordered for complainant.

NEW YORK GRAPE SUGAR CO. *v.* BUFFALO GRAPE SUGAR CO. and
others.

SAME *v.* AMERICAN GRAPE SUGAR CO. and others.

(Circuit Court, N. D. New York. July 23, 1885.)

1. PATENTS FOR INVENTIONS—LACHES OF PATENTEE—RIGHT OF VENDEE TO RECOVER DAMAGES.

The patentee's previous laches and indifference in regard to the use of his patents by defendant corporation *held* sufficient to prevent the enforcement by a court of equity of the pecuniary claims of his vendee against it for infringements before the purchase of the patent.

2. SAME—INFRINGEMENT BY CORPORATION—PURCHASE BY FORMER DIRECTORS—RIGHT OF ASSIGNEE TO DAMAGES.

When the executive officers and managers of a corporation that has been infringing a patent, having sold their stock, purchase the patent, their assignee will not be allowed in equity to make the corporation pay the profits created by their own acts of infringement.

In Equity.

Dickerson & Dickerson, for plaintiffs.

John R. Bennett and Sherman S. Rogers, for defendants.

SHIPMAN, J. This is a motion to amend the interlocutory decrees in the entitled causes, so as to provide for an accounting of the profits and an assessment of the damages which accrued upon patents 65,664, 81,883, and 137,911, prior to the plaintiffs' purchase thereof. The facts in the cases are stated at length in the published opinions in 18 FED. REP. 638, and 20 FED. REP. 505. Upon these facts two questions arise:

1. Are the claims against the Buffalo Grape Sugar Company, which Joseph J. Gilbert assigned, through Messrs. Phillip and Morgan, to the Messrs. Jebb, for the profits and damages which had accrued upon the infringement of his patents Nos. 65,664 and 81,883, such as should be enforced by a court of equity in this suit, commenced in 1881?

The position of the defendants is that if Mr. Gilbert had brought against the Buffalo Company a bill for an injunction and an account, instead of making the assignment, he would have been successfully met, so far as the accounting of profits and damages before the commencement of the suit was concerned, by the principle that "laches and neglect are always discountenanced" by a court of equity. It is urged by the plaintiff that, assuming it to be true as found by the court, that the entire patented process was not used until 1878-79, there was but a brief period during which Gilbert could have been chargeable with laches. If this was the entire case, the defendants' position would be exceedingly weak. The facts are that in 1868 Fox & Williams were using the machinery described in the Gilbert patent of 1867, and his process, up to and including the deposit upon the tables. Fermenich & Williams were also using the same part of the process.

Each of these firms were sued by J. J. Gilbert for infringement. Probably just before the institution of the suit against Fox & Williams they were offered by Colgate Gilbert a license to use the patents then in existence for \$10,000, which was refused. The suits were subsequently voluntarily discontinued. One of the reasons for the discontinuance, which was given by Colgate Gilbert to one of the witnesses, and the one which was found by me to be the reason for the subsequent inaction of J. J. Gilbert, was because Fox & Williams were syrup manufacturers, and were not substantially interfering with the business of the Gilberts. From that time Fox & Williams and their successor, the Buffalo Company, continued to use the Gilbert machinery, and, commencing in 1878-79, it used the entire process. The American Company, which was formed in 1877, also used the same machinery and process during the management of the Jebbs, and before the sale of their stock in May, 1879. No subsequent objection was ever made by J. J. Gilbert to any acts of either of said companies, or to any act of any other manufacturer, although there were various other infringers between 1868 and his death. His whole conduct showed an indifference as to the infringement, and led the infringers to believe that his patents were not valid or important. The great bulk of the business, in which the entire process was used, was undoubtedly the manufacture of glucose, a business which, during the time of the infringement, was immense, and which the patentee did not wish to stop. It is true that he did not know that either company was using the entire process, and he did not care to know. He had an "easy indifference" on the subject. But it is said that he did not know that either company was using his process in the laundry-starch business, and that, if he had known, he would have been aggressive and positive in his efforts to suppress infringement. He must have known that each company was making laundry starch, and he knew that the Buffalo Company had used his machinery and a part of his process in the manufacture of glucose, and that his predecessor had refused to take a license. If he had cared to investigate and see whether this competitor was now infringing upon his rights, it would not have been difficult for him to ascertain. On the contrary, he was content to use his patented process in his own mill, and was apparently indifferent whether the Buffalo Company used it or not, though with very good reasons to believe that it was an infringer.

I am strongly of opinion that, as against the Buffalo Company, J. J. Gilbert would have had no standing in an attempt to obtain the aid of a court of equity to recover these old claims. As against the American Company, he would have been in a better position; for, while he knew that it, like the other company, was making glucose to a very large extent, there is no positive evidence that his attention was ever particularly called to its machinery, or that he knew that it had ever used his inventions in whole or in part. If, however, he had, in 1881, asked for an injunction against the Buffalo Company's fur-

ther use of his patents, it would have seemed to me unjust that he should also be permitted to obtain an account of the profits and an assessment of the damages which were the result of the very extensive business, which he did not wish to stop, and which grew out of the use of patents to which he apparently had had no objection since the discontinuance of the suits commenced in 1868.

There are no decisions which relate to a similar state of facts. In *McLean v. Fleming*, 96 U. S. 246, there was a knowledge of the plaintiff's predecessors of the defendant's use of their trade-mark for, perhaps, 20 years. In *Merriam v. Smith*, 11 FED. REP. 588, the infringers, who were both manufacturers, were wholly unaware of the existence of the patent which they infringed, and which was intended for the manufacture of welts for carriage trimmings. The patentees were equally ignorant of the infringing machine. In that case, while Judge LOWELL left the purchasers of the claims for past damages to their action at law, the question of laches on the part of the patentees did not, apparently, arise. I therefore place the decision of this branch of the case upon the general principle that the patentee's previous laches and indifference in regard to the use of his patents by the Buffalo Company, will prevent the enforcement by a court of equity of his pecuniary claims against that company for infringements before the purchase of the patents by the present owner and plaintiff.

2. Are the claims against the American Grape Sugar Company for the infringement of the J. J. Gilbert patents, and also of No. 137,911, which were assigned to the plaintiff by the Messrs. Jebb, such as a court of equity will enforce?

The works of this company were erected under the personal management and direction of the Messrs. Jebb, both of whom were directors, and one was vice-president and the other was treasurer of the company, and both were afterwards actively engaged, as its officers and managers, in this infringement. Subsequently, having sold their stock in the company for \$80,000, they bought these patents, and now are seeking, through their assignee, to make the company pay the profits which were created by their own acts of infringement. As the active managers of the company, they committed or authorized the infringement, and, having obtained title to the patents which they infringed, brought a suit to compel the company to pay for their own unlawful acts. That suit was subsequently converted into the present one by stipulation. An enforcement of such a claim does not seem to me to be the province of a court of equity. It is not claimed that an accounting shall be had for the time during which the patents were owned by the Messrs. Jebb.

The defendants presented affidavits upon which they asked that, in case the motion was granted, it should be upon condition that the case should be opened so as to permit them to present newly-discovered evidence that the invention described in the patent of 1867

was in public use, with the consent of the patentee, in the year 1861. The affidavits state the declaration of a third person in regard to what he had ascertained could be proved by other persons, and also his declarations as to the effect of these discoveries upon the suit against the Duryeas. I think that the truth of the declarations of the third person is not sufficiently manifest to justify me in opening cases so carefully prepared as these were.

The plaintiff's motion is denied, except as to an accounting of the profits and an assessment of damages for the use of No. 137,911 by the Buffalo Grape Sugar Company before its purchase by the Messrs. Jebb.

THE CALABRIA.

(District Court, S. D. New York. July 3, 1885.)

CHARTER-PARTY — CONSTRUCTION — "THE SEASON OF 1882" — PRIOR CONTRACT BY TELEGRAM — EVIDENCE.

Where a complete contract for the charter of a vessel was made by telegram "for the season of 1882, ending October 31st," and the vessel made one voyage under the contract at lower rates than for single voyages, and a formal charter was then drawn up, and was signed by the captain, in the charterer's office, for "the season of 1882," omitting the words "ending October 31st," and the evidence showed that no new or different contract was intended from that already partly executed, *held*, that the prior contract by telegram was competent evidence of the intention of the parties, and of the meaning of the phrase "season of 1882," although, in the absence of such evidence, the expression by custom would bind the vessel until navigation was closed by ice; accordingly *held*, that the captain was justified in refusing to run under the charter after October 31st.

In Admiralty.

Jennings & Russell, for libelants.

Jas. K. Hill, Wing & Shoudy, for claimants.

BROWN, J. This was an action for damages on a charter-party, for the vessel's refusal to continue her trips after October 31st until the actual close of navigation, some six weeks subsequent. A perfect contract between the libelants and the master of the *Calabria* had been made by telegrams. After a series of negotiations the libelants definitely accepted, by telegram, the offer of the *Calabria*, at a definite price, "for the season ending October 31st." The *Calabria* made one voyage under this contract, and in part fulfillment of it, at less rates than for single voyages; and then, in the libelants' office, a more formal charter-party was drawn up, chartering the vessel "for the season of 1882," without repeating the words of the telegram, "ending October 31st." In interpreting the meaning of the ambiguous phrase, "the season of 1882," in this charter, the prior telegrams were competent evidence, and must be taken into consideration. *Merriam v. U. S.* 107 U. S. 437; *S. C.* 2 Sup. Ct. Rep. 536; *Brawley*

v. U. S. 96 U. S. 168; *Rhodes v. Cleveland R. M. Co.* 17 FED. REP. 426; *Knowles v. Toone*, 96 N. Y. 534. They control and limit the meaning of the phrase, "the season of 1882," and prove beyond controversy the sense in which that phrase was used and the intent of the parties. That intent is controlling. In the case of *The Miantinomi*, 3 Wall. Jr. 46, the word "ton" was thus shown to be intended to be 2,240 pounds, and not the statutory ton of 2,000 pounds.

The contract by telegram in this case was a binding contract. It was made after somewhat prolonged negotiations. It was partly executed, and could not be changed except by some subsequent contract intended to vary it, upon which the minds of the parties met. The evidence satisfies me beyond doubt that, in the execution of the more formal charter, no change in the previous contract was intended, at least, on the captain's part. His testimony is explicit that it was stated by him at the time that the season was to end as agreed on by the telegrams. There was no conceivable motive for the captain's receding from this part of the existing contract. The object of the meeting at the libelants' office was not to make a new contract. The contract was already fixed and certain. The object was merely to put the existing contract into more formal shape. In fixing the meaning of the phrase, "the season of 1882," the informal contract by telegram must be read with the formal contract afterwards drawn up, as explanatory of it. The telegrams make certain the intention of the parties, unless there be evidence of a common intention to make a new contract; and there clearly was no such common intent. If the indorsement on the charter by Mr. Wooster was intended to hold the captain to anything different, it is clear that the captain did not assent to it. The captain did not sign it; and it is no part of the charter itself. Mr. Wooster's testimony also shows that the season was to close on the thirty-first of October, "if the captain wished, or had any offer, to carry deals off shore." In that conversation it appears that the only point spoken of by Mr. Wooster as material to him was that the captain should not, after the thirty-first of October, enter the service of the libelants' rivals and competitors in business. The captain stated that he had no wish to do so; and after the thirty-first of October he did not do so.

I cannot find, therefore, that the libelants have either a legal or a meritorious cause of complaint; and the libel should, therefore, be dismissed, with costs.

NEWMAN v. DAVIS and others.

(Circuit Court, E. D. Arkansas. August 1, 1885.)

1. EXECUTION SALE—TITLE ACQUIRED BY PURCHASER.

In Arkansas a judgment creditor purchasing land at execution sale, on his own judgment, acquires the title and the rights of a *bona fide* purchaser for value against third persons claiming the same through the judgment debtor by secret trusts, or unrecorded instruments, of which he has no notice, actual or constructive, before the sale, and he buys subject to all the equities and rights of third persons, of which he has actual or constructive notice before he purchases.

In Equity.

In 1876 the plaintiff and Charles H. Carlton jointly purchased, and paid for, the plantation in controversy. The deed for the plantation, which was recorded, was made to Carlton alone, who gave the plaintiff a written paper stating he held the legal title to an undivided half of the plantation in trust for the plaintiff. This paper was not acknowledged or recorded. On the twenty-eighth of July the defendants Davis and Gaines recovered judgment in the circuit of Chicot county—the county in which the lands in controversy lie—against Carlton for \$1,357.26. Executions were issued upon the judgment, which were levied on the plantation purchased by the plaintiff and Carlton, as the property of the latter, and upon a sale of the property on said executions the defendants Davis and Gaines became the purchasers for \$1,005, and after the expiration of the year allowed by law for redemption, received a deed for the property. On the seventeenth day of April, 1879, Dowdle recovered judgment in this court against Carlton and Street for \$2,120.73. Chicot county is in this district, and this judgment was a lien on the real estate of Carlton in that county. Execution issued on this judgment, upon which the same plantation was sold on the sixth of February, 1880, and purchased by Street for \$625. The lien of this judgment being prior to that of the judgment of Davis and Gaines, the latter, on the tenth day of July, 1880, purchased Street's certificate of purchase, paying him therefor \$718.75, and took an assignment of the same, and afterwards procured a deed thereon, for the premises, from the marshal.

The bill seeks to establish and quiet the plaintiff's title to an undivided half of the plantation, as against the defendants Davis and Gaines, whose title was acquired in the mode above stated. The bill alleges the defendants, including Street, had notice of the plaintiff's equitable title to half of the lands before they purchased them at the execution sale, and that they had the like notice before purchasing Street's certificate of purchase. The bill did not waive an answer under oath; and the answer, which is under oath, denies explicitly any notice to Street or the defendants of the plaintiff's equitable title to the undivided half of the plantation, until after the defendants had

purchased at execution sale, and from Street, and procured their deeds under said purchase. The plaintiff was at no time in possession of the land. It is clear from the evidence that neither the plaintiff nor Street had any notice, actual or constructive, of the plaintiff's equity in the land until after they purchased the same, and that they purchased believing Carlton was the sole owner of the plantation.

D. H. Reynolds, for plaintiff.

Dodge & Johnson, for defendants.

CALDWELL, J. Section 671 of Mansfield's Digest reads as follows:

"No deed, bond, or instrument of writing, for the conveyance of any real estate, by which the title thereto may be affected in law or equity, hereafter made or executed, shall be good or valid against a subsequent purchaser of such real estate for valuable consideration, without actual notice thereof; or against any creditor of the person executing such deed, bond, or instrument obtaining a judgment or decree, which by law may be a lien upon such real estate, unless such deed, bond, or instrument, duly executed and acknowledged, or approved, as is or may be required by law, shall be filed for record in the office of the clerk and *ex officio* recorder in the county where such real estate may be situated."

In view of this statute, which has been in force since 1846, and the exposition of it by the supreme court in 1855, it is remarkable that the law applicable to the facts of this case should, at this day, be considered doubtful. It is believed that when due consideration is given to the statute, and the cases on the subject are read in the light of the statute, which at times seems to have received too little consideration, the doubt and mist that hang over the question will, in a great measure, disappear. This section came before the supreme court of the state for construction, in the case of *Byers v. Engles*, 16 Ark. 543. The action was ejectment, and the facts were that the defendant, Engles, bought the land from the judgment debtor, and paid for it, and received "a valid deed of conveyance" for the same, and entered into possession under his deed before the judgment against the former owner on which the land was sold was rendered; but the defendant's deed was not filed for record until after the judgment was rendered, and the execution had been levied on the land. The deed was filed, and the plaintiff had both actual and constructive notice of the same, before he purchased at execution sale. Construing the statute in the light of these facts, the supreme court said:

"The question is, shall we give this statute a literal construction, by which judgment lien creditors will override all incumbrances or conveyances not of record at the time judgment is obtained, wholly irrespective of any actual notice which the judgment creditor may have; or shall we place this class of creditors upon the same general footing of creditors who contract for liens and hold actual notice equivalent to registry notice in all cases? * * * Thus considered, we hold that, upon a liberal and fair construction of our statute, judgment creditors are, alike with subsequent purchasers and mortgagees, affected by notice of a prior unregistered deed or contract touching real estate, and that notice is equivalent to registry as to all persons. * * * Up to the time of sale, then, there would seem to be no necessity for giving notice to any one. But when the property is about to be sold, the creditor, as

well as the purchaser, has a right to know what incumbrances there are upon it. Public policy requires this, to prevent a sacrifice of property; and the interest of the creditor in making his debt, as well as an assurance to the purchaser that he buys clear of all titles not made known to him at that time, requires it. And if notice of the prior incumbrance is not then given, as well to the creditor as the purchaser, the actual notice substituted in the place of the registry notice is not as broad and full; and consequently cannot be received instead of such registry notice, and both the creditor and purchaser may rely upon the statute, that declares all deeds, etc., of which notice is not given void as against them. And although the purchaser at such sale, by virtue of the statute, gets a perfect title to the property purchased, free from all incumbrances, of which notice is not given, it is not because the lien attached in the first instance to a perfect, unincumbered title, or that such title was in fact in the debtor at the time of the sale, but because the first purchaser, notwithstanding his superior title, failed to give notice of it. Therefore it was by force of the statute swept off as fraudulent, and left the title to the purchaser as perfect as if the prior conveyance had never been made."

In *Jackson v. Allen*, 30 Ark. 110, the court say:

"The second question was decided in *Byers v. Engles*, 16 Ark. 543. True, in that case the chief justice dissented, but he was overruled by a majority of the court, and the case having stood unreversed for about twenty years, repeatedly followed, and involving a rule relating to title of real property, we are disposed to treat it as settled law."

These remarks are repeated in *Pindall v. Trevor*, Id. 249. Prior to the decision in *Byers v. Engles*, it was not known when the lien of a judgment creditor attached, and became paramount to the rights of persons claiming by "deed, bond, or instrument duly executed and acknowledged," but not recorded; whether it was upon the rendition of the judgment, levy of execution, or at the sale on execution; nor was it known whether the judgment creditor was bound by actual as well as constructive notice of such instruments. These questions were settled in that case by the court holding that the title of one who purchased land and received a deed "duly acknowledged," but which he failed to file for record until after the rendition of the judgment against his vendor, and the levy of execution on the land, will prevail over the title acquired by the purchaser at execution sale, if such purchaser had actual or constructive notice of the existence of such deed before he purchased; but that in such case, if the purchaser at the execution sale has neither actual nor constructive notice of the prior conveyance, he "gets a perfect title to all the property purchased." On this last point the court was very explicit, as will be seen by reference to the last paragraph herein quoted from the opinion; and it is not perceived how the court could have reached any other conclusion, in view of the peremptory language of the statute. Nothing is said in the case of *Byers v. Engles* as to the effect upon the judgment creditor of notice in fact of a secret trust, or a right claimed under a defectively acknowledged instrument, or an instrument in which the land intended to be conveyed is wrongly described. This case did not call for any expression on these points; later cases did.

The case of *Allen v. McGaughey*, 31 Ark. 252, decides that a purchaser from the judgment debtor, in possession under a deed in which the land, by mistake, is wrongly described, has a better right than the judgment creditor who purchased at execution sale with knowledge of these facts. Expressions that go beyond this were not necessary to the decision of the case. The same may be said of the case of *Pindall v. Trevor*, 30 Ark. 249, and *Williams v. McIlroy*, 34 Ark. 85. The statute, taken literally, gives the judgment creditor preference over the purchaser from the judgment debtor, unless the latter holds by "deed, bond, or instrument duly executed and acknowledged." But, in the cases last cited, the doctrine of *Byers v. Engles*, as to the effect upon the purchaser at execution sale of notice in fact of the claims of third persons founded on deeds "duly acknowledged," was extended, and applied to notice of any equity or right which the third person could have successfully asserted against the judgment debtor. In these cases (*Pindall v. Trevor*, *Allen v. McGaughey*, *Williams v. McIlroy*) the purchaser at execution sale had notice of the rights or equities of the third party before his purchase. These cases would doubtless have been decided the very converse of what they were, if the purchaser at the execution sale, when he purchased, had had no notice, actual or constructive, of the third person's equities. Such must have been the ruling, if any effect is to be given to the plain words of the statute. The law of this state on the subject, in the light of the statute and the decisions, is that a judgment creditor purchasing land at execution sale, on his own judgment, acquires the title and the rights of a *bona fide* purchaser for value, against third persons claiming the same through the judgment debtor, by secret trusts or unrecorded instruments, of which he had no notice, actual or constructive, before the sale; and that he buys subject to all the equities and rights of third persons, of which he has either actual or constructive notice at any time before the purchase. As thus formulated, the rule in this state is in harmony with the general doctrine on the subject, which is that a purchaser at execution sale is protected to the same extent as if he were purchaser at private sale, from claims previously acquired by third persons from the judgment debtor, of which he had no actual or constructive notice. Freem. Judgm. § 366; Freem. Ex. § 366.

In some of the states the question has arisen whether the judgment creditor shall be regarded as a purchaser for value, and protected by the registry laws from infirmities in the debtor's title, of which he had no notice, actual or constructive, at the time of the purchase. The authorities are not uniform on this question. Freem. Judgm. § 366a. But this question is settled in this state by the statute, which plainly gives a judgment creditor preference over secret equities and unrecorded instruments, of which he has neither actual nor constructive notice before his purchase at execution sale.

In the case at bar, Street purchased the land under the senior judg-

ment without notice of the plaintiff's equity, and the defendants Davis and Gaines purchased from Street for a valuable consideration without notice, actual or constructive, of the plaintiff's equities. They are, therefore, *bona fide* purchasers for value, without notice, independently of the purchase under their own judgment.

Undoubtedly there are expressions in the opinion of the court in *Allen v. McGaughey, supra*, and in other cases to which reference has been made, which, taken by themselves, would seem to support the plaintiff's contention that a purchaser at execution sale acquires no other or greater right than the judgment debtor possesses, and that he takes the land charged with all the equities that might be asserted against the judgment debtor, whether he had or had not notice of the same. But these general expressions were not necessary to the decision of the case, and must be read in the light of the facts of the case the court was deciding. In the later cases, to which reference has been made, the statute seems to have been overlooked. It is not cited, and the reasoning is not given, and is not very obvious, by which the conclusion is reached that under the statute the judgment creditor is bound by actual notice even of secret trusts or defectively acknowledged instruments.

To carry the doctrine to the extent claimed by the plaintiff in the case at bar, and hold that the judgment creditor is bound by secret trusts and unrecorded instruments of which he has no notice at the time of his purchase, would be, in effect, a judicial abrogation of the statute.

Carlton, without the knowledge or consent of the defendants, put upon record, long after the sales of the lands on the executions, a deed of trust disclosing the plaintiff's equity in the lands, and providing that his (Carlton's) interests in the lands might be sold to pay the judgments against him, upon which the land had already been sold. This deed of trust originated with Carlton. It was made without the knowledge or consent of those named as beneficiaries, and was to their prejudice, was never accepted by them, and cannot impair their rights.

Let a decree be entered dismissing the bill for want of equity.

EAST TENNESSEE, V. & G. R. Co. v. PICKERD, Comptroller.¹

(Circuit Court, E. D. Tennessee. May, 1885.)

1. TAXATION—EXEMPTION OF PROPERTY OF CORPORATIONS FROM TAXATION—VALIDITY—IMPAIRMENT OF CONTRACTS.

Legislatures, unrestrained by some constitutional limitation, have full power to provide, in an act creating a corporation, for an exemption of its property from taxation; and such a provision in the charter of a corporation constitutes a contract which the state may not subsequently impair.

2. SAME—EXEMPTION GRANTED BY REFERENCE TO PRIOR ACTS.

By its charter and other acts to which it refers, the property of the Cincinnati, Cumberland Gap & Charleston Railroad Company was exempted from taxation; and by force of the legislative and judicial action, detailed in the opinion, said exemption passed with the property and became vested in complainant.

4. SAME—JUDICIAL SALE OF VESTED FRANCHISE.

The legislature of Tennessee had constitutional authority, after 1870, to provide by law a remedy whereby an outstanding vested franchise, including, among other privileges, an immunity from taxation, could be subjected to a judicial sale for the payment of the just debts of its owner, and for the transfer of the same, in connection with a conveyance of the property, to which it was appurtenant, to a purchaser.

In Equity.

W. M. Baxter, for complainant.

B. J. Lea, Atty. Gen., for the State.

Marks & Vertrees, for defendant.

BAXTER, J. The complainant seeks, by its bill in this case, to enjoin the collection of taxes assessed against that portion of its property formerly belonging to the Cincinnati, Cumberland Gap & Charleston Railroad Company, on the ground that it is exempt from taxation. If the exemption claimed exists, it arises under the legislation and judicial proceedings to be hereinafter referred to and considered. The act of January 27, 1848, entitled "An act to incorporate the East Tennessee & Virginia Railroad Company," exempts all of its property, except slaves, from taxation for 20 years from and after the completion of its road, "and no longer." The act of February 9, 1850, entitled "An act to incorporate the Nashville & Louisville Railroad Company," exempted all of its property from taxation for and during its corporate life.

There is no doubt of the validity of these exemptions. The power of a legislature under our system, when unrestrained by some constitutional limitation, to contract in an act creating a corporation for an exemption of its property from taxation, has been too long established to be now called in question. The supreme court, in the *Binghampton Bridge Case*, 3 Wall. 73, say that the question has been "settled by an unbroken course of decisions," both in the "federal and

¹ Reported by Harper & Blakemore, Esqs., of the Cincinnati bar.

state courts;" that "all courts are estopped from questioning the doctrine;" that "the security of property rests upon it;" and that "a departure from it now would involve dangers to society that cannot be foreseen, shock the sense of justice of the country, unbinge its business interests, and weaken, if it did not destroy, the respect which has always been felt for the judicial department."

In *Humphry v. Pegues*, 16 Wall. 249, the same court reiterates the doctrine, and, among other things, say:

"Another question is raised, to-wit, that a legislature does not possess the power to grant to a corporation a perpetual exemption from taxation; that it is not competent for one legislature, by binding another, to compass the death of the state. It is too late to raise this question in this court. It has been held that the legislature has the power to bind the state in relinquishing its power to tax a corporation. It has been held that such a provision in a charter of incorporation constitutes a contract, which the state may not subsequently impair. These doctrines have been reaffirmed and reiterated so recently as 1871, in an opinion of Mr. Justice DAVIS in the case of the *Wilmington, R. R. v. Reich*, 13 Wall. 264. They must be considered as settled."

These rulings have been adopted and applied in numerous cases in Tennessee. See *Knoxville & O. R. Co. v. Hicks*, 9 Baxt. 442.

Assuming under these authorities that the exemptions granted to the East Tennessee & Virginia, and Nashville & Louisville Railroad companies are valid contracts that cannot be impaired by legislation, we will proceed to the next inquiry made necessary by the exigencies of the case, to-wit: Did the Cincinnati, Cumberland Gap & Charleston Railroad Company acquire, under its charter, a like exemption of its property? The act of November 18, 1853, incorporating the Cincinnati, Cumberland Gap & Charleston Railroad Company, among other things, enacted that said "company shall be, and it is hereby, invested with all the rights, powers, and privileges, and subject to all the restrictions and liabilities, of the Nashville & Louisville Railroad Company, except as otherwise provided in this chapter." And the act of December 22d following, entitled "An act to charter the Lexington & Knoxville Railroad Company," further provides "that the Cincinnati, Cumberland Gap & Charleston Railroad Company shall be, and it is hereby, invested with all the rights, powers, and privileges, and subject to all the restrictions and liabilities of the East Tennessee & Virginia Railroad Company, except as otherwise provided in this act and the act this is intended to amend."

The complainant insists that by virtue of the foregoing enactment the Cincinnati, Cumberland Gap & Charleston Railroad Company did, in common with the two companies referred to, acquire an immunity from taxation to the same extent as it had been conferred on said former companies. But this has been expressly denied by the supreme court of this state in two decisions: *Wilson v. Gains*, 2 Leg. Rep. 31, and *East Tennessee, V. & G. R. R. v. Hamblin Co.*, decided in 1877, but not reported. We have heretofore given our reasons for dissenting from these cases, and subsequent reflection and investiga-

tion have confirmed the conclusions then reached. *Louisville & N. R. Co. v. Gains*, 3 FED. REP. 266. In thus dissenting from the ruling of the supreme court of Tennessee, we followed, as we were bound to do, a contrary doctrine announced by the supreme court of the United States. The statute of a state, say this last tribunal, "may make a contract as well by reference to a previous enactment making one, and extending rights to another party." *Binghampton Bridge Case*, *supra*. Here the power of the legislature to enter into a contract in the way pointed out is affirmed. But the court does not undertake to say in that case that the terms employed in the statutes under which complainant claims, to-wit, "rights, powers, and privileges," are sufficient to invest the Cincinnati, Cumberland Gap & Charleston Railroad Company with the immunity from taxation granted to the two companies to whose charters reference is made. Not at all. But in *Humphreys v. Pegues*, 16 Wall. 244, where this precise question arose, the court did so hold.

The pertinent facts of the last case are briefly these: South Carolina in 1851 incorporated a railroad company without exemption from taxation. But in 1855, by an amendatory act, it conferred that privilege. And in 1863, by another act incorporating another and different railroad company, it was provided that "all the rights, powers, and privileges" conferred on the previous corporation should be conferred on the second company. Upon these facts the supreme court held (1) that the property of the second corporation was made, by the act of 1863, exempt from taxation; (2) that the legislature could not, without contravening the national constitution, repeal the act of 1863 so as to subject said last company's property to taxation. And, among other things, the learned justice who delivered the opinion of the court said:

"All the *privileges* as well as the powers and rights of the first corporation were granted to the latter. A more important or more comprehensive privilege than a perpetual exemption from taxation can scarcely be imagined. It contains the essential idea of a peculiar benefit or advantage of a special exemption from a burden falling upon others."

The precise point decided is that the word "privilege" did include the exemption from taxation granted to the former corporation. And although numerous cases have since arisen involving kindred questions which have been elaborately discussed and distinguished from *Humphry v. Pegues*, the latter case has been in no way weakened or qualified, but the same has been, by clear implication, several times reaffirmed. Mr. Justice MATTHEWS, in the case of *Tennessee v. Whitworth*, 22 FED. REP. 81, said:

"The language of the sixth section (which gave to the Nashville & Decatur Railroad Company all the rights and privileges previously granted to the Nashville & Chattanooga Railroad Company) is precisely equivalent to a declaration that the Nashville & Decatur Railroad Company shall be governed by the charter of the Nashville & Chattanooga Railroad Company, as though it had been re-enacted as such, with the name of the former company in-

serted instead of the latter, repeating in detail the language of each section, granting rights and privileges, and imposing restrictions and liabilities."

These adjudications are conclusive upon this court, and unless there is some fact not yet adverted to that renders them inapplicable, they must control this case.

The defendant insists that the Cincinnati, Cumberland Gap & Charleston Railroad Company took nothing under that clause of its charter professing to vest it with the rights, powers, and privileges of the Nashville & Louisville Railroad Company. Its contention is that the act to incorporate the last-named company provided that it "should become a law whenever the state of Kentucky may enact the same for the same purpose." No such co-operative legislation has been enacted, and no company has been organized under said act. Upon these conceded facts the complainant insists that said act never took effect or became a law, and that no such corporation as the Nashville & Louisville Railroad Company ever existed; and hence the charter of the Cincinnati, Cumberland Gap & Charleston Railroad Company, professing to vest in the latter company all the rights, powers, and privileges, and onerate it with all the restrictions and liabilities of such non-existing company, passed nothing. It has been so held by one of the circuit judges of the state. Yet, while his judgment was subsequently affirmed both by the state and national supreme courts, neither of them discussed this particular question, nor intimated an opinion in regard to it, unless the solicitude manifested to find other and more plausible grounds upon which to rest their decisions may be regarded as an intimation against the views of the subordinate court. *Railroad Co. v. Hamblen Co.* 102 U. S. 273.

This ruling is, in my judgment, manifestly erroneous. The act incorporating the Nashville & Louisville Railroad Company was enacted by the legislature in conformity with the requirements of the constitution. It was duly enrolled, attested by the speakers of both houses, and regularly promulgated and published as one of the statutes of that session. The courts have always taken, whenever it came in question, and still continue to take, judicial notice of its existence and contents. The legislature knew, when it passed the act to incorporate the Cincinnati, Cumberland Gap & Charleston Railroad Company, that no company had been organized under it; and, under the construction contended for by the defendant, the act in question would be converted into a meaningless farce. Such a construction is precluded by every reasonable hypothesis. It is, to my mind, clear that the legislature intended to incorporate the act to charter the Nashville & Louisville Railroad Company in all its details into, and make it a part of, the act to incorporate the Cincinnati, Cumberland Gap & Charleston Railroad Company's charter, and in this way to confer upon and vest in said last-named corporation all the rights, powers, and privileges prescribed therein and granted thereby, including the exemption claimed.

But we need not pursue this discussion any further, as it is not essential to a correct determination of this case.

The act of December 22, 1853, herein previously referred to, also assumes to vest the Cincinnati, Cumberland Gap & Charleston Railroad Company with all the rights, powers, and privileges previously granted to the East Tennessee & Virginia Railroad Company. This company had a lawful existence. Among its rights, powers, and privileges was an immunity from taxation for 20 years from and after the completion of its road. This period has not yet elapsed. If this immunity was vested in the Cincinnati, Cumberland Gap & Charleston Railroad Company, and was subsequently passed to the complainant, it is not important to inquire in this case whether it acquired, in the manner alleged, the rights, powers, and privileges of the Nashville & Louisville Railroad Company or not; for, if the immunity was acquired in virtue of the reference in its charter to the East Tennessee & Virginia Railroad Company's charter, it has not yet expired, and the complainant is entitled to be protected in the enjoyment of its said privilege until it is lost by the lapse of time.

Having shown, as we think, that the Cincinnati, Cumberland Gap & Charleston Railroad Company was by law vested with an immunity from taxation, we will next proceed to inquire whether that immunity has been passed to and invested in the complainant. Ordinarily no such immunity will pass to a purchaser as an incident to the acquisition of the property exempt. *Morgan v. Louisiana*, 93 U. S. 217; *Wilson v. Gains*, 103 U. S. 417; and *Louisville & N. R. Co. v. Palmes*, 109 U. S. 244; S. C. 3 Sup. Ct. Rep. 193. But such an immunity may pass to a purchaser if it is authorized by law. *Memphis R. Co. v. Commissioners*, 112 U. S. 617; S. C. 5 Sup. Ct. Rep. 299. So let us see if there was any sufficient authority for the transfer claimed by the complainant in this case.

By the act of February 11, 1852, the legislature of Tennessee projected a general system of railroad improvement for the state. In it the state undertook to aid private enterprise in the building of various railroads, by loaning to the several companies organized for the purpose state bonds, on the conditions therein prescribed. These provisions were precautionary, and were intended to indemnify the state against loss; and, among other reservations of power for the accomplishment of that object, the third section of the act provided "that the state of Tennessee, upon the issuance of said bonds, and by virtue of the same, shall be invested with a lien or mortgage, without a deed from the company, upon the road-bed, right of way, grading, etc., * * * acquired, or to be acquired, by the companies" to which aid was to be extended. And to avoid all possible conflict between the state and other creditors of said aided corporations, the fourth section of said act further provided "that it shall not be lawful for any one of said companies to give, create, or convey to any person or persons whatever, any lien, incumbrance, or mortgage of any

kind, which shall have priority over or come in conflict with the lien of the state herein secured; and every such lien, incumbrance, or mortgage shall be null and void as against the lien of the state." And as a further precaution, the legislature reserved the power to thereafter "enact all such laws as may be deemed necessary to protect the interest of the state against loss in consequence of the issuance of said bonds." Aid was accordingly extended under and pursuant to the provisions of said act to the Cincinnati Cumberland Gap & Charleston Railroad Company.

Among other conditions of this loan was an undertaking by each of said borrowing companies to provide for the payment of the semi-annual interest as the same accrued. The Cincinnati, Cumberland Gap & Charleston Railroad Company failed to do this, but, along with other companies similarly obligated, neglected to provide for the payment of said interest as it matured. Thereupon the legislature, in the exercise of its reserved authority to enact such laws as might be deemed necessary to protect the state's interest, passed the following enactments authorizing and providing for the sale of delinquent railroads. By the first, to-wit, the act of July 1, 1870, three commissioners were appointed to make the sale, who, encountering some and foreseeing other legal obstacles to an advantageous sale, declined to proceed until further legislation could be had, and by a formal report suggested and recommended further and remedial legislation. It was in deference to their recommendation that the act of December 22, 1870, was passed. This act authorized and required said commissioners to file a bill for and in behalf of the state, in the chancery court at Nashville, against all delinquent railroad companies, including the Cincinnati, Cumberland Gap & Charleston Railroad Company, for the purpose of enforcing, under the decrees of said court, a sale of said several delinquent companies' property for the benefit of the state. And among the powers conferred by said act in said court was the authority "to define as may be thought proper" what "the rights and duties and liabilities" of the purchasers should be; the tenth section of said act declaring that the purchaser should be vested with "all the rights, privileges, and immunities appertaining to said franchise to be sold, under the act of incorporation and amendments thereto, and the general improvement laws of the state and acts amendatory thereof."

Thereupon a bill was filed in accordance with the requirements of the foregoing statute, and prosecuted to a final hearing. In the progress of the case, the court, in discharge of the duty enjoined upon it by the statute to adjudicate and determine all questions of law and matters of controversy, of whatever nature, whether of law or of fact, that had arisen, or that might arise, touching the right and interest of the state, and also of the stockholders, bondholders, creditors, and others in said road, and to define "what shall be the rights, duties, and liabilities of a purchaser of the state's interest in said roads," did,

among other things not necessary to be recited, declare that the state had the right, under the law, to have said "roads, property, and franchises" sold in satisfaction of its lien; and that the purchasers thereof would take said "roads, property, and franchises free from all claims whatsoever," except such as were reserved by the decree to secure the payment of the purchase money, together with "all the rights, privileges, and immunities appertaining to the franchise so sold, under its act of incorporation and the amendments thereto, and the general improvement law of the state and acts amendatory thereof." It furthermore adjudged that said company was indebted to the state in the sum of \$1,404,680 for bonds previously loaned it, and the matured and unpaid interest thereon, and decreed a sale of said road, property, and franchises, upon the terms and conditions set forth in the decree; and at the sale made pursuant thereto, the complainant, through its agents, became the purchasers thereof; and upon complainant's application, duly made, said sale was confirmed, and "all the right, title, interest, claim, and demand which said Cincinnati, Cumberland Gap & Charleston Railroad Company, its stockholders, creditors, or the state of Tennessee," had in and to said "property, right, franchises, and privileges of said company," which were sought to be, and under the decrees in said cause were ordered to be sold and transferred, were divested out of said parties respectively and vested in the complainant, with all the legal and equitable rights incident thereto, as defined in the former decrees" in said cause, for the period prescribed by law.

Thus it is insisted that the complainant has succeeded to the ownership of the property and franchises and privileges of the Cincinnati, Cumberland Gap & Charleston Railroad Company, including the immunity from taxation previously possessed by said company. This contention, however, is denied by the defendant.

If, as we have endeavored to show, the exemption originally claimed was valid in favor of the Cincinnati, Cumberland Gap & Charleston Railroad Company, it is clear that it was the intention and purpose of the legislature to have transferred it, under the legislation and judicial proceedings recited above, to the complainant as incident to its purchase; but it is now contended that said transfer was in contravention of the constitution of 1870, and therefore invalid and inoperative; and in support of this position the case of *Trask v. Maguire*, 18 Wall. 391, is recited on.

Trask v. Maguire is, in many of its facts, very much like this case. But the two cases are by no means identical. Missouri, like Tennessee, loaned its bonds to railroad corporations to aid them in the construction of their roads, and retained statutory liens on the roads and their appurtenances, with authority, in default of payment, to sell the same. The power to sell was by the law vested in the governor. He was authorized to sell at auction, and to the highest bidder and, in certain contingencies, to buy the roads and property for the

state, subject to such disposition as the legislature might thereafter direct. After this legislation, the state, in July, 1865, adopted a new constitution containing the following clauses:

"No property, real or personal, shall be exempt from taxation, except property of the state. The general assembly shall not pass any special law exempting the property of any named person or corporation from taxation."

The railroad in question, to which the state had loaned its bonds, and on whose road and appurtenances it had retained a lien coupled with a reservation of a right to sell, having failed to meet its obligation to the state, was proceeded against and its road and appurtenances sold and bought in by the governor for the state. This vested the franchise of the company and the title to its property in the state. Being thus vested the legislature, by an act passed for the purpose, appointed commissioners to "sell, convey, transfer, and make over said road, and all its franchises, privileges, and rights, title and interest, appertaining to the road;" and declared therein that "the purchaser thereof should acquire by his purchase all the rights, franchises, privileges, and immunities which were possessed and enjoyed by the original corporation under its charter and laws amendatory thereof." The commissioners thus appointed sold and conveyed the road as they were required by the law to do.

On these facts it became a question whether the purchaser did acquire the immunity from taxation possessed by the original corporation. The supreme court held that it did not, but on grounds not at all applicable to this case. The property of the first corporation, say the court, "was undoubtedly exempt from state and county taxes. But when the state became the purchaser, the immunity ceased; the property stood in its hands precisely the same as any other unincumbered property of the state, exempt from taxation, not by any previous stipulation with the company, but as all property of the state is exempt. The act under which the resale was made, provided that the purchasers should have all the rights, franchises, privileges, and immunities which were enjoyed by the defaulting company under its charter and laws amendatory thereof. The question, therefore, was whether the legislature was competent to grant the immunity claimed, under the constitution which went into operation previous to the passage of the act authorizing the sale. And proceeding to argue the question, the court say: "The plain meaning of the ordinance and acts under which said sale was made" was that the sale should be made "in conformity with such laws as the legislature may constitutionally pass, not in conformity with any law which the legislature could devise, if it had unlimited discretion in the matter." And to this the court adds that it is "clear that it never was intended" that the sale of the franchise of a defaulting corporation should renew an exemption which had once ceased to exist, and which the constitution had declared should never thereafter be created; that the inhibition of the constitution applies, in all its force, against the renewal of an

exemption equally as against its original creation; and this inhibition the legislature could not disregard in providing for the sale of the property which it had purchased.

It will be seen that this decision rests upon two very satisfactory grounds: (1) That the ordinance and acts under and in virtue of which the resale of the property and franchises were made never intended to vest the purchaser with the immunity from taxation possessed by the original corporation; and (2) if the legislature had so intended, it could not, in the face of the constitution then existing and prohibiting exemptions, authorize the renewal of an exemption that had been previously extinguished. But this is a very different case. Here the state, being the creditor of an insolvent corporation, was anxious to collect its debt, to secure the payment of which it held a lien on the company's property and franchises, with authority to legislate for its own benefit in relation thereto. A valuable part of this franchise was the exemption of the company's property from taxation. This exemption was a vested right when the constitution of 1870 went into operation, beyond the reach of a constitutional convention or legislative action. It was competent for the state to have legislated, as the state of Missouri did, to have authorized the governor or some other agent to have bought in the property, when sold, in the name and for the benefit of the state; and if it had done this, the franchise would have reverted in the state and been extinguished, and could not, in view of the explicit provisions contained in the constitution of 1870 requiring all property to be taxed, have been renewed.

But this policy was not adopted. The exemption existed; it was valuable property, owned by an insolvent debtor, and in conscience liable for its debts, although there was, at the time, no remedy by which it could have been subjected thereto. In this exigency, the state, being both creditor and legislator, called its reserve power into requisition and provided a remedy. Being desirous of realizing the highest possible price for its debtor's property, it directed a sale of the company's franchise as well as its visible property, and, by way of encouraging bidders and enhancing the price, guaranteed, through a solemn adjudication of a competent court made by authority of law, that the purchasers should by their purchase acquire with a title to the property, the rights, privileges, and immunities possessed, and be subject to all the duties and obligations previously resting on the defaulting corporations, as defined by their charters and amendatory legislation.

That it was the intention of the legislature and the court to convey with said property and franchises the immunities granted, as well as to operate the purchasers with the obligations and duties imposed by the charters of the defaulting companies, is clearly deducible from the legislation in question and the decrees of the court made thereunder. If so, we have successfully distinguished this case from that

of *Trask v. Maguire*; that is to say, the legislation in the last-named case, as interpreted by the court, did not intend to vest the purchaser with an immunity from taxation, whereas in this case it did.

This, then, brings us to the consideration of the second proposition: Had the legislature the constitutional authority,—not to grant an immunity from taxation after 1870,—but to provide by law a remedy whereby an outstanding vested franchise, including, among other privileges, an immunity from taxation, could be subjected to a judicial sale for the payment of the just debts of its owner; and for the transfer of the same, in connection with a conveyance of the property to which it was appurtenant, to a purchaser? We think, both upon reason and authority, that it had. Such power has been exercised from time immemorial. Legislatures have without objection from time to time, as the exigencies of the state made it necessary, enlarged remedies by mesne and final processes, for the collection of debts. In this way they have made property, which could not be reached by the ordinary processes of the law, amenable to creditors through some new and appropriate statutory remedy. In this way incorporeal and other valuable interests that could only be reached through courts of equity have been subjected to executions at law. Other illustrations might be given, but it is not deemed necessary. Wherefore, then, is it that the legislature of Tennessee could not in the exercise of its legislative power provide a remedy for subjecting the Cincinnati, Cumberland Gap & Charleston Railroad Company's property, with its vested privileges and other immunities, to sale for the payment of its debts?

In *Memphis & L. R. R. Co. v. Railroad Com'rs*, 112 U. S. 609, S. C. 5 Sup. Ct. Rep. 299, the court say "that a franchise to be a corporation is not a subject of sale and transfer, *unless made so by statute which provides a mode for exercising it*, thereby clearly implying that such sale and transfer could be authorized by statute." If the legislature could do this, this controversy is at an end. We have here shown that such sale and transfer was authorized, and the particular mode of executing it provided for. No new exemption is created: the property of said corporation was already exempt from the burden of taxation; the state had no constitutional right to exact a revenue from it; it could have provided for the sale of the property and franchises without including the exemption; and if it had elected to do this, the state would have regained its power of taxation over the same. But the legislature expressly submitted the question to the judgment of the court in a suit to which it was a party, directing, in order that there might be no misconception in regard to the matter, that the court should, by decree, define what the rights and obligations of purchasers should be. The court, in obedience to the legislative mandate, declared that the purchaser would acquire, under such sale, "all the right, title, interest, claim, and demand which the Cincinnati, Cumberland Gap & Charleston Railroad Company, its

stockholders, creditors, the state of Tennessee, and all other parties to said suit herein and to the property, rights, franchises, and privileges of said company," and that the same should "be divested out of them and vested" in the purchaser; and it was subsequently so decreed. This is an adjudication of the question, made at the instance, under legislative authority, and for the benefit, of the state. It was so adjudged in order that bidders might be accurately and judicially advised of the rights which they would acquire in case their bids were accepted. The court defined their rights; declared that they would acquire "all the rights, privileges, and immunities" which the delinquent companies possessed under their charters and amendatory legislation. This decree was pronounced by a competent court, in a suit in which the state by her own volition was complainant for her own benefit, and from which she had the right of appeal. But no objection was interposed, no appeal taken, and no writ of error prosecuted. The adjudication remains unreversed and in full force, and cannot be collaterally attacked in this proceeding. The state having been a party to said suit, and acquiescing in the decision made therein, the sale having been made and the bids offered and received on the faith of said decrees, and said sale having been reported and confirmed by the court, and the immunity from taxation having been vested, along with the other corporate privileges, in the purchasers, the respective rights, liabilities, and obligations of the parties are fixed, and the state, as well as other parties to the cause, is estopped from claiming anything in contravention of said adjudication. The state is as much bound by the adjudication as an individual would be under the same facts.

The adjudication of the supreme court of the United States in *Railroad Co. v. Hamblen Co.*, *supra*, was made upon an imperfect and limited statement of the facts, and is no authority against the decision made herein. The facts of this case are substantially identical with those of *Railroad Co. v. Hicks*, *supra*, and the decision made therein by the supreme court of the state is in entire harmony with the views expressed here.

The immunity from taxation may or may not have been a judicious grant. This is a proposition which we are not called on to discuss. Our duty is fully discharged when we declare the law as we find it to exist, and protect the parties in the enjoyment of their legal rights. We think that the legislation and judicial proceedings recited exempts that portion of the complainant's property acquired from the Cincinnati, Cumberland Gap & Charleston Railroad Company, and that it is entitled to the preliminary injunction prayed for.

WILLIAMS, Adm'r, etc., v. NORTH GERMAN INS. CO.¹

SAME v. LONDON & PROVINCIAL INS. CO.

SAME v. MERCANTILE FIRE & MARINE INS. CO.

(Circuit Court, S. D. Iowa. June 26, 1885.)

1. FIRE INSURANCE—MISTAKE IN POLICY—NEGLIGENCE OF AGENT—REFORMATION.

Where a policy of insurance, which has been drawn up by the agent of the insurer and merely accepted by the insured, does not represent the intention of both parties because of the fault or negligence of the agent, it may be reformed so as to express the contract as it was intended to be made.

2. SAME—EVIDENCE—KNOWLEDGE OF AGENT.

On examination of the evidence in this case, *held*, that the agent knew at the time what interest was intended to be insured, and that the policy should be reformed to properly show such interest.

3. SAME—OCCUPANCY OF ELEVATOR INSURED.

Where the property insured is an elevator, and it appears, although a part of the time it was not actually used, and there was no steam up or men working there, men were around the place all the time, and the insured kept his papers there, it will not be considered that the elevator was vacant in a sense that would avoid the policy.

In Equity.

Hagerman, McCrary & Hagerman, for complainant.

Anderson Bros. & Davis, for defendant.

MILLER, Justice, (*orally*.) The plaintiff, Williams, obtained policies of insurance against the risk of fire on what is known as the "Keokuk Elevator." The policies read that the Keokuk Grain Elevator Company is insured against loss by fire to such and such amounts, and the loss, if any, is payable to Williams; administrator. C. L. Williams is and was administrator of his father's estate. At the time of this insurance—at the time it was made—the elevator property had been sold under a decree of this court, and had been bought in by Williams as administrator for the estate. He bought it in and held the certificate of purchase, liable and subject to redemption at the end of the year from the date of sale. The condition of the title, therefore, was that the legal title was in the Keokuk Grain Elevator Company, and the interest of a purchaser under a defeasible claim was in Williams as administrator of his father's estate. Before the twelve months for which the insurance was to run would expire, it was obvious that the condition of the title must be changed; either the elevator company must redeem and have a clear title to the property before the policy expired, or, failing to redeem, Williams would receive the deed and divest all rights of the elevator company. What took place was that the company did not redeem; that Williams received the deed to the property, and after he had got the deed, the elevator company being di-

¹ Reported by Robertson Howard, Esq., of the St. Paul bar.

vested of all title, the fire took place, but during the life of the policy. All lawyers know that the elevator company, having no interest in the property at the time of the fire, was not insured, and could not collect any money, and could not sustain a suit for such recovery. Nor did the clause, "Loss, if any, payable to C. L. Williams," change that legal relation. The loss mentioned in that form of policy was the loss of the Keokuk Grain Elevator Company. If this fire had taken place before the expiration of the time of redemption, the policy would have been effectual. It would have covered the loss of the elevator company. It would have been its loss. The loss would have been payable to Williams, but since the elevator company had no interest in it when the fire took place, there was no loss to it, and Williams was not insured by the policy.

Williams has filed a bill in chancery averring that the language of the policy in that respect did not represent the contract which was made. He avers that he made a contract with Maxwell, the insurance agent, to insure him and his interest in the property. He avers this with sufficient precision, and he swears to it in various forms and shapes, and other testimony is taken on the subject. The first question to be considered is whether, admitting the statements of the bill to be true, and taking for granted the testimony of Williams, it was a case for relief in chancery. I remember the old decisions in the chancery courts of England on the subject that a written contract cannot be reformed in equity for a mistake in law. That is all the branch of the subject that embarrasses me to-day. But, without examining authorities abroad, the decisions of the supreme court of the United States must govern me, and I am inclined to think that doctrine has been much narrowed in modern times. Without going to great length at the present time, I shall state it about this way: Where an instrument fails to represent what both parties intended to have it represent, and one party had drawn up the instrument, and the other party merely accepted it, and the fault was on the part of the party drawing up the instrument, it can be reformed. It would be a harsh rule if a person applying to an insurance agent, who is supposed to know the legal value of the language used in such policies, which he is drawing up every day, and who is supposed to know exactly what is desired, if that agent fails to do that which was intended, it would be harsh to say that the instrument shall not be reformed, and that chancery shall not give relief.

The testimony on that subject, although very well handled by the counsel for the companies, leaves no shadow of doubt on my mind that both parties intended to insure the interest of the administrator of his father's estate in that property. I think that every one not familiar with rules of law would say that the policies saying that loss, if any, was payable to Williams, that Williams was insured; but that is a mistake.

Williams' testimony is broad and full and clear that he communi-

cated to Maxwell the exact condition of this property as I have recited it; that there had been a decree and a sale, and that he held the certificate of sale; that it would expire during the term of the policy, and he would get the title. All these particulars he explained to Maxwell, and he told Maxwell he wanted that interest insured, and Maxwell so understood it. Williams' brother swears to the same thing. He was present, and says that the whole thing was explained to Maxwell more than once. The clerk in the office of Maxwell confirms this statement. He was present, he wrote out the policies, and he questioned Maxwell about the thing being done; doubted the sufficiency of the language; and Maxwell told him to fill it out that way; that it effected the object. When the fire took place Williams went to Maxwell and had a talk with him. Maxwell confirmed his statements in writing.

For some reason it seems Williams knew Maxwell better than some others, and he had Maxwell go before a notary public, and he made a long statement, and signed it, and swore to it in the presence of two witnesses, and the notary, and the witnesses swear that certain interlineations were made at his suggestion. And yet Maxwell, after getting to California, and under contract of re-employment, swears he never heard about this question regarding the title. I do not care to discuss such testimony. I am satisfied that the story of Williams is in the main true; that Maxwell understood the character of the title to the property; and that he was requested to provide for that state of things, and he carelessly made the policy as he did, and as it stands to-day. Some authorities are read,—something about need of absolute proof, in order to reform a legal instrument,—but I do not attach any importance to these, as I am perfectly satisfied that the contract on which this policy was executed was such as to demand the reformation of the policy. I therefore hold that it should be reformed so as to express the fact that the interest of Williams as administrator was insured.

One or two other questions are presented, and about them I have less difficulty. One of these was the provision as to leased ground; that the policy should be void unless that fact was expressed, and also if the property ceased to be occupied during the term the policy should become void, unless the company was notified and gave its consent. The bill seeks to reform the policy in both of these particulars, and asks the insertion in the policy that it was known to be on leased ground, and was to be permitted to be vacant at times. I do not think that, having reformed the policies as to the interest insured, these questions are such as need reformation. I think provisions can be waived, and the company estopped by its own transactions from asserting them. But I think it is better in these chancery cases to dispose of the whole case, if possible, and that there is no need of a jury on these questions. I am satisfied that Mr. Maxwell knew very well that this was leased ground; that his attention was called to it; and

that he made the insurance with that understanding. Therefore the company waived that part of the contract.

The lease was not from a private citizen, but from the city of Keokuk, which could not be supposed to have any interest in the burning of the property, or its destruction in any way. And this fact of the leased ground was known to the whole board of insurers.

As to the occupancy of the building, if I was a juror I should say that the property was occupied; that the elevator remained there, with its machinery, sometimes used and sometimes not used, as it had been for years. The cessation from use simply meant that no steam was up and that nobody went there to work; but men were around there all the time, and Williams went there frequently,—had his papers there; and I think that I, as a juror, notwithstanding some part of the time they were not using the elevator, would find it was not vacant. But it is claimed that Maxwell knew this, and nobody could tell when it would be vacant. Brookings had it at the time of the insurance, and I think that no juror could be justified in saying that these conditions are not waived. On the whole, then, I am satisfied that this company contracted to insure the interest of Williams in these three policies; that the language of the policies, failing to express that, should be reformed to make them express it. The other objections are not valid, and a decree should be entered for the complainant accordingly.

BUNDY, as Receiver, etc., v. JACKSON.

(Circuit Court, E. D. Arkansas. August 10, 1885.)

1. PROMISSORY NOTE—LIABILITY OF INDORSER WHERE MAKER IS FICTITIOUS PERSON.

The payee and indorser of a negotiable promissory note is liable as maker, where he knows the maker is a fictitious person; and if he were to be regarded as an indorser, he would be liable on his indorsement without demand or notice.

2. NATIONAL BANK—SALE BY BANK OF ITS OWN STOCK—PURCHASE BY OFFICERS OF BANK—ESTOPPEL.

The sale which section 5201, Rev. St., requires a national bank to make of its own stock, is real and not fictitious. And where the president and cashier of a national bank, which is the owner of some of its own stock, purchase such stock, and execute their note to the bank for the purchase money, in a suit against them on the note, by the receiver of such bank, they are estopped to set up as a defense that their purchase of the stock was unauthorized, or that their purchase was merely colorable, or to avoid a forfeiture of the bank's charter, or for any other deceptive or illegal purpose.

3. SAME—PURCHASE AND SALE OF STOCK BY PRESIDENT—RATIFICATION.

The sale by the president of a national bank, to himself and the cashier, of the stock of the bank, owned by the bank, may be ratified by the bank or its legal representative; but a sale by himself to the bank, of its own stock, where he acts in the double capacity of seller and buyer, cannot be ratified when the purchase of the stock by the bank is not necessary to prevent loss upon a debt previously contracted. In the one case the sale of the stock is enjoined by

law, and its sale by the president may be ratified, however irregular it may have been in the first instance; but the purchase of its own stock by the bank is interdicted by law, and for this act there can be no authorization in advance, and no ratification afterwards.

At Law.

The plaintiff is receiver of the Hot Springs National Bank, appointed by the comptroller of the currency. This suit is on a note, the facts relating to which are as follows: The Hot Springs National Bank owned \$500 of its own stock, which was "laid on the counter and counted as \$550 cash" and carried on the books as that much cash. On the second of January, 1884, Andrew Bruon and the defendant, R. E. Jackson, then the president and the cashier, respectively, of the bank, on the suggestion of Bruon, and for the purpose, as he said, of taking the stock out of the list of cash items of the bank, signed the name of a fictitious person, as maker, to a negotiable promissory note, due in 90 days, for \$550, payable to their own order, and indorsed this note to the bank. In consideration for their note they took from the bank, and placed to their own account, the \$500 of stock, which they duly transferred to themselves on the books of the bank. How the bank acquired this stock, and how long it had belonged to the bank, is not shown; but it had evidently belonged to the bank several months. The note was renewed one or more times. About the time the bank closed its doors, Bruon and Jackson transferred the stock back to the bank, and destroyed their note,—the note here sued on. The stock of the bank is worthless. There is no evidence tending to show the directors had any knowledge of this transaction.

U. M. & G. B. Rose, for plaintiff.

John McClure, for defendant.

CALDWELL, J. The payee and indorser of a promissory note is liable as maker, where he knows the maker is a fictitious person; and if he were to be regarded as an indorser, he would be liable on his indorsement without demand or notice. 1 Pars. Bills & Notes, 559, 560. Section 5201, Rev. St., reads as follows:

"No association shall make any loan or discount on the security of the shares of its own capital stock, nor be the purchaser or holder of any such shares, unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith, and stock so purchased or acquired shall, within six months from the time of its purchase, be sold or disposed of at public or private sale; or, in default thereof, a receiver may be appointed to close up the business of the association, according to section fifty-two hundred and thirty-four."

The bank having in some way become the owner of this stock, it was required within six months from the date of its purchase to sell it, on pain of having a receiver appointed to close up the business of the bank. It is obvious the president of the bank had this clause of the act in view when this transaction took place, and that the execution of the note, and the transfer of the stock from the bank to Bruon and Jackson was a scheme to escape the penalty for a longer ownership

of the stock by the bank. The sale which the law requires the bank shall make of its own stock is a real sale and not a fictitious one. The president and cashier, it is true, could not make a sale of the stock to themselves that would bind the bank; but the directors might have sold them the stock; and when the bank, or its representative, elects to ratify the sale they made to themselves, Bruon and Jackson will not be heard to set up their own illegal or unauthorized act to avoid their contract. Nor will they be permitted to allege the sale and purchase was merely colorable, or to avoid a forfeiture of the bank's charter, or for any other deceptive or illegal purpose. Bigelow, Estop. 513. "The receiver is the statutory assignee of the association," (*Kennedy v. Gibson*, 8 Wall. 498, 506,) and, as such, possesses all the powers requisite to "collect all debts, dues, and claims belonging to it," and which the directors of the bank could have asserted and collected if no receiver had been appointed. The receiver may therefore treat the purchase of the stock by Bruon and Jackson as valid, and he elected to do so within a reasonable time after the facts came to his knowledge.

The subsequent effort of Bruon and the defendant to relieve themselves from liability, by transferring the stock back to the bank and tearing up their note, was futile. The statute declares the bank shall not purchase its own stock, unless such purchase shall be necessary to prevent loss upon a debt previously contracted. The purchase by the bank, through its president, of the stock owned by himself and the defendant was not made to prevent such a loss. The president of the bank had no power to purchase stock from strangers, or release the claims of the bank against any person. *Morse, Bank*. 146, 147. And, of course, he could not act in the double capacity of buyer and seller, and contract with himself for the discharge of his own obligation, and, as president of the bank, purchase stock from himself, which the bank by law was prohibited from purchasing from any one. For this act there could be no authorization in advance, and no ratification afterwards. It does not have to be formally disaffirmed by the directors or the receiver, because neither could ratify or impart validity to it if they desired to do so. The sale of the stock by the bank was enjoined upon it by law, and its sale by the president could therefore be ratified, however irregular it may have been in the first instance; but the purchase of the stock by the bank was interdicted by law, and was therefore incapable of ratification. The assets of the bank constitute a trust fund for the benefit of its creditors, and when wrongfully diverted can be followed in whosoever hands they can be traced. The debt incurred by the defendant to the bank, by the purchase of the stock and the execution of the note, has never been paid. The destruction of the evidence of the debt did not pay the debt. The title to the stock never passed from Bruon and the defendant to the bank. The stock is theirs, and if in the possession of the bank, or the receiver, it is held in trust for them. If the acts

practiced by the president and cashier of the bank in this case can be indulged in with impunity by bank officers, then the safeguards provided by statute for the security of depositors and other creditors of the bank are blank paper.

Let judgment be entered for the plaintiff for the amount of the note and interest.

COLWELL and others v. SPRINGFIELD IRON CO.

(Circuit Court, S. D. New York. August 14, 1885.)

BROKERS—COMMISSIONS—EXPRESS AGREEMENT—COMPROMISE.

Plaintiffs, brokers in railway supplies, knowing of a party who wanted rails and fastenings, telegraphed to defendant, a manufacturer and seller of railway iron, for prices, to cover them 1 per cent. on rails and $2\frac{1}{2}$ per cent. on fastenings. Defendant gave prices, and a contract was made for the sale and delivery of the iron at an agreed price, on that basis as to plaintiffs' commission, but the contract fell through by default of the purchaser, and no rails were delivered or paid for under it. Afterwards, plaintiffs, in consideration of \$1,000, canceled a contract with the purchaser, and waived all claim or interest in certain contracts, among them this contract with defendant. In an action to recover commissions, *held*, that a verdict was properly directed for defendant.

At Law.

Charles W. Hassler, for plaintiffs.

George Zabriskie, for defendant.

WHEELER, J. The plaintiffs are brokers in railway supplies. The defendant is a manufacturer and seller of railway iron. They knew of a party who wanted rails and fastenings, and telegraphed to defendant for prices, "to cover us one per cent. on rails and two and one-half per cent. on fastenings." The defendant gave prices, and a contract was made for the sale and delivery of the iron at an agreed price, on that basis as to the plaintiffs' commission. The contract fell through by the default of the purchaser, and no rails or fastenings were delivered or paid for under it. Afterwards the plaintiffs, by an instrument in writing signed by them and delivered to the purchaser, in consideration of \$1,000, canceled a contract which they had with him, and waived all claims or interest they might have in several contracts named, among which was this contract with the defendant for the purchase of this iron. Upon these facts, about which there is no controversy, a verdict was directed for the defendant.

1. There is no question but that, as has been well argued for the plaintiffs, brokers employed to make contracts of sale or purchase are, generally, entitled to their commissions when the contracts are effected. They are entitled to their pay when the work for which they are to be paid is done, in the absence of express stipulation. In this case the defendant did not employ the plaintiffs to make sales, or contracts of sale, so that they could recover upon an implied

promise to pay for work done on request; but the plaintiffs applied to defendant and sought prices, as if acting for a purchaser, and if no provision had been made for commission none would have become due in any event. An express provision was made, and the plaintiffs are entitled only according to the terms of the provision. These were that the price which the defendant was to have was to cover to plaintiffs—that is, include for them—the commission. When the defendant should receive the price, the amount of the commission would be received for the plaintiffs. Until the price should be received there would be nothing for the plaintiffs. There is nothing about the business of brokers to prevent the operation of express engagements more than there is in other employments. The plaintiffs proposed their own terms, and the defendant accepted them, and has a right to stand upon them. This does not hold the plaintiffs to the default of the purchaser, but to the terms of their employment, such as it was.

2. If the plaintiffs should recover of the defendant, the purchaser would be liable to the defendant, for the amount paid, as a part of the price of the iron not taken and paid for, in enhancement of the damages of his default. The purchaser compromised that liability from him to the defendant, and from the defendant over to the plaintiffs, directly with the plaintiffs. This was a satisfaction of this claim, and discharged the intermediate liability. *Thurman v. Wild*, 11 Adol. & E. 453; *Bevins v. Ramsey*, 15 How. 179. If the plaintiffs should recover their commission of the defendant they would be twice paid for the same thing.

Motion for new trial denied.

TAYLOR, Jr., *qui tam*, v. GILMAN.

(Circuit Court, S. D. New York. August 13, 1885.)

1. COPYRIGHT—"CHARTS"—SHEETS OF PAPER CONTAINING TABULATED INFORMATION.

The word "chart," as used in the copyright law, does not include sheets of paper exhibiting tabulated or methodically arranged information.

2. SAME—INFRINGEMENT BY AGENTS—RIGHT TO RECOVER PENALTY FROM PRINCIPAL.

The penalty or forfeiture given to a party aggrieved by the infringement of his copyright cannot be recovered from a principal whose agents have, without his knowledge, been guilty of such infringement.

Action Under Rev. St. § 4965.

R. Robertson, for plaintiff.

Andrew Gilhooly, for defendant.

WHEELER, J. This action is brought upon section 4965, Rev. St., to recover one dollar, half to the use of the United States and half

to the use of the plaintiff, for each of several hundred thousand copies of a work alleged to be a chart, copyrighted by the plaintiff, and printed by the defendant, and found in his possession. The original copyright act of 1790 provided for maps, charts, and books. 1 St. at Large, 124. A chart then was a marine map, as is shown by all the dictionaries of the time, both English and American. Historical or other prints were added by the act of 1802, (2 St. at Large, 171;) musical compositions, cuts, and engravings, by the act of 1831, (4 St. at Large, 486;) photographs, by the act of 1865, (13 St. at Large, 540;) and paintings, drawings, chromos, statues, statuary, and models or designs intended to be perfected as works of the fine arts, by the act of 1870, (16 St. at Large, 198.) A distinction was made between recoveries for the infringement of the copyright of a book, and those for that of the other works, by the act of 1831; the former being fixed at fifty cents and the latter at one dollar for each sheet. This distinction was preserved in the act of 1870, by giving such damages as might be recovered in a civil action in any court of competent jurisdiction for the infringement of the copyright of a book, and one dollar for each sheet of all but paintings, statues, or statuary, and \$10 for each copy of those found in the possession of the infringer, and is continued to the present time. Rev. St. §§ 4964, 4965. Thus the literary composition of books to be read has for a long time been protected in one mode, and the production of works of art to be viewed in another mode, and charts have always been placed among the works of art. Sheets of paper exhibiting tabulated or methodically arranged information came to be called charts, so that a definition of chart covering them was put into the edition of Worcester's Dictionary published in 1864, and into that of Webster's Dictionary published in 1865. The plaintiff's work was printed upon a single sheet doubled so as to make two leaves with four pages. On the first page was the title and contents, the name of the author, and notice of the copyright. On the second, was the popular and electoral votes for president from 1789 to 1880, inclusive, by political parties, with the names of candidates and explanatory notes. On the third, was the popular vote for the leading candidates for president in 1880 by states, with a note giving the scattering vote and the electoral vote for president and vice-president by states. On the fourth, was the electoral college for 1884 by states, with blanks for the number of each for each leading political party, the total electoral vote, the number necessary for a choice, the day of election, and the day of the meeting of electoral colleges. The alleged infringing copies are printed upon a single sheet folded in the same manner. On the first page is an advertisement of the Great American Tea Company. The second, third, and fourth are identical in matter with the plaintiff's; and in arrangement, except that on the second page of the plaintiff's the columns are divided and printed across the page, and on that page of the infringement they are printed entire up and down

the page. These publications would, perhaps, come within this new definition of chart. They are tabular views of these votes methodically arranged, the notes being explanatory of the tables. Still, the compilation of these tables was a literary rather than an artistic performance. The printed work has leaves and pages, although these may not be necessary to constitute a book within the meaning of the copyright laws. *Clayton v. Stone*, 2 Paine, 382.

When books and charts were first protected by the copyright laws this work would not have been protected as a chart; nor for many years afterwards. No change has been made in the use of that term in the statute to indicate that congress intended that it should take to itself there any new definition. On the contrary, it has been separated from the word "book," and kept with the word "map," and other words of artistic import, thus showing an intention to continue its use in the same sense of a chart of the class with maps, and other works of art. *Mallan v. May*, 13 Mees. & W. 511; *Neal v. Clark*, 95 U. S. 704. When it is doubtful in what sense a word is used, it is proper to look at the purpose for which it is used. While this statute is remedial in so far as it furnishes a remedy to the party aggrieved, it is penal as to so much of the recovery as goes to the United States. The United States is not aggrieved in a civil sense; but the law is violated when the copyright is infringed, and punishment is inflicted to the extent of one-half the sum imposed. *Johnson v. Donaldson*, 18 Blatchf. 297; S. C. 3 FED. REP. 22; *Schreiber v. Sharpless*, 17 FED. REP. 589; *Schreiber v. Sharpless*, 110 U. S. 76; S. C. 3 Sup. Ct. Rep. 423. As a penal statute, it must be construed strictly, and not be held to include what it does not clearly cover, to make any one guilty by construction. *TANEY, C. J., U. S. v. Morris*, 14 Pet. 475. Although it was ruled at the trial, for the purpose of taking the evidence as to the whole case, that this might be found to be a chart, on full consideration now it appears that the word "chart," as used in the statute, will not include it.

The alleged infringement was done by the defendant's agents in the management of the Great American Tea Company for him, in his absence, and wholly without his knowledge, consent, or approval, for the purpose of disseminating the advertisement of the wares of that concern, which is owned by the defendant, but has been wholly in the control of others for several years, on account of his inability. A verdict was directed for the defendant, principally upon the ground that he could not be made liable in this action under these circumstances. The scope of the agency is to be inferred from the fact that the management of the business of the tea company was left wholly to the agents. The business consisted in dealing in teas and coffees, including advertising the goods extensively. The agents had full authority to do whatever was necessary about such advertising. The advertisement which took the place of the plaintiff's title page was no infringement of the plaintiff's rights. The election statistics

of the other pages had no relation whatever to the defendant's business. The agents had no authority to do anything about printing such statistics for him. The statistics served to give currency and admittance to the advertisement; and constituted a part of the vehicle to carry it, as an attractive picture or beautifully tinted paper would. Had the agents stolen such paper, or paper with such picture, or paper with these three pages of statistics printed upon it, and used either to print the advertisement upon, no one would probably claim that the defendant was thereby guilty of theft, and could justly be convicted of it. And, if not, it is not easy to see how the defendant is guilty of the offense of unlawfully copying those pages on account of what the agents did, although he might be liable civilly for the damages in either case. There are many cases where property is forfeited on account of some situation in which it is placed without the knowledge or consent of the owner, but in such cases the property only is proceeded against, and there is no conviction of the owner to affect his person or other property. *U. S. v. Brig Malek Adhel*, 2 How. 210; *Dobbins' Distillery v. U. S.* 96 U. S. 395. And there are cases where it is held that the act of the agent in the course of his employment is evidence against the principal in a criminal proceeding, but evidence which may be rebutted by showing want of knowledge, consent, or encouragement. *Com. v. Nichols*, 10 Metc. 259; *Attorney General v. Sidden*, 1 Crompt. & J. 219; *Rex v. Gutch*, 1 Moody & M. 433; *Rex v. Almon*, 5 Burr. 2686. Here this want appeared. Cases of sales of intoxicating liquor are instanced, but in such cases the statute frequently prohibits and punishes sales by agents and servants expressly. Where a penalty or forfeiture is given to a party aggrieved, so that the recovery is a remedy for the injury, the right to recover may be founded upon the doings of agents, the same as other rights of action. *Stockwell v. U. S.* 13 Wall. 531; *Attorney General v. Sidden*, 1 Crompt. & J. 219. That the recovery is for more than single damages, or of a fixed sum, is not material, if it is for compensation. *Burnett v. Ward*, 42 Vt. 80; *Newman v. Waite*, 43 Vt. 587. But when the penalty, or a part of it, is inflicted for punishment only, the guilt of the party to be punished should be established. *Schreiber v. Sharpless*, 6 Fed. Rep. 175. As the case is now considered, a verdict for the plaintiff would fail upon each of these grounds.

Motion for new trial denied.

MYERS v. CALLAGHAN.

(Circuit Court, N. D. Illinois. July 6, 1885.)

1. COPYRIGHT—INFRINGEMENT— DAMAGES — PROFITS ON SALE OF SECOND-HAND BOOKS BY INFRINGING PUBLISHER.

A publisher who, having published and sold books in violation of the rights of the owner of the copyright, purchases such books and resells them, may be charged with the profit realized from the second sales, in addition to that realized from the first sales.

2. SAME—DETERMINING SELLING PRICE OF INFRINGING REPORTS FORMING PART OF FULL SETS SOLD.

M. owned the copyright of volumes 39 to 46 of the Illinois Reports, and the state reporter the copyright for the later volumes. C., who owned the copyright of volumes 1 to 31, inclusive, republished and sold volumes 39 to 46, in violation of the rights of M., in full sets made up of the volumes owned by him, the infringing volumes, and volumes purchased from the reporter. *Held*, that the selling price of the infringing volumes might be determined with sufficient accuracy by deducting from the amount received for a full set of reports the amount paid for the volumes purchased from the state reporter, and then dividing the balance by 46.

3. SAME—EXPENSE OF INFRINGERS' BUSINESS.

The report of the master as to the general average expenses of the infringer's business, which should be deducted from the proceeds of the sales of the infringing volumes, affirmed.

4. SAME—EXPENSES OF STEREOTYPING.

An infringer will not be allowed to charge the cost of stereotyping the infringing volumes as a part of the expense of producing them.

5. SAME—PARTNERS' SALARIES.

When the infringers are partners, and under the partnership agreement each member is entitled to draw out of the business for his personal expenses and support a specific sum per annum, the amounts so drawn out by the respective partners cannot be included as part of the general expenses of the firm in conducting its business, in order to arrive at the percentage of such expenses. *Rubber Co. v. Goodyear*, 9 Wall. 788, distinguished.

6. SAME—EXPENSE OF EDITORIAL WORK.

The amount paid by an infringer for editing the infringing volumes will not be allowed as an item of expense in producing them.

7. SAME—COST OF UNSOLD VOLUMES.

Where the infringer has not been required by the decree of the court to surrender the unsold infringing volumes, but has been restrained from selling them, and has retained them in his possession, he cannot be credited for the cost of these volumes in order to determine the profits of those already sold.

8. SAME—BURDEN OF PROOF.

While a court will not presume that all the money received by a piratical publisher on the sale of his books is profit, still, as the proof as to the cost of producing the work is wholly in the control of the defendant, the complainant makes a *prima facie* case of right to recover by showing the selling price and the usual manufacturers' cost.

Exceptions to Master's Report.

J. V. Le Moyne and *Geo. W. Cothran*, for complainant.

Jas. L. High, for defendants.

BLODGETT, J. The original bill in this case charged that complainant was owner of the copyright of volumes 32 to 38, inclusive, of the reports of the decisions of the supreme court of Illinois, and that defendants had infringed the same. By the supplemental bill complainant charged that he was the owner of the copyright of volumes 39

to 46, inclusive, of the same series of reports, and that defendants had infringed upon his right as such owner, and an accounting was decreed as to both bills, after hearing on the pleadings and proof, and reference was made to masters to ascertain and report the amount of defendants' profit in the publication and sale of the infringing volumes; the case made under the original bill having been referred to Bishop, master, and the case made under the supplemental bill having been referred to Bennett, master. These masters have respectively made their reports; Mr. Bishop, by his report, finding that defendants should be charged with \$13,451.19 as the proceeds of the sale of volumes 32 to 38, and that they were entitled to be credited with \$6,465.14 as the proper cost of producing said volumes, thus leaving profit of \$6,986.05, for which he recommended a decree be made. This report was on the basis that the average sale of these volumes by defendants was at the rate of \$4.62½ per volume, which the master concluded was a fair average price, as shown by the proofs. Mr. Bennett, by his report, found that the defendants should be charged with \$10,231.48 as the proceeds of sales of volumes 39 to 46, inclusive, and that they were entitled to be credited with \$5,798.44 as the proper cost of producing said volumes, thus leaving a profit to the defendants of \$4,433.44, for which he recommended a decree.

Both complainant and defendants have filed exceptions to these reports, and these exceptions have been argued orally, and by briefs supplementing the oral arguments.

The objections urged on behalf of complainant are mainly to the report of Mr. Bennett. The first objection is that the master refused to allow, as part of complainant's damages, the profits of the defendants on about 156 of the infringing volumes which had been sold by defendants and purchased in again as second-hand books, and resold; the master holding that, having charged the defendants with the profits on the first sale of these volumes, they had a right to buy them in at second hand, and could then sell them again without accounting for the second profit. I think this exception well taken. The law intends to secure the owner of a copyright of any book or literary composition the monopoly of the market for such book,—that is, the right to supply all who wish to purchase,—and if the infringing publisher can buy at second hand the infringing publication, and again place it on the market, to that extent he supplants the owner of the copyright, who has the right to supply the demand. It is well known that many books are purchased only to serve a temporary purpose by the purchaser, and when that purpose has been served, the purchaser puts the book again upon the market. When he does so, and finds a purchaser, he, to that extent, interferes with the owner of the copyright. While it may be true, if an infringing publisher has sold a volume and accounted to the owner of the copyright, the purchaser of that volume holds it free of any claim by the owner of the copyright, yet I do not understand that such purchaser can put

the work again upon the market without accounting to the owner of the copyright; and the case seems much stronger, from an equitable point of view, when the infringing publisher buys the book or volume he has thus sold, and again puts it upon the market and supplies the customer who, otherwise, would have been compelled to buy from the owner of the copyright. I therefore conclude that the master should have charged the defendants with the profit on these resales.

The next exception of complainant to Mr. Bennett's report goes to the mode by which the master arrived at the average price at which defendants sold the infringing volumes 39 to 46. The defendants are publishers of and dealers in law books in the city of Chicago. They own the copyright or control the sale of volumes of the Illinois Reports from 1 to 31, inclusive. Mr. Freeman, the present reporter of the supreme court, owned the copyright of all the volumes above 46, and the most of these sales were made in sets, the infringing volumes being used to fill out the sets. Defendants purchased the volumes above 46 of Mr. Freeman at his regular rate; and, for the purpose of determining the selling price of the infringing volumes, the master deducted from the amount received for a full set of reports the amount paid Mr. Freeman, and then divided the balance by 46 to obtain the price at which defendants sold the infringing volumes, thus making the selling price of the infringing volumes and those owned or sold by defendants the same, and by this rule the average selling price of the infringing volumes is \$4.34, while the complainant insists, from the proof before the master of separate sales by defendants of nearly 400 copies of the infringing volumes, an average price of \$4.58 8-10 is shown; but the master, in consideration of the impossibility of ascertaining from the proof the exact price which defendants had received for the infringing volumes, split the difference between the price arrived at by the defendants' rule and that contended for by the complainant, and fixed the selling price at \$4.46 4-10 per volume. In this, I think, the master approximated as nearly to the true amount as could be done, and I am not disposed to disturb his action in that regard. It is conceded that the exact selling price cannot be arrived at from the proof. It also appears that about 400 copies were sold at higher rates than results from the price by sets, and I think the master was justified in taking the mean result of the two methods.

The next objection involves the conclusion by both masters as to the percentage of the general average expenses of defendants' business, which should be deducted from the proceeds of the sales of the infringing volumes; the objection being mainly urged on the ground that defendants had not clearly and actually shown from their books and other sources of proof the percentage of their expenses to their receipts in the transaction of their business during the time the infringement was going on. Inasmuch as the object of an inquiry like this is to ascertain the profits which defendants have made, or ought to have made, from their infringement of the copyright, and award those prof-

3 by way of damages to the complainant, so that the defendants shall make no gain by their piracy, it is clear that, in order to arrive at these profits, we must, as nearly as practicable, ascertain the proper cost to defendants of manufacturing the infringing volumes, and the cost of selling the same; or, in other words, if the cost of selling these particular books was only a part of defendants' business, how much of the general expenses of the defendants in conducting their business should be deducted from the proceeds of these sales. The defendants contended that the proof shows that it cost them 17 per cent. of the gross proceeds of sales to sell their books, and that, therefore, they were entitled to a credit of that amount from the proceeds of the sales, in addition to the cost of production. Mr. Bennett concluded from the proof before him that 12 per cent. was a fair allowance to the defendants for their general expense credit, and Mr. Bishop, from the proof before him, allowed 12 7-8 per cent. for these average expenses. Without discussing, which, it seems to me, it would not be profitable or material at this stage of the case to do, the question as to who had the burden of proving the credit to be allowed defendants from the gross proceeds of their sales in order to determine their profits, it is sufficient to say that the conclusions of the two masters as to the percentage of this general expense account are so nearly alike that I am fully content to allow their findings in this regard to stand. If the testimony before Mr. Bennett was left in any respect incomplete or unsatisfactory, by reason of defendants' declining to produce papers or books, the complainant could, by proper application to the court, have compelled the production of such books; and, having failed to make such application, it is now too late to complain on that ground. Both parties submitted before the master such proof as they saw fit upon the question of expense, and if either of them thought more proof necessary and obtainable, they should have applied to the court for it in apt time.

The next objection is in regard to the finding of Mr. Bishop as to the price at which defendants sold volumes 32 to 38, inclusive. He found the average price per volume at which the defendants sold the infringing volumes 32 to 38 was \$4.62½, while the plaintiff insists that the price, as fixed by the proof of sales of separate volumes, and defendants' catalogue of prices, should have been found much higher. I have examined the proof, and am content with the master's finding in this regard. As I have said, in regard to Mr. Bennett's finding, it is impossible to determine from the evidence the exact average price per volume, and also impossible to determine the exact price at which defendants sold each infringing volume. The master seems to me to have carefully considered all the proof before him, and, I think, has fairly approximated to the truth.

Upon the accounting the defendants claimed, as part of the expense of producing the infringing volumes, the cost of making stereotype plates, instead of printing the edition from the type. This item is

conceded by the proof to be equal to 50 per cent. of the cost of composition; that is, if it cost \$500 to set the type for a volume, it costs \$250 more to make stereotype plates, thus making the plates for the volume cost \$750. Both masters, on the accounting, rejected this item, and allowed only the cost of type-setting, press-work, binding, and the cost of materials used in producing the infringing volume, and defendants' first exception goes to the refusal of both masters to allow them for this expense of stereotyping. I think the testimony before the masters upon this point shows quite satisfactorily that it is now a common practice among publishers of standard books to stereotype the matter and print from the stereotype plates; but it shows with equal certainty that stereotyping is merely a convenience to the publisher, and not a necessity, and I fully concur with the masters who have considered this case that an infringer should not be allowed to charge an unnecessary cost against one whose rights he has invaded. The defendants have been found by the decrees in this case to have been trespassers and wrong-doers in the premises, and should not be permitted to charge the complainant with this stereotyping expense, which they might, perhaps, have properly incurred if they had had the lawful right to publish these volumes. The defendants must be held to have known at the time they incurred this expense that they were wrong-doers, and could not proceed in all respects as though they had a right to publish these books, and make their arrangements to continue the publication as the demand should arise for future editions, while all these expenses might with entire propriety have been incurred by one who had the lawful right of publication.

The next exception by the defendants is the refusal of both masters to allow the salaries of the several defendants as part of the general expense of conducting their business. The proof shows that the partnership agreement between the defendants contained provisions by which each member of the firm was entitled to draw out of the business for his personal expenses and support a specific sum per annum, and the contention of defendants is that the sum so drawn out by the respective partners is part of the general expenses of the firm in conducting its business, and should be included in order to arrive at the percentage of such expenses; but I agree with the masters that the complainant is not equitably obliged to contribute to the support of the defendants while they are engaged in destroying his property, as would be the case if the court should sustain the position of the defendants in this regard.

The only case which seems to support the defendants' position in this respect is *Rubber Co. v. Goodyear*, 9 Wall. 788; but that was a suit against an incorporated company, and the salaries of its officers for conducting its business were deemed part of the proper expenses of the company, thus differing, as it seems to me, in principle from this case.

The next objection by the defendants to the master's report is that both masters refused to allow as an item of defendants' expense in producing the infringing volumes in question certain sums paid by defendants for editing these volumes. It seems to me this objection is fully met by the decree of the court holding that these volumes infringe the complainant's copyright. It is said that, although the court so found, yet the defendants paid quite a considerable sum for editing these volumes; but neither the masters nor the court can draw the line and say how much of this editorial work ought to be paid for or allowed. The court has found that the books, as published, violated the complainant's copyright, and, so far as the complainant is concerned, it can make no difference whether the defendants have paid for editing them or not. They might as well, for the purposes of this case, have copied the books bodily, without editorial help, as to have imitated them to the extent found by the court.

Defendants also except to the finding of the masters as to the average selling price of the volumes. I have already said, in discussing the exceptions of complainant, all that I deem necessary as to these exceptions by defendants.

It is also contended by defendants that Mr. Bennett erred in finding that the defendants had made any profit by the publication of volumes 39 to 46, and insisted that the proof showed they had made no profits whatever out of the publication of these volumes. Much of the argument has already been considered in discussing the item of stereotyping, salaries, editorial work, etc., but it is also urged that Mr. Bennett erred in not allowing the defendants for the cost of the unsold volumes; the defendants contending that they should be credited for the cost of these volumes in order to determine the profits of those already sold.

The decree in the case does not require the defendants to surrender these volumes to complainant, but merely enjoins the defendants from selling them. If the defendants should offer to surrender the volumes on hand to the complainant, it would be equitable to require the complainant to allow the cost of these volumes in the accounting; but so long as the defendants decline, or, at least, do not offer, to turn these unsold volumes over to the complainant, it does not seem to me right that they should be allowed the cost of producing them. Undoubtedly, the defendants prefer to retain the possession of these volumes, under the injunction restraining their sale, until they have tested the questions raised in the case by an appeal to the supreme court, rather than surrender them to the complainant, and, so long as they elect to do this, it seems to me the finding of the master is correct.

I have thus gone through the exceptions topically, rather than *seriatim*, and have, I think, considered all the points raised in the numerous exceptions filed. In regard to the question as to who has the burden of proof as to the amount of defendants' profit it seems to me that, while the court will not presume that all the money received

by a piratical publisher on the sale of his books is profit, still, as the proof as to cost of producing the work is wholly in the control of the defendants, the complainant makes a *prima facie* case of right to recover by showing the selling price, and the usual manufacturers' cost. The defendants, if for any reason they are not content to abide by the proof as to ordinary cost of production to the trade, must take the burden of showing by their own proof what their actual legitimate expenses were.

The complainant's first and second exceptions to Mr. Bennett's report are sustained, and all the other exceptions filed by complainant and defendants are overruled, and a re-reference ordered to Mr. Bennett to state the account as to the profits of the resold volumes, unless the parties shall stipulate as to such profits.

GRAHAM v. GENEVA LAKE CRAWFORD MANUF'G CO.

(Circuit Court, E. D. Wisconsin. May 10, 1881.)

1. PATENTS FOR INVENTIONS—DAMAGES FOR INFRINGEMENT—LICENSE FEE.

Where a patentee does not desire to retain a close monopoly of his invention, the amount of the license fee which he has fixed in his dealings with other parties may be considered a proper compensation in damages, where the character of the infringement does not justify exemplary damages.

2. SAME—NOMINAL DAMAGES.

Although the questions may be close, still it is manifestly wrong, his invention appearing to be valuable, that a patentee should only be allowed nominal damages against an infringer.

3. SAME—AGREEMENT TO SECURE INTRODUCTION OF PATENTED MACHINE.

Agreements made to secure the manufacturer an introduction of a patented machine are not to be considered as unqualified licenses fixing a royalty or license fee, which can be accepted as establishing, within the language of the court in *Seymour v. McCormick*, 16 How. 480, the average of actual damages sustained by a patentee when his invention is used without license.

4. SAME—RATE OF ROYALTY.

Where a license under letters patent provides for the payment of a royalty of five dollars a machine, but subject to a reduction of three dollars if paid promptly, etc., it will, on the question of assessing damages against a third party, be considered as establishing a royalty at the lower rate.

5. SAME—REVOKED OR ABANDONED LICENSE.

Where the question is close, a revoked or abandoned license may be considered as throwing light upon the value which an inventor has put upon the right to manufacture his patented machine.

6. SAME—ALLOWANCE OF INTEREST.

In this case the court reduces the amount reported by the master from five dollars to three dollars a machine, but *allows interest* from the date of the interlocutory decree establishing the patent and the fact of infringement.

In Equity.

Banning & Banning, for complainant.

Flanders & Bottum, for defendant.

DYER, J. In cases like this the theory of the law is that the complainant shall recover the *actual* damages which he has sustained by reason of the infringement. In arriving at such damages it is held that where the patentee does not desire to retain a close monopoly of his invention, the amount of the license fee which he has fixed in his dealings with other parties may be considered a proper compensation in damages where the character of the infringement does not justify exemplary damages. I have examined with care all the cases cited in which the rule just stated is enunciated, and uniformly they are cases where the license fee or royalty was fixed without question by the patentee, and was well established; and the difficulty in the present case is in determining whether Graham had an established price for a license, while the defendant was manufacturing and selling its infringing machine, which can be adopted as a measure of actual damages within the principle laid down by the authorities. This is the pinch of the case, and I have been not a little perplexed to know just what the court should do in disposing of the exceptions to the master's report. Undoubtedly the complainant should not have his claim reduced to nominal damages. That, I think, would be manifestly wrong. Not much satisfactory light can be extracted from the Waterman and Waterman & Bloom contracts. The two contracts first made have been lost, and cannot be produced. The one of date January 29, 1870, is in evidence. They all, according to the evidence, provided for the payment of a royalty of \$10 on each machine, but they appear to have contained various provisions and qualifications to cover contingencies, which materially affected their character as licenses, by which an absolute license fee was fixed. The contract in evidence contains numerous conditions, intended, evidently, to secure the introduction to public notice and use of the Graham invention, and providing for the return to Waterman of certain proportions of the royalty upon the happening of certain contingencies. And I am inclined to look upon all of these agreements made with Waterman and Waterman & Bloom as rather partaking of the nature of efforts to secure the manufacture of the machine and its introduction into public use than as unqualified licenses fixing a license fee which could be accepted as establishing, within the language of the court in *Seymour v. McCormick*, 16 How. 480, the average of actual damages sustained by the patentee when his invention should be used without his license.

By the arrangement with the Bloomington Company, which was verbal, it is said that a royalty of \$10 was to be paid; but nothing was ever done by that company, and nothing was ever realized by Graham. By the agreement with the Wayne Agricultural Company, a royalty of three dollars was to be paid, and the license included something more than the invention in question. Nothing was done under this license, and it was afterwards revoked. By the license granted to the Ann Arbor Agricultural Company, a royalty of five dollars was

to be paid, subject, however, to a reduction to three dollars if the company should faithfully perform the contract on its part, and should make prompt payments as the contract requires. This license is understood to be now in force, and it is evidently the license upon which complainant's counsel depends as establishing a license fee of five dollars, and upon which the master also relied in adopting that amount as measuring the complainant's damages. It is to be observed, however, of this license that it was granted pending this suit, and therefore it can hardly be claimed that it proves a license fee established before this case was commenced, and while the defendant was infringing. However that may be, the question is whether, if the complainant has established a license fee at all which should govern in the present controversy, it may not be said to be three dollars with as much force as it may be said to be five dollars. As we have seen, the license to the Wayne Company provided for a royalty of three dollars. True, it was revoked and abandoned, and it has been held that the price for which an inventor in a single instance may have sold his right to certain territory is not a criterion by which to determine the value of his patent, or the damages sustained from its infringement. But in a case like the present, where it is a close question whether it can be said that the patentee has established a fixed and positive license fee or royalty at all, it seems to me that this license may be looked at as throwing light upon the value which the inventor has put upon the right to manufacture his machine, so far as it is to be considered in disposing of the present case. Further, we find that by the license to the Ann Arbor Company the royalty of five dollars is subject to be reduced to three dollars if the company performs its contract, and the legal presumption is that the company will perform. Now, in view of this state of the case, has not the patentee really established three dollars as his license fee as effectually, for present purposes, as it may be said he has established five dollars as such fee, and even more effectually? I admit that, upon the facts presented, any course of reasoning by which a conclusion may be sought on this question of damages is not very satisfactory. In other words, it is not easy in such a case as this to determine what is precisely just and right between the parties; but, on the whole, I have concluded to somewhat reduce the amount which the master has allowed. I will put the license fee on each machine at three dollars, as, in the light of the evidence before me, most nearly measuring or approximating the compensation in damages to which the complainant is entitled. And in arriving at this conclusion I take also into consideration the fact that a large number of the machines in question were not manufactured by the defendant, but were purchased for sale from other manufacturers.

The master has found that the defendant has manufactured 747 machines, and has sold 823 machines manufactured by other parties, all of which infringe complainant's patent, making in all 1,570 machines to be included in an estimate of damages. The 216 other

machines spoken of in the master's report are not here considered or included. A royalty or license of three dollars on each machine, if paid on 1,570 machines, would make an aggregate of \$4,710, and on that sum I shall also allow interest at 7 per cent. from the date of the entry of the interlocutory decree, which was October 11, 1880. Such interest amounts to \$192.29, so that the total amount to be allowed is \$4,902.29. To the extent thus indicated the exceptions to the master's report will be sustained, and decree accordingly.

NOTE. In the case of *Graham v. McCormick*, Northern district of Illinois, decided April 17, 1885, unreported, Judge GRESHAM confirmed a master's report as to the allowance of three dollars a machine under this same patent, but set it aside as to an allowance of interest from the date of the decision sustaining the patent and charge of infringement. The decree entered in the *McCormick Case* amounted to \$85,351.

BATE REFRIGERATING CO. v. EASTMAN.

(Circuit Court, S. D. New York. June 12, 1885.)

PATENTS FOR INVENTIONS—INFRINGEMENT—COOLING AND DISTRIBUTING APPARATUS—REISSUE No. 7,643, Cl. 5.

The fifth claim of reissued letters patent No. 7,643, issued to Moses J. Kelly, April 24, 1877, for an improvement in air cooling and distributing apparatus, when properly construed, is not infringed by the apparatus described in letters patent No. 226,231, granted to Joseph J. Coleman on April 6, 1880, for an air-cooling and refrigerating apparatus, the refrigerating effect being produced by the compression and expansion of air.

At Law.

Dickerson & Dickerson, for complainant.

John R. Bennett and Roscoe Conkling, for defendant.

SHIPMAN, J. This is an action at law to recover damages for the alleged infringement by the defendant, in the port of New York, of the fifth claim of reissued letters patent No. 7,643, issued to Moses J. Kelly, April 24, 1877, for an improvement in air cooling and distributing apparatus. The original patent No. 44,731, dated October 18, 1864, and antedated October 6, 1864, was assigned to the plaintiff on December 21, 1876. By written stipulation between the parties a jury was waived, and the action has been tried by the court. After the plaintiff had rested his case, and after the introduction by the defendant of two patents, and a decree or order of the circuit court for this district dismissing the bill in equity of the present plaintiffs against the present defendants praying for an injunction against the infringement of the reissued letters patent which are the subject of this action, the defendant moved that judgment be entered for the defendant upon the ground that, upon the facts as presented, the action

could not be maintained. The only question which I shall consider is whether the fifth claim, properly construed, includes the apparatus which is admitted to have been employed and used by the defendant on board an English vessel in the port of New York, between the dates stated in the complaint, in the manner stated in the written stipulation.

The patentee states in the specification of the reissue and also of the original patent that his air-cooling apparatus was "for cooling carcasses where hung to cool in slaughtering establishments; cooling halls, railroad cars, grain-bins, the holds of vessels, and other places and apartments in which it may be desired to reduce the temperature of the atmosphere by the introduction of cool or cold air." In the description of the construction and operation of the apparatus the patentee described, with particularity, two forms of chests or receptacles for ice. Certain portions of one form of one box are to be filled with ice, and the other form of box is to be kept full of ice, or nearly so. The air which enters an aperture in the lower portion of the ice-box is cooled by passing through or over the ice in the compartment. Over the ice-box are placed what are styled "common fanners," inclosed within an air-tight casing, or otherwise directly connected with a pipe which conducts the cold air from the ice-box, so that (the fanners being put in motion by a belt on a pulley, or otherwise) all the air they move is drawn through this pipe. Leading from the fanners overhead in slaughtering establishments is a large pipe, tube, or conductor. Smaller pipes lead from this tube immediately over each row of carcasses, and in the small pipes are openings from which currents of air issue upon each carcass, as may be desired. The ice being arranged in either of the two described ice-boxes, or in a described ice-house, in the manner detailed in the patent, "and the fanners put in rapid motion, a portion of the air is rapidly cooled and forced through the pipe, P, (the pipe connected with the fanners,) into any place or apartment to be cooled, and there distributed through and from a sufficient number of small perforated tubes," so as to properly equalize or equally distribute the air thus introduced. There are five claims of the reissued patent. I will only read the first and fifth.

"1. In an air-cooler or apparatus for cooling carcasses, etc., the combination of a fan-blower, or its equivalent, an ice-chest, or equivalent, and one or more pipes or conduits, which equally distribute the air within the place or apartment to be cooled, substantially as and for the purpose herein set forth."

"5. In an air-cooler or apparatus for cooling carcasses, etc., the combination of the fan-blower or fanners, F, the system of tubes T, *tt*, etc., and the ice-chest or depository in either of said forms, as and for the purpose shown and represented."

The fifth claim is substantially like the single claim of the original patent. The apparatus which is claimed to infringe the Kelly patent is described in letters patent to Joseph J. Coleman, No. 226,281,

dated April 6, 1880, for an air-cooling and refrigerating apparatus, the refrigerating effect being produced by the compression and expansion of air. The following description of the apparatus is, in general, the description contained in the specification, but is much abbreviated. The refrigerating chamber is between the decks of a vessel, and is for the reception of meats. There are two air-compressing cylinders, the piston-rods of which are connected to the pistons of the two expansion cylinders. The compressed air from the compression cylinder passes up through a cylindrical vessel or tower, in which it is subjected to the cooling action of sprays of cold water, and thence the compressed and cooled air passes to a similar cylindrical vessel, where it is deprived of most of its moisture by passing in contact with a series of perforated plates. The partially dried compressed air passes through a pipe to a second drying device, composed of a number of horizontal tubes. The air, in its passage through these tubes, is deprived of its remaining moisture, and passes through a pipe to the expansion cylinder. The expanded air from the exhaust ports of these cylinders enters chambers so that any moisture which may remain will be converted into snow, and deposited in said chambers. The expanded air then passes into a main pipe, and thereafter into pipes which extend up the sides of the chamber, and then horizontally along the beams; the air escaping from the open ends of the pipes, which are of different lengths, in order to equalize the distribution of the cold dry air throughout the refrigerating chamber. It will be seen that in the infringing apparatus the air is not chilled by contact with ice, and that it contains no chest or receptacle for ice in the ordinary meaning of those terms.

The Kelly reissued patent was under careful examination, in 1881, by Judge Nixon in the suit of the present plaintiff against Toffey, but as the infringing mechanism in that case contained an ice-chest filled with ice, by contact with which the air was cooled, the important question in this case, and which relates to the construction of the fifth claim, was not considered by the court. The same facts which are here presented were under discussion before Judge BLATCHFORD, in 1881, upon a motion for preliminary injunction in a suit in equity between the present parties. It was held that the defendants infringed the first and second claims of the Kelly reissue. Since that time, in view of the effect of the reiterated decisions of the supreme court, which commenced in the year 1882, upon the subject of reissues, it is now conceded that these claims are undue expansions of the original patent, and the contention is narrowed to the claim concerning which testimony was not presented to Judge BLATCHFORD, and which he did not, therefore, pass upon. And it is conceded that the fifth claim is to receive the same construction which it should properly receive if the original patent had never been surrendered.

In examining this claim, by the aid of the specification and the state of the art in 1864, it is apparent that the patentee's invention

included the cooling of carcasses in slaughtering establishments; the cooling of halls, holds of vessels, and other apartments in which it might be desired to reduce the temperature of the atmosphere by the introduction of cold air; and that this cooling effect was produced by the introduction and distribution of a sufficient quantity of cool or cold air through such a number of perforated tubes that the air then introduced could be properly equalized, or that the temperature of the apartment be made equable. He desired to cool, not only the holds of vessels, but also halls or other apartments to which external air was admitted by doors and windows. The principal thing which he had in mind was the cooling of recently slaughtered carcasses of animals. He did not, however, confine himself to that single object, but included the cooling of any apartment, and this was to be done by equalizing, throughout the place to be cooled, the air introduced or distributed through his system of tubes. The only described or suggested manner by which the cooling of the air that was to be introduced into the apartment was effected was by compelling it to pass over and through ice in an ice-chest, by the aid of a blower or fanner. He did not, apparently, intend to include, and did not suppose that his invention was broad enough to include, any method of cooling air which existed in the use of scientific means operating in a very different manner from the simple mechanical appliances which he had adopted. He therefore did not suggest the possible use of any other means, but asked for and obtained a patent for the combination of the fanners, F, the system of tubes, T, *tt*, and the ice-chest or depository in either of the forms which he had described. His claim was not so rigid as to prevent ordinary mechanical modifications of the apertures, which might be on one side or the other side, or on the end of the small tubes; or mechanical modifications of the shape and length of the pipes themselves. His fanner would include mechanical modifications or equivalent devices by which motion is imparted to air. There might be various forms of chest or depository besides the simple ones which his ingenuity had suggested; but the language of his specification does not indicate the idea that the invention, as it lay in his mind, was so far-reaching as to include any and all means of cooling air which the scientific mind had then made known.

Although, as a rule, a patent for a combination includes the then known equivalents for the respective elements of the combination, yet I cannot conceive that the claim of the original Kelly patent can be properly construed to include, as an equivalent or substitute for the described ice-chest, any and all methods of accomplishing the result of chilling air which were known at the date of the patent; the specification or the claim not having given a suggestion of an invention of such general character. It is not necessary to inquire whether the invention of Kelly could be generalized, or was in fact broad enough to have justified him in asking for, when he made his original application in 1864, and in obtaining, a patent for any ice depository or its

equivalent,—meaning by the term “equivalent” any then known method or apparatus for cooling air and removing moisture, which might consist of cylinders for compressing and expanding air, and condensing coil and air-pumps; and whether, therefore, under the theory of reissues which prevailed until a comparatively recent date, courts were not justified in construing a claim in a reissue for any ice-chest to include such a substitute; for the original patent shows that the application which he did make and which he intended to make was for a patent of a much narrower character. He described the invention and only the invention which is contained in the claim, and which, so far as it relates to the ice receptacle, was the ice-chest or depository in either of the described forms,—meaning a chest for the reception of ice as the cooling agent. His claim aptly describes the same invention which was described in the specification, and an invention “complete in itself.” The omission to make a broader claim, not being the result of inadvertence, accident, or mistake, as those terms are now defined, could not be corrected by a reissue, and cannot now be corrected by expanding the original claim so as to include that which makes the new claim of the reissue invalid. If, as is declared in *Mahn v. Harwood*, 112 U. S. 354, S. C. 5 Sup. Ct. Rep. 174, “a patent for an invention cannot be lawfully reissued for the mere purpose of enlarging the claim, unless there has been a clear mistake, inadvertently omitted, in the wording of the claim,” such original claim cannot be enlarged by construction so as to include what was intentionally, and not inadvertently and by mistake, omitted.

It is unnecessary, under this construction of the fifth claim, even if an examination of the testimony of Mr. Brevoort and Prof. Mortor was proper upon this motion, to examine the question whether, if the ice-chest, in either of its forms, meant any ice-chest, that term would include any receptacle or mechanism in and by means of which air was chilled by any mechanical or chemical instrumentality known at the date of the patent, or to further consider whether the Coleman mechanism was known at the date of the original Kelly patent in any other than the broad sense that compression and expansion cylinders were known, by means of which, and the force-pumps connected therewith, air was chilled; or other important questions, which have received, as they deserve, the earnest attention of the counsel in the case.

The motion is granted, and let judgment be entered for the defendant.

ECLIPSE WINDMILL Co. v. WOODMANSE WINDMILL Co. and others.

(Circuit Court, N. D. Illinois. July 27, 1885.)

1. PATENTS FOR INVENTION—ECLIPSE WINDMILL—NOVELTY—INFRINGEMENT.

Reissued patent No. 9,493, issued December 7, 1880, to William H. Wheeler, and reissue No. 6,101, granted to E. & D. C. Stover, on October 27, 1884, for improvements in windmills, *held* not void for want of novelty, and claim 1 of No. 9,493, and claims 3, 4, 5, and 6 of 6,101, infringed by the mill manufactured and sold by the Woodmanse Windmill Company.

2. SAME—LICENSEE NOT TRANSFERABLE.

A license by a patentee to use his invention is personal to the licensee, and not transferable to a third party.

In Equity.

Hill & Dixon, for complainant.

Coburn & Thatcher, for defendant.

BLODGETT, J. This is a bill to restrain an alleged infringement, and for an accounting, as to reissued letters patent No. 9,493, dated December 7, 1880, issued to the complainant as assignee of William H. Wheeler, the original patent having been granted to William H. Wheeler, October 20, 1874, for "an improvement in windmills;" and also as to reissued letters patent No. 6,101, granted to E. & D. C. Stover on October 27, 1884, the original patent having been granted to said parties on December 3, 1872, for an improvement in windmills; the infringement being charged as to the first claim of patent No. 9,493, and the third, fourth, fifth, and sixth claims of patent No. 6,101. The defenses interposed are: (1) That the patents in question are void for want of novelty; (2) that the defendants do not infringe; (3) that the defendants are using the said patents by the license and authority of complainants and the original patentees.

The main controversy is as to the validity of reissued patent No. 9,493. Both the inventions in question are devices applicable to that class of windmills in which a flexible tail-vane or rudder is employed to carry the wind-wheel more or less out of the wind, as the velocity increases or diminishes, for the purpose of maintaining the mill at a uniform rate of speed, or of stopping its motion entirely; and the Wheeler device consists of a weighted arm arranged at one side of the vertical or horizontal axis of the windmill, for the purpose of counteracting the lateral strain on the vertical axis of the wind-wheel, when the latter is carried obliquely to the wind, and in increasing the force of the counterbalancing weight in proportion as the strain upon the vertical axis of the windmill is increased; or, as it is now popularly known and described in the art, a counterbalancing weight of varying resistance. In all windmills in which a flexible tail-vane or rudder is employed, by means of which the wind-wheel is turned out of the wind, some mode of initiating the turning of the wheel from its direct front to the wind, so as to carry it around out of the wind, has been found necessary; and in the first practical windmill of this

and which was constructed, this initial motion was obtained by a side vane which caused a heavier pressure of the wind upon one side of the wheel than was received upon the other, whereby, when the wind reached a certain pressure or velocity, the wheel would swing laterally around so as to bring itself parallel to the wind. The operation of this device was unsatisfactory, for the reason that the side vane operated too abruptly, and frequently swung the wheel entirely out of the wind, when it was not desirable to do so, but was rather desirable to swing it only partly out of the wind, so as to relieve the wheel of a portion of the pressure; and the Wheeler device, now in question, consisted of the arrangement of a lever, weighted at the extreme end, and so fixed to the operative parts of the device as that, when at rest, and when the wheel faced the wind, the lever hung suspended with the weight at its lower end, but when the wheel commenced to swing out of the wind, the lever began to rise in the arc of a circle from a vertical to a horizontal position, and, as it so raised, the weight at its further end, by its increasing leverage, as it swung in the arc, increased the resistance to the swinging of the wheel, and therefore resisted, or prevented, the entire swinging of the wheel out of the wind, unless the pressure of the wind increased. The main feature of the Stover device consists in adjusting the wind-wheel at an angle to its axis, and to the line of the jointed tail-vane, so that the wheel could itself, on an increase of the wind, initiate its own swinging motion out of the wind; and the various claims of the Stover patent, charged to be infringed, have reference to this feature.

A large number of prior patents for windmill devices are cited as anticipating the devices covered by these two patents, but, after a careful examination of them, I do not find that they can be said to anticipate either of the devices covered by the complainant's patents. Many, if not all of them, show weights, but they are not weights which are so arranged or adjusted as to increase the resistance as the wheel moved away from the wind, or diminish it as the wheel swung back to face the wind. I feel compelled to say, after a careful examination of the arguments of counsel, and the various illustrations presented, that it seems to me the proof is full and satisfactory to the point that William H. Wheeler was the first to apply to a practical wind-wheel the idea of a weight of varying resistance to regulate the swinging of the wheel out of or into the wind; and that the Stover patent was the first to show the mode of initiating the swinging of the wheel out of the wind, in wind-wheels, where the jointed tail-vane was used, by setting the wheel at an angle with its own axis. I must therefore find that the defense of want of novelty is not sustained by the proof.

As to the question of infringement, there can be no doubt that the defendant's device is not only a weight of varying resistance, but it is so nearly the exact counterpart of that of the Wheeler device as to hardly have any other feature than a mere mechanical change. Whatever there is in it different from that of the complainant's device

covered by the Wheeler patent is merely mechanical, and not such a change as evades contribution to the owners of the Wheeler patent. The proof also shows that the defendant sets its wind-wheel at an angle with the line of the tail-vane for the purpose of initiating the swinging out of the wind, instead of using the side vane, or any other device, to accomplish that purpose.

As to the claim that the defendant is using the device in question by the license of the complainant, or the original patentees, it appears from the proof that about September 11, 1874, the Eclipse Windmill Company, complainant in this case, was carrying on business as a manufacturer of windmills at Beloit, Wisconsin. E. & D. C. Stover were carrying on the same business at Freeport, in this state, and Harrison Woodmanse was also engaged in the same manufacture at Freeport. The Stovers were patentees and owners of certain patents pertaining to windmills, and had given a license to Mr. Woodmanse to use their patents in his business. William H. Wheeler had an application pending before the patent-office for a patent for his device, covered by the patent of October 20, 1874; and the Stovers had also pending before the patent-office an application for a patent on a kindred device, and an interference had been declared between them. On the eleventh of September an agreement was made by which the Stovers admitted that Wheeler was the prior inventor of the device covered by his application, and a settlement of the controversy involved in the interference was made between the parties. At the same time a license was issued by Wheeler to the Stovers, authorizing the use by them and their licensees of the device covered by his application for the patent now in question, which license was confirmed by Wheeler after the issue of his patent; and about September 22, 1874, a large number of windmill manufacturers, among whom were the Eclipse Windmill Company, William H. Wheeler, Harrison Woodmanse, and the Stovers, formed an association for the purpose of protecting the windmill interests and patents in which they were respectively interested, by which it was agreed that each party to or member of the association might use so much of the patents owned by the other members as was necessary in building their respective mills as then constructed, so long as the association should continue in existence. It is conceded that the license of the Stovers to Harrison Woodmanse was not in force at the time this suit was commenced, nor at the time of the infringement now complained of. The proof also shows that the present corporation, the Woodmanse Windmill Company, was organized about June, 1881, and that the only color of authority or license that said corporation has for using the patent in question is an assignment from Harrison Woodmanse to said corporation of all his right to use said patent.

The proof also shows that while the Windmill Protective Association, formed in September, 1874, may still have a nominal existence, yet a large number of its members, including Wheeler and the pres-

ent complainant, withdrew therefrom several years since, and the association can hardly be said now to continue in existence as it was at the time the agreement for interchangeable use of the patents of the respective members was made. But, without reference to that question, I think it is sufficient to say that the law is well established that a license by a patentee is personal to the licensee, and not transferable, and that Harrison Woodmanse could not clothe the present defendant with any authority to use the patents in question by virtue of his membership in the Windmill Protective Association. *Troy Iron & Nail Factory v. Corning*, 14 How. 216; Curt. Pat. § 213.

The bill in this case charged the infringement by defendants of several other patents besides the ones which I have considered, but, upon the hearing, all the infringements charged were abandoned except the two patents now mentioned. No question can arise as to the validity of the reissue of this patent, because the claims alleged to be infringed in this case are the same as the claims in the original patent. The court therefore finds that the defendants have infringed the first claim of reissued patent No. 9,493, and the third, fourth, fifth, and sixth claims of reissued patent No. 6,101, and a reference to a master will be ordered to take an account of the damages; and the bill is dismissed for want of equity as to the other patents mentioned therein.

THE MARATHON v. THE ANDREW HICKS.

(District Court, D. Massachusetts. August 4, 1885.)

COLLISION — STEAM-SHIP AND BARK — ATLANTIC OCEAN — FOG — SPEED — FOG-HORN.

A speed by a steam-ship of $10\frac{1}{2}$ knots an hour in a dense fog is immoderate even in mid-ocean. Steam-ship held liable for collision with whaling bark.

In Admiralty.

Geo. Putnan, for the *Marathon*.

C. T. Russell and *C. T. Russell, Jr.*, for the *Andrew Hicks*.

NELSON, J. These are cross-libels for a collision between the Cunard steam-ship *Marathon* and the whaling bark *Andrew Hicks*, of New Bedford. The collision occurred in a thick fog in the Atlantic ocean, in latitude 50 deg. 31 min. N., longitude 22 deg. 51 min. W., at about 5 o'clock of the afternoon of July 1, 1882. The wind was light, from the south-west, and the sea smooth. The *Hicks* was cruising for whales. She was close-hauled on the starboard tack, her course being S. S. E. The *Marathon* was on a voyage from Liverpool to Boston. Her course before the collision was W. by N. She heard and saw nothing of the *Hicks*, and took no measures to avoid her, until they were so close together that the collision was inevita-

ble. The Hicks struck the Marathon end on, upon the starboard bow. The Marathon suffered considerable damage, but the injuries to the Hicks were so severe that she was obliged to return to port, and her voyage was broken up. The charge against the Marathon is that she was going at an immoderate speed. I am of opinion that this charge is fully sustained by the evidence. The maximum speed of which she was capable was between 12 and 13 knots. Her average sea-speed, in good weather, was from 11 to 12 knots. Just before the collision she was running at the rate of $10\frac{1}{2}$ knots. The fog was so thick that an approaching vessel could not be seen twice her length off. Such a rate of speed in such a fog must be pronounced immoderate, even in mid-ocean. The fault attributed to the bark is that she failed to give signal of her approach by sounding a proper fog-horn. That her horn was blown constantly for some time before the collision does not admit of a doubt. The evidence of the men on the bark is clear and positive on the point. I see no reason not to believe their statements. At least one blast of her horn was heard on the steam-ship before she came in sight. The horn was of the usual dimensions, and such as is always carried by vessels of her class. I do not think any fault is shown on the part of the bark.

In the suit against the Marathon, an interlocutory decree is to be entered for the libelants; the libel of the Cunard Steam-ship Company against the owners of the Hicks is to be dismissed, with costs.

THE POTTSVILLE.

THE JAMES H. MOORE.

(District Court, D. Massachusetts. August 7, 1885.)

COLLISION—VINEYARD SOUND—STEAMER AND SCHOONER—FOG—TORCH—MUTUAL FAULT—DAMAGES.

On examination of the evidence, *held*, that the steam-ship Pottsville was negligent in running at full speed in a dense fog in such a thoroughfare for vessels as Vineyard sound, and in failing to stop and reverse when the fog-horn of the schooner James H. Moore was first heard, and that the schooner was also negligent in not exhibiting a torch, and that the damages should be divided.

In Admiralty.

J. C. Dodge & Sons, for the James H. Moore.

R. Stone, for the Pottsville.

NELSON, J. This collision occurred in Vineyard sound, three miles west of West Chop, on the evening of the seventeenth of August, 1884. The wind was moderate from W. S. W., with thick fog. The schooner James H. Moore was on a voyage from Perth Amboy to Boston with a cargo of coal. She was under mainsail, foresail, and jib, with the wind directly aft. She was making from five to six knots. The Pottsville, a large sea-going steam-ship, was on a voyage from Salem to Philadelphia, light. Her course after passing West Chop was parallel with and nearly opposite to that of the Moore. She was going at full speed, from nine to ten knots. When the two vessels were from one-ninth to one-eighth of a mile apart, the fog-horn of the schooner was heard by the lookout on the steamer, and reported to the pilot; and was also heard in the pilot-house. The sound seemed to those on the steamer to come from over the port bow. By the master's order, the wheel of the steamer was put hard to port, to pass the schooner on the port side. The speed of the steamer was also reduced to one bell. Almost immediately afterwards, within a very short interval of time, the schooner's lights were seen by the steamer's lookout through the fog and reported. The steamer's engine was then put full speed astern, but too late to avoid the collision. She struck the schooner on her starboard side, a few feet abaft the fore-rigging, cutting her down to the water's edge, and sinking her almost instantly. The crew escaped in the boat, and were taken on board the steamer. The lookout of the steamer was killed by the falling of the foretop-mast, pulled down by the rigging of the schooner.

The error of the Pottsville was twofold. Driving the steamer at full speed in a dense fog, in such a thoroughfare for vessels as Vineyard sound, was a violation of the twenty-first sailing rule, which requires steam-vessels to go at moderate speed in a fog. *Second*, the failure to stop and reverse when the fog-horn was first heard, violated the same rule, which requires a steam-vessel, when approaching an-

other vessel so as to involve risk of collision, if necessary, to stop and reverse. The immediate cause of the collision was evidently the mistake of the lookout and master of the Pottsville, who, deceived by the sound of the fog-horn, apparently heard on the port bow, supposed the approaching vessel was coming on the port side, when, in fact, she was directly ahead, or on the starboard bow. The difficulty of distinguishing in a fog the exact direction from which sound proceeds, is well known to navigators, and this fact should have been taken into account by the master of the Pottsville. This he failed to do, and consequently his port wheel drove the steamer directly upon the schooner. The exact position of the approaching vessel could not be known, and hence there was risk of collision. In such a situation it was not sufficient merely to slacken speed. He should have stopped and reversed. If he had done this, the collision would, in all probability, have been avoided, or, at least, the damage would have been greatly diminished.

The charges against the Moore are that she changed her course, and did not show a torch. I do not think the first charge is proved, but it is admitted that no torch was shown. Her reply is that there was not time to show a torch, and that it would have done no good. There certainly was not time after the Pottsville's lights were first seen, but counting from when her fog-whistle was heard from over the starboard bow, which was several minutes before the lights came in sight, there was plenty of time. It is quite possible that a torch shown on deck would have been seen sooner than the schooner's lights. In that case the Pottsville's engines would have been reversed sooner, and at least the force of the blow and the consequent damage would have been diminished. I think this case must be governed by Judge LOWELL's decision in *The Hercules*, 17 FED. REP. 606.

There must be a decree for the libelants in each case, the damages to be divided.

ENDY v. COMMERCIAL FIRE INS. CO. OF NEW YORK.

(Circuit Court, D. California. August 17, 1885.)

1. REMOVAL OF CAUSE—DIVERSITY OF CITIZENSHIP MUST EXIST WHEN.

A suit cannot be removed from a state court to a national court on the ground of citizenship, under the act of 1875, unless the requisite citizenship of the parties existed both when the suit was commenced and at the time of filing the petition for removal. *Gibson v. Bruce*, 108 U. S. 562, S. C. 2 Sup. Ct. Rep. 873, and *Houston & T. C. Ry. Co. v. Shirley*, 111 U. S. 360, S. C. 4 Sup. Ct. Rep. 472, followed.

2. SAME—AMENDMENT OF PETITION.

McNaughton v. South Pac. C. R. Co. 19 FED. REP. 883, followed as to right to amend petition in circuit court to show diversity of citizenship, and held, that where the state court has refused to order the removal of a cause on defective petition, an amendment is not a matter of right, and will not be permitted.

On Motion to Amend Petition.

Crittenden Thornton, for the motion.

Eagon & Armstrong, contra.

SAWYER, J. A suit cannot be removed from a state court to a national court on the ground of citizenship, under the act of 1875, unless the requisite citizenship of the parties existed both when the suit was commenced and at the time of filing the petition for removal. *Gibson v. Bruce*, 108 U. S. 562; S. C. 2 Sup. Ct. Rep. 873; *Houston & T. C. Ry. Co. v. Shirley*, 111 U. S. 360; S. C. 4 Sup. Ct. Rep. 472. The record in this case does not show the proper citizenship of plaintiff at the time of the commencement of the suit, and the state court therefore properly refused to make an order removing the cause.

Plaintiff asks leave to amend his petition in this court in such manner as to show the proper citizenship of the parties to give jurisdiction. In *McNaughton v. South Pac. C. R. Co.* 19 FED. REP. 883, doubt was expressed as to the authority of the court to allow such an amendment, notwithstanding the ruling to the contrary in some circuits, and the inconvenience of the practice pointed out. But, conceding the authority, it was held that such an amendment is not a matter of right, but a matter resting in the sound discretion of the court, and ought not to be permitted.

This court is still satisfied with that ruling, and will adhere to it until overruled by higher authority. As shown in the case cited, great embarrassments might result from such an amendment, as, after an amendment in the United States circuit court, the records of both courts would show jurisdiction. The supreme court has settled the point that the state court is not required to let go its hold upon a case till a proper cause for removal is shown by its record. This being so, upon an amendment in the circuit court both courts might regularly proceed to render final judgments that might be different, or even be opposed, and there be no error disclosed by the record of either court upon which the judgment could be reversed.

The amendment of the petition is denied, and the cause remanded, with costs.

CONSOLIDATED BUNGING APPARATUS CO. *v.* AMERICAN PROCESS FER-
MENTATION CO.

(Circuit Court, E. D. Wisconsin. August, 1885.)

EQUITY PRACTICE—DOCKET FEE—REV. ST. § 824—CASE DISCONTINUED.

No docket fee is taxable in a suit in equity voluntarily discontinued by the complainant before any hearing, either interlocutory or final.

In Equity.

Banning & Banning, for complainant.

Cotzhausen, Sylvester, Scheiber & Sloan, for defendant.

DYER, J. This is a suit in equity; and after issue joined by bill, answer, and replication, but before the taking of any proofs, and without the determination of any question in the case by the court, the complainant voluntarily dismissed its bill. In the taxation of costs, the defendant contends that it is entitled to an allowance of a docket fee of \$20 under the first clause of section 824 of the Revised Statutes. I have examined all the decisions that bear upon the question, and fully agree with the conclusions announced in *Coy v. Perkins*, 13 FED. REP. 111, by Mr. Justice GRAY and Judge LOWELL, and concurred in by Judge NELSON, and with the ruling in *Yale Lock Manufg Co. v. Colvin*, 14 FED. REP. 269, made by Judge WHEELER. The docket fee of \$20 is only taxable in a suit in equity "on final hearing." What constitutes a final hearing within the meaning of section 824 is clearly and most satisfactorily shown by Mr. Justice BLATCHFORD in *Wooster v. Handy*, 23 FED. REP. 52, and by the cases cited in his opinion. There was no such hearing, nor, indeed, any hearing, in this case. The taxation of a docket fee of \$20 must therefore be disallowed. No docket fee whatever is given by the statute in a suit in equity voluntarily discontinued by the complainant, as this suit was, before any hearing, either interlocutory or final.

OZARK LAND CO. *v.* LEONARD and others.

(Circuit Court, E. D. Arkansas. May, 1885.)

INJUNCTION—NOT SUSPENDED BY SUPERSEDEAS.

A decree granting an injunction is not nullified or suspended by an appeal to the supreme court, though all the requisites for a *superedeas* are complied with.

In Equity.

John B. Jones, for plaintiff.

T. W. Brown and O. P. Lyles, for defendants.

CALDWELL, J. The defendants, by O. P. Lyles, their solicitor, tendered an appeal-bond in this case, and stated that the penalty of the bond was sufficient to cover the value of the timber on the lands in controversy, and prayed the opinion of the court as to whether the defendants, upon the approval of the bond, would have the right to cut and remove the timber from the lands in controversy, notwithstanding the injunction contained in the final decree perpetually enjoining them from so doing. The injunction is not nullified by the appeal. The supreme court say :

"Neither an injunction, nor a decree dissolving an injunction, passed in a circuit court, is reversed or nullified by an appeal or writ of error before the cause is heard in this court." *Slaughter-house Cases*, 10 Wall. 273.

This doctrine is reaffirmed in *Hovey v. McDonald*, 109 U. S. 150, S. C. 3 Sup. Ct. Rep. 136, where the court say :

"It was decided that neither a decree for an injunction nor a decree dissolving an injunction was suspended in its effects by the writ of error, though all the requisites for a *supersedeas* were complied with."

In the last case cited it is said the power undoubtedly exists in the circuit court, if the purposes of justice require it, to order a continuance of the *status quo* until a decision by the appellate court, and that equity rule 93 was adopted in recognition of this power. If no order was made by the court on the subject, the injunction would remain in force against the defendants, notwithstanding the appeal. But, to prevent any misconception on the subject, the order approving the bond will state that the appeal is not to suspend the injunction. This is proper, because for the court to permit the appeal to supersede the injunction, and the defendants to go forward and cut the timber on the land in controversy, would be to take from the plaintiff the fruits of its decree. The land is only valuable for its timber. If the defendants are allowed to cut and remove the timber, and the decree should be affirmed, the plaintiff, while nominally successful, would, in reality, lose the subject-matter of the litigation, which would go to the defendants.

It is said that in case the decree is affirmed the defendants and their sureties would be liable on the *supersedeas* bond to the plaintiff for the value of the timber cut. Conceding, but not deciding, that this would be so, then the result of a suspension of the injunction on the defendants would be, in effect, a sale by the court, at a price to be hereafter fixed by the verdict of a jury, of the timber on the land to the defendants, without the consent of the plaintiff. This is a case where the *status quo* should continue until the case is decided by the appellate court, and an order will be entered to that effect. This will preserve the rights of both parties.

OZARK LAND CO. v. LEONARD and others.

(Circuit Court, E. D. Arkansas. April 20, 1885.)

1. DECREE BY DEFAULT—NOT SET ASIDE, WHEN.

When a demurrer to the bill has been overruled, and a final decree is afterwards regularly rendered by default for want of an answer, the decree will not be set aside without a satisfactory showing that the defendant has a meritorious defense.

2. INCONSISTENT DEFENSES IN EQUITY—EFFECT OF.

It is a rule in equity that where a defendant sets up by his answer under oath two inconsistent defenses, the result will be to deprive him of the benefit of either; and this rule applies to an answer under oath read as an affidavit of merits, on a motion to set aside a decree rendered by default, and the decree will not be set aside where the affidavit sets up two flatly inconsistent defenses, as, for example, where one defense relied on is a tax title, in the defendant, to the lands, and the other is that the lands are and always have been the property of the United States.

In Equity. On motion to set aside a decree rendered by default, and permit defendants to answer.

John B. Jones, for plaintiff.

T. W. Brown and O. P. Lyles, for defendants.

CALDWELL, J. The object of this suit is to quiet the title of the lands described in the bill. The bill alleges the plaintiff is the owner in fee of the lands, which are chiefly valuable for the timber upon them; that they are wild and unoccupied; and that the defendants set up a claim to the same based on an alleged tax title, which is void, and are trespassing on the same by cutting and carrying away the timber. The bill was filed December 14, 1883. The defendant Leonard was not found in this district, and an order was made on the fifth of February, 1884, that he be served in Tennessee, the state of his residence, with a copy of the order requiring him "to appear to the action, and plead, answer, or demur, on the first Monday in March, 1884." This order was served on that defendant on the seventh of February, 1884. The defendants Allen and McRae were served with subpoena on the eighth of February, 1884. A demurrer to the bill was filed April 2, 1884, which, after argument, was overruled July 14, 1884. The demurrer raised questions which were decided in the case of *Lamb v. Farrell*, 21 FED. REP. 5, and in the opinion filed in this case, and reported in 20 FED. REP. 881. It was the duty of the defendants, under rule 34, to answer the bill the next succeeding rule-day after the demurrer was overruled, which would have been the first Monday in August. No answer was filed on that day, though the defendants had notice that the plaintiffs required the answer to be filed under the rule. The defendants continuing in default, on the sixth of October, 1884, a decree *pro confesso* was taken against them. Notice of the decree *pro confesso* was given to defendants' counsel, and no motion to set aside the same, or for leave to plead, having been made, on the seventh of November a final decree,

upon satisfactory proofs, was rendered. On the twenty-seventh of December following, a motion and affidavits were filed to set aside the decree, and to permit the defendants to answer, and an answer was then tendered. At the suggestion of defendants, final action on this motion was continued from time to time; and on the twenty-fifth of March, 1885, the defendants tendered for filing, in case the decree was vacated, an amended answer. The motion to set aside the decree must be overruled for several reasons:

1. The decree was properly taken after the defendants had been in default for a long time. The default was the result of negligence. The timber on the lands in controversy constituted its chief value. The defendants continued to cut and remove timber from the lands after the decree, and before they had ever moved to set it aside. They continued to trespass upon the land until proceeded against for contempt. Their only pretense of title to the land is deraigned through a sale for taxes, which is void, and there is much in the history of the case to justify the suspicion that the defendants were not ignorant of the weakness of their title, and that they were merely using it to make a show and pretense of title, while they stripped the land of its timber, and that they were not anxious to bring the merits of their title to the test of a judicial examination.

2. There are no merits in the proposed answers. The state acquired the lands from the United States under the swamp-land act. It is conceded that if the lands did not pass to the state under that act, that they are still the property of the United States. One of the proposed defenses is that the state procured the title from the United States by fraudulently representing that the lands were swamp and overflowed lands, when they were not so, and that the lands are still the property of the United States. It will be time enough to go into an inquiry on that subject when the United States, or some one claiming by or through the United States, raises the question. If this defense is true the defendants have no title, for their only pretense of claim is a tax title, which confessedly is void, if the lands belong to the United States. The proofs and exhibits submitted with the bill prove conclusively that the tax sale under which the defendants claim is void. It is void for an excessive levy, and because the requisite notice of delinquency and sale was not given, and for other reasons. The answer tendered is evasive and unsatisfactory on this point, and fails to show validity or merit in the defendants' title. The amended answer tendered to be filed sets up some proceedings had in the circuit court of Clay county, under the overdue tax law, which have not the slightest bearing on the case. The decree in the overdue tax case, chiefly relied on, is a nullity. It was rendered the same day the bill was filed, without the notice prescribed by the statute, and without notice to any one. The plaintiff was not a party, had no notice, and did not appear to the action, and for these reasons would not be bound by the decree if it were otherwise regular. The other decree

exhibited adjudges the tax sales invalid. If the tax sales are void, the defendants have no title, and it is not perceived how their case is strengthened by a decree to that effect. If that decree could have any bearing in the case, it would itself be fatal to the defendants' claim.

3. The answers tendered set up defenses inconsistent with each other, viz.: (1) That defendants acquired title through a sale of the lands for taxes; and (2) that the lands are and always have been the property of the United States. If they were the property of the United States they were not subject to taxation. "A defendant cannot insist upon two defenses which are inconsistent with each other, or are the consequence of inconsistent facts. * * * From the cases of *Jesus College v. Gibbs* [1 Younge & C. 145, 160] and *Leech v. Bailey*, [6 Price, 504,] above referred to, it is to be collected that where a defendant sets up by his answer two inconsistent defenses, the result will be to deprive him of the benefit of either, and to entitle the plaintiff to a decree." 1 Daniell, Ch. Pl. & Pr. 713. There may be some doubt whether this rule should now obtain, in all its strictness, where the answer is not under oath. In the practice in the courts of this and many other states, under the Code, it does not prevail; but the practice in equity cases, in this court, is regulated by the equity rules and the English chancery practice and not by the Code. The answer and amended answer tendered in the case at bar are under oath. They are tendered as showing merits, and as a basis for setting aside a final decree, duly rendered upon an *ex parte* hearing on a bill previously taken as confessed for want of an answer. The showing made in such case should be free from all deceit and double-dealing, and when the answer, which for the purposes of this motion is to be treated as an affidavit of merits, sets up two defenses, one of which must undoubtedly be false, the defendant discredits himself by his own pleading, and the answer should avail him nothing as an affidavit of merits or otherwise. The demurrer to the bill was overruled after full argument and consideration. *Ozark Land Co. v. Leonard*, 20 FED. REP. 881; *Lamb v. Farrell*, 21 FED. REP. 5.

Having been fully heard on the law of the case, and having failed to answer within the time required by the rules, and the affidavits of merits not being satisfactory, the motion of the defendants to vacate the decree, and for leave to answer, is overruled.

CLARK, Assignee, etc., v. HEZEKIAH.

(District Court, E. D. Arkansas. 1885.)

1. HUSBAND AND WIFE MAY, IN EQUITY, CONTRACT WITH EACH OTHER.

Independently of the married woman's act, courts of equity regard husband and wife as distinct persons, capable of contracting with each other, and if the husband borrows the wife's money, equity will enforce payment of the loan, not only against him, but as well against his representatives, including his assignee in bankruptcy.

2. WIFE'S EQUITY TO A SETTLEMENT.

The wife of a bankrupt has, in equity, a right in all cases to an adequate provision out of her own property, and when such property cannot be reached by the assignee in bankruptcy of her husband, without the intervention of a court of equity, the court will compel him to make a competent settlement upon her. This jurisdiction was not abridged by the act of January 11, 1851, (chapter 111, Gould's Dig.) requiring the wife to file a schedule of her statutory separate property.

3. MONEY—WIFE NOT REQUIRED TO SCHEDULE.

The scheduling act of January 11, 1851, did not require the wife to schedule her money kept in her own possession; and the recording of a mortgage to her was a sufficient scheduling of the same under the act of December 31, 1860.

4. MORTGAGE—FAILURE TO RECORD NOT PER SE FRAUDULENT.

The fact that a mortgage, executed by the husband to the wife, was not recorded for 18 months, and until after debts had been contracted by the husband, does not of itself render it void.

5. UNRECORDED MORTGAGE—WHEN NOT VOID UNDER BANKRUPT ACT.

A mortgage executed more than six months before the commencement of proceedings in bankruptcy, and otherwise valid, is not void under the bankrupt act simply because it was recorded less than four months before the commencement of such proceedings, and after the mortgagor had become insolvent.

In Equity.

The complainant, as assignee in bankruptcy of F. W. Hezekiah, filed his bill in equity against the defendant, Agnes Hezekiah, wife of the bankrupt, praying that a mortgage on certain real estate, executed by the bankrupt to his wife, might be declared fraudulent and void. The facts of the case are admitted, and are as follows:

(1) That on the ninth day of October, 1871, the defendant, then the wife of the bankrupt, had the sum of \$2,700, which was her own separate money, bequeathed to her by Dr. Fiddes, a relative of hers, then lately deceased at Kingston, Jamaica; (2) that she loaned said sum of money to her husband on the tenth day of October, 1871, and on the same day her husband, to secure said loan, executed to her the mortgage deed in question; (3) that she gave the mortgage to her husband immediately after its execution, in order that it might be recorded, and that anything else might be done in the premises which might be necessary, and that she supposed it had been recorded in reasonable time, and never knew the delay which occurred in filing it for record until it had actually been filed; (4) that her husband was not insolvent when the mortgage was signed and delivered, but became so prior to the time it was filed for record; (5) that the mortgage was filed for record on the sixth day of June, 1873, and her husband was adjudged a bankrupt on proceedings commenced on the first day of July, 1873; (6) that she filed no schedule in

the recorder's office of the county, claiming said money or mortgage as her separate property.

M. W. Benjamin, for plaintiff.

U. M. Rose, for defendant.

CALDWELL, J. Courts of equity uphold and enforce contracts between husband and wife, concerning her separate property. "The wife may become a creditor of her husband by acts and contracts during coverture, and her rights as such will be enforced against him and his representatives." Story, Eq. Jur. § 1373; Story, Eq. Pl. § 62. "Courts of equity regard husband and wife as distinct persons, and allow them to contract with each other as though they were unmarried." *Woodworth v. Sweet*, 44 Barb. 268. The husband may allow the wife to retain her separate estate; and if he borrows her money, equity will enforce payment of the loan. *Woodworth v. Sweet*, 51 N. Y. 8. The maxim that equity follows the law,—a maxim which, if followed literally, as Mr. Austin well observes, would leave nothing for the courts of equity to perform,—never had any application in those courts in determining and protecting the separate property rights of the wife. The protection of the estate of the wife from the operation of the harsh rule of the common law has been a recognized head of equity jurisprudence from the earliest times. In that forum the wife has always been regarded as a favored suitor when invoking its aid to enforce the just obligations of her husband, and for the protection of her separate estate. The husband may be a trustee for the wife, and will be compelled in equity to account for any money or property belonging to her which he has received. *Walker v. Walker*, 9 Wall. 743. And where a husband would be considered a trustee for his wife, his assignee in bankruptcy will be held a trustee in like manner. Deacon, Bankr. 501; Shelf. Bankr. 388.

The wife of a bankrupt has in equity a right in all cases to an adequate provision out of her own property, and when such property cannot be got at by the assignee without the intervention of a court of equity, the court will compel him to make a competent settlement upon her. Deacon, Bankr. 501; Shelf. Bankr. 388. And the assignee in this case having invoked the aid of a court of equity to set aside a conveyance made by the husband to secure the separate money of the wife, if the conveyance should for any reason prove to be ineffectual, the court would compel the assignee to make settlement of the whole or part of the mortgage debt upon the wife, according to her condition and circumstances. Bisp. Eq. § 109 *et seq.*; *Davis v. Newton*, 6 Metc. 537; 2 Perry, Trusts, §§ 629, 639; *Beeman v. Cowser*, 22 Ark. 429.

Where, as in this case, the husband engages, at the time he receives the separate money of the wife, to repay it, equity will not only enforce such contract against him, but as well against his representatives, including his assignee in bankruptcy. *Re Blandin*, 1 Low. Dec. 543; S. C. 5 N. B. R. 39; *In re Bigelow*, 2 N. B. R. (quarto,)

170; *In re Jones*, 14 N. B. R. 125; *Jaycox v. Caldwell*, 51 N. Y. 395; *Taggard v. Talcott*, 2 Edw. Ch. 628; *Marsh v. Marsh*, 43 Ala. 677; *Logan v. Hall*, 19 Iowa, 491.

The bankrupt court is invested with an equitable as well as legal jurisdiction, in all matters pertaining to the administration of the bankrupt's estate; and when the wife has loaned her separate money to her husband, or he has otherwise become legally or equitably indebted to her, she may prove for such debt against his estate. *Re Blandin*, 1 Low. Dec. 543; *In re Bigelow*, 2 N. B. R. 170; Hil. Bankr. p. 288, § 22. And in some of the states the wife may now sue her husband at law for her statutory separate money and property, (*Jones v. Jones*, 19 Iowa, 236; *Logan v. Hall*, Id. 497; *Wilkins v. Miller*, 9 Ind. 100; *Scott v. Scott*, 13 Ind. 225;) and may enter into partnership with him. *In re Kinkead*, 3 Biss. 405, and note.

Section 6 of article 12 of the constitution of 1868 recognized the absolute right of the wife to retain as her separate property all real and personal property acquired by her either before or after marriage. The last clause of the section declares that "laws shall be passed providing for the registration of the wife's statutory separate estate, and when so registered" it shall not be liable for the husband's debts. The general assembly passed no law on this subject after the adoption of the constitution of 1868 and prior to the date of this transaction. But by the provisions of section 16 of article 15 of the constitution, chapter 111 of Gould's Digest was continued in force. By the provisions of this chapter, the wife might become "seized and possessed of any real or personal property by bequest, demise, gift, or distribution, in her own right and name, and as her own property." To make this provision effectual against the creditors of her husband, the act required the wife to file a schedule of her separate property in the recorder's office of the county where she lived. Mrs. Hezekiah filed no schedule of the money loaned to her husband, or the mortgage given to secure the same, and it is insisted that this omission is fatal to her rights. The constitution of the state reversed the rule of the common law; coverture no longer invested the husband with the title to his wife's property. The schedule required by the act was intended to give the world notice of her rights, and thus prevent her husband from obtaining a fictitious credit on the faith that he owned the property. If notice were not thus given, her property was liable for the husband's debts; but the husband could take no advantage of a failure to schedule; "he has knowledge of the true ownership, and hence needs no notice." *Jones v. Jones*, 19 Iowa, 236.

This act was not intended to abridge the known jurisdiction of courts of equity to make a proper settlement on the wife and enforce her just rights against her husband. Its purpose was to relieve married women from the rigorous rules of the common law, now so universally condemned as to have been superseded, in a greater or less degree, by statute in all the states and territories of the Union, and

in England. As to what shall be considered separate property of the wife, the act goes beyond the rules before adopted in courts of equity, and merely enlarges the field for the operation of those doctrines. *Re Blandin, supra*. But the act requiring the wife to schedule her statutory separate property cannot be construed to extend to her money while kept in her own possession. The husband can derive no fictitious credit from the wife's money when thus kept. It is not, therefore, within the reason of the law. *Beeman v. Cowser*, 22 Ark. 429; *German Bank v. Himstedt*, 42 Ark. 62.

Assuming, but not deciding, that the mortgage falls within the scheduling act, the record of the mortgage itself was a sufficient scheduling under the act of December 31, 1860, p. 84, and it was recorded before the husband was adjudged a bankrupt. The mortgage was not filed for record for more than 18 months after its execution, and during this time the debts due some of the creditors of the bankrupt were contracted, and the mortgagor became insolvent. It is not suggested that the mortgage was withheld from record for any fraudulent purpose; on the contrary, the admitted fact is that the wife supposed it had been recorded, and the failure to file it for record arose from the negligence of her agent, to whom, on its execution, it was delivered in good faith for that purpose. The fact that a conveyance executed by a husband directly to his wife has not been recorded for a year, and until after the debts are contracted by the husband, does not of itself render such a conveyance void. *Brookbank v. Kennard*, 41 Ind. 339.

In discussing the effect of a failure to record a conveyance from the husband to the wife, Mr. Justice HUNT, in *Beecher v. Clark*, 10 N. B. R. 385, says: "If Clark and his wife supposed that the only value of record was to prevent the effect of another deed by him, and the wife had confidence that he would make no other conveyance, the omission to record has no significance." And see *Cragin v. Carmichael*, 2 Dill. 519. The statute of this state provides that a mortgage "shall be a lien on the mortgaged property from the time the same is filed in the recorder's office for record, and not before." Section 4288, Gantt's Dig. But though not recorded, the mortgage is good between the parties and against the administrators of the mortgagor and his general creditors. *Haskill v. Sevier*, 25 Ark. 152. In the absence of fraud it is immaterial what time may have elapsed between the date of its execution and the time it is filed for record. The lien is established and becomes effectual against all the world the instant it is filed, and will prevail over any subsequent conveyance or lien.

But it is urged the mortgage is void under the fourteenth and thirty-fifth sections of the bankrupt act, because, though executed more than six months before the commencement of proceedings in bankruptcy, it was filed for record less than four months before the commencement of such proceedings, and after the mortgagor had be-

come insolvent. This mortgage was taken as security for a loan of money made at the time of its execution, and would have been a valid security under the bankrupt act had the mortgagor then been insolvent to the knowledge of the mortgagee, if the latter (as it is admitted to be the case here) made the loan *bona fide* and without any fraudulent purpose. *Darby's Trustees v. Boatman's Sav. Inst.* 1 Dill. 141; *Cook v. Tullis*, 18 Wall. 332; *Tiffany v. Boatman's Inst.* Id. 376. A fiat of bankruptcy is, in legal effect, an execution in favor of all the bankrupt's creditors. The assignee stands in the position of a judgment creditor, and may assert all the rights, and have the same relief in any given case, that a judgment creditor might. Confessedly, a judgment creditor, whose judgment was subsequent to the recording of defendant's mortgage, could not, on the facts in this case, successfully attack it, nor can the assignee do so unless the mortgage is obnoxious to some provision of the bankrupt act. That a mortgage executed more than six months before the commencement of proceedings in bankruptcy, and otherwise valid, is not void under the bankrupt act simply because it was filed for record less than four months before the commencement of such proceedings, and after the mortgagor had become insolvent, is settled as well as any question can be by the authority of adjudged cases. *In re Wynne*, 4 N. B. R. 5; *In re Dow*, 6 N. B. R. 10; *In re Perrin v. Hance*, 7 N. B. R. 283; *Cragin v. Carmichael*, 2 Dill. 519; *Gibson v. Warden*, 14 Wall. 244.

Let a decree be entered dismissing the bill for want of equity.

SINGER MANUF'G CO. v. MCCOLLOCK.

(Circuit Court, E. D. Arkansas. September 2, 1884.)

1. STATUTES—RULES FOR CONSTRUCTION OF STATUTES.

(1) When an act of the legislature admits of two interpretations, one of which brings it within, and the other presses it beyond, their constitutional authority, the courts will adopt the former construction. (2) In the construction of statutes the rules of grammar are less important than the intention of the legislature; and the sense and spirit of a statute will prevail over the strict grammatical construction of its words. (3) A construction will not be put upon a statute which will render it nugatory, if it is susceptible of a construction that will give it a reasonable operation and effect.

2. SAME—CONSTRUCTION OF A CONSTRUING STATUTE.

A statute which declares "that it was and is the intent and meaning" of a prior act to give redemption from sales of land under decrees of chancery courts, will not be construed to be an invasion of the judicial function, but will be treated as a direct enactment that such prior statute shall, in future, apply to sales of real estate under decrees in chancery.

3. SAME—MORTGAGE—RIGHT OF REDEMPTION—RULE OF PROPERTY.

The right of redemption given by statute at the time a mortgage is executed, enters into, and becomes a part of, the mortgage contract; it is a rule of property, as obligatory on the federal as on the state courts.

In Equity.

E. W. Kimball, for plaintiff.

CALDWELL, J. Under the equity rules, the plaintiff is entitled to a final decree of foreclosure of a mortgage on real estate, executed since the passage of the act of March 4, 1875. The only question in the case is whether the decree shall in terms give the defendant the right to redeem the mortgaged premises within 12 months after the sale under the decree. Section 2696 of Gantt's Digest, enacted in 1868, reads as follows:

"When any real estate, or any interest therein, is sold under execution, the same may be redeemed by the debtor from the purchaser, or his vendees, or the personal representatives of either, within 12 months thereafter."

Other sections provide the mode of making the redemption. This section was held not to apply to sales under decrees of foreclosure of mortgages. In this state of the law the legislature, on the fourth of March, 1875, passed the following act:

"That it was and is the true intent and meaning of sections numbered two thousand six hundred and ninety-six, (2696,) two thousand six hundred and ninety-seven, (2697,) two thousand six hundred and ninety-eight, (2698,) two thousand six hundred and ninety-nine, (2699,) and two thousand seven hundred (2700) should and does apply to all sales of real estate, made and had under, and by virtue of, decrees of chancery courts, in the same manner as they did to sales under executions at law."

It is said this act is a nullity because it is a legislative construction of a prior statute, and an invasion by the legislative department of the government of the functions that belong to the judicial department. It must be conceded that the powers of the three departments of the state government—legislative, executive, and judicial—are clearly separated and sharply defined by the constitution; and under this division of power it is unquestionably the function of the legislature to make, and of the courts to construe, the laws. The judicial power cannot legislate, nor can the legislative power act judicially. But it would hardly be just to impute to the legislature passing this act the deliberate intention to usurp the functions of the judicial department. Such a construction would be hypercritical and captious, and legislative acts are not to be interpreted by the courts in that spirit. When an act of the legislature admits of two interpretations, one of which brings it within, and the other presses it beyond, their constitutional authority, the courts will adopt the former construction. In the construction of statutes the rules of grammar are less important than the intention of the legislature. And the sense and spirit of the statute prevails over the strict grammatical construction of its words, "for the letter killeth, but the spirit giveth life." This is a remedial statute, and the words of such a statute are always to be construed largely and beneficially; and it is not unusual to extend the enacting words of a remedial statute beyond their literal import and effect, in order to include cases within the same mischief. Dwar.

St. 64. And a construction will not be put upon a statute which will render it nugatory, if it is susceptible of a construction that will give it a reasonable operation and effect. It was not competent for the legislature to give this statute a retrospective operation, so far as relates to sales under mortgages, (*Bronson v. Kinzie*, 1 How. 311; *Edwards v. Kearzey*, 96 U. S. 595; *Brine v. Insurance Co.* Id. 627,) and if it does not operate prospectively, then it was enacted in vain. It was obviously the intention of the legislature to apply sections 2696-2700, Gantt's Dig., to all sales under decrees of chancery courts. It was competent for the legislature to have said this in terms, and the act would have been effectual. And when they said "that it was and is the true intent and meaning of" those sections that they should have that effect, they simply meant to assert, as they well might, that in future they should have that effect.

An act of congress declared that "the act of March 2, 1867, shall be construed to impose the taxes therein mentioned to the first day of August, 1870. * * *" It would have been competent for congress to have imposed the taxes in question by an act having a retrospective operation; but it was contended that the enactment quoted was nothing but an unconstitutional effort on the part of congress to invade the powers of the courts, and to give a construction to a prior act of congress of which it was not susceptible. Answering this objection, the court, speaking by Mr. Justice MILLER, said:

"But where it [congress] can exercise a power by passing a new statute, which may be retroactive in its effect, the form of words which it uses to put this power in operation cannot be material, if the purpose is clear, and that purpose is within the power. Congress could have passed a law to reimpose this tax retrospectively, to revive the sections under consideration if they had expired, to re-enact the law by a simple reference to the sections. Has it done anything more? Has it intended to do anything more? Are we captiously to construe the use of the word "construe" as an invasion of the judicial function where the effect of the statute, and the purpose of the statute, are clearly within the legislative function?" *Stockdale v. Insurance Cos.* 20 Wall. 323.

A later case before Mr. Justice MILLER, on the circuit, is on all fours with the case at bar. The act of congress of March 2, 1867, (14 St. 426,) impliedly forbade the organization of railroad companies in the mode the corporation in question was organized. But by a subsequent act of congress, (act of June 10, 1872; 17 St. 390,) it was provided that the previous act "shall be construed as having authorized and as authorizing the legislative assemblies of the territories of the United States, by general incorporation acts, to permit persons to associate together as bodies corporate for purposes above named." The railroad company, the legality of whose organization was questioned, filed its certificate of organization in 1873, and its organization was legal if the act of 1872 was valid. But it was contended that that act only construed the former act, and was ineffectual for any purpose. Mr. Justice MILLER, in answer to this contention, said:

"It is denied that congress has any right to give a construction to the statute which will bind the court, and therefore that act of 1867 remains, and this railroad has no competent organization which will enable it to take subscriptions to stock. But in a case which came up concerning taxation under the internal revenue law, which I decided myself in the supreme court, [*Stockdale v. Insurance Cos.* 20 Wall. 323,] a very similar statute, construing a former statute, is made the subject of consideration, and in that case the court held that while it might not be true that rights existing prior to the explanatory or declaratory statute will be affected by that declaratory statute, yet, inasmuch as congress or any legislative body has a right to pass a law for the future that such a statute shall be held to mean so and so, while it may not affect past transactions, it is equivalent to the passage of a statute of that character for the future; and, while it is not necessary for us to decide here whether that declaratory statute would affect any contracts or transactions prior to its passage, it is sufficient to say that after its passage it became a part of the law of 1867, and it was a declaration by congress that railroad companies might be organized in the manner that this was organized, after that period." *Stebbins v. Board Co. Com'rs*, 4 FED. REP. 282.

The act is effectual to give redemption from sales under decrees of foreclosure rendered on mortgages executed since its passage. This right entered into and became a part of the mortgage contract. It is a rule of property, as obligatory on the federal as on the state courts. *Brine v. Insurance Co.* 96 U. S. 627.

DREIER v. CONTINENTAL LIFE INS. CO. OF HARTFORD, CONN.¹

(Circuit Court, D. Indiana. August 14, 1885.)

1. LIFE INSURANCE — FALSE ANSWERS AS TO PREVIOUS DISEASE — APPLICATION, HOW CONSTRUED.

To the questions in an application for insurance whether the applicant had "ever had any of the following complaints: * * * Pneumonia, * * * spitting or raising of blood, * * * or any disease of the lungs," the answer was, "No;" and to the question, "What sickness or sicknesses has the party had during the 10 years last past?" the answer was, "None except fever—cure perfect;" and to the question, "Is the party now in good health?" the answer was, "Yes." *Held*, that the answers were true, within the meaning of the contract, although the insured had on one occasion "spit blood;" the evidence showing that he had not had the spitting in such form as to be called a disease, disorder, or constitutional vice; and that the question did not require him to state every instance of blood-spitting, but only such as amounted to a disease.

2. SAME — EVIDENCE — STATEMENTS OF PHYSICIANS IN PROOF OF DEATH PRIVILEGED.

Statements in the proof of death, made by the physician of the insured, as to the previous complaints and ailments of the insured, are privileged communications within the meaning of the Indiana statute, and not admissible to show that the answers made to certain questions in the application for insurance were false.

At Law.

¹ Reported by Robertson Howard, Esq., of the St. Paul bar.

U. J. Hammond and John S. Tarkington, for plaintiff.

Finch & Finch, for defendant.

WOODS, J. Action upon an insurance policy upon the life of Peter H. I. Dreier, taken for the benefit of his wife, the plaintiff. By the terms of the policy the application for the insurance was made a part of the instrument, and the answers to questions are explicitly warranted to be true. The defense specially pleaded to the action is that certain of the answers to questions in the application were false; that to the inquiry, "Has the party had any of the following complaints: * * * (16) Pneumonia, * * * spitting or raising of blood, (20) any disease of the lungs," the answer was, "No;" and that to the question, "What sickness or sicknesses has the party had during the ten years last past?" the answer was, "None, except fever—cure perfect;" and to the question, "Is the party now in good health, and does he usually enjoy good health?" the answer was, "Yes;" that these answers were all, and each severally, false and a breach of warranty in this: that the insured had been afflicted with pneumonia and had had spitting and raising of blood prior to the date of the policy and had been afflicted with disease of the lungs. This answer, in so far as it is well pleaded, casts upon the plaintiff the burden of proving the truth of the answers and warranties in question. *Continental Life Ins. Co. v. Kessler*, 84 Ind. 310.

It seems to be an established rule that "the application for insurance must be construed strictly against the insurer." The supreme court of Indiana so declared in effect in *Pennsylvania Mut. Life Ins. Co. v. Wiler*, at November term, 1884, reported in *Insurance Law Journal* for May, 1885. By this rule, as indeed by the terms of the question on the subject, there is no warranty in this case that the insured never had spitting or raising of blood, but only that he had not had the complaint of spitting or raising blood; equivalent to a warranty that he had not had blood-spitting in such form as to be called a disease, disorder, or constitutional vice. See *Connecticut Mut. Life Ins. Co. v. Union Trust Co.* (U. S. Sup. Ct.) *Amer. Law Reg.* January, 1885; S. C. 5 Sup. Ct. Rep. 119.

The answer pleaded, it may be observed, does not allege the existence of any such disease or disorder, and therefore really presents no issue upon this point. But we will consider the case as if the issue were made. If the question put to the applicant for the insurance had been whether or not he had had any spitting of blood, or had had any symptom of disease, such as spitting or raising of blood, it would doubtless have required the disclosure of a single instance of blood-spitting. *Geach v. Ingall*, 14 Mees. & W. 95; S. C. Bigelow. *Life & Acc. Ins.* R. 306; *Insurance Co. v. Miller*, 39 Ind. 475; and *Vose v. Eagle Life Ins. Co.* 6 Cush. 42, are cases which illustrate the distinction, and are in this respect different from the case now presented. See, also, *Cushman v. Insurance Co.* 70 N. Y. 72, and authorities cited.

The inquiry now is not whether or not there was a misrepresentation or a false warranty in respect to a symptom of disease, but whether or not the party had actually had the disease, the warranty being that he had not; and consequently the single instance of blood-raising proved has significance only as an item of evidence tending to show the presence, but not itself constituting the fact, of disease or disorder. The weight which this evidence should have depends, of course, largely upon the circumstances of the occurrence, and of other pertinent evidence, if there be any competent to be considered. There is no other evidence relevant to this point and favorable to the defense, except certain statements made by Dr. Hadley, physician of the deceased, contained in the proof of death furnished by the plaintiff to the defendant company; and these statements, it is now insisted, come within the rule of privileged communications between patient and physician, and therefore cannot be considered. The court is inclined to this view. It is clear that Dr. Hadley could not, against the will of the plaintiff, if called as a witness, have been allowed to testify to the facts contained in these statements. *Pennsylvania Mut. Life Ins. Co. v. Wiler, supra*; *Masonic Mut. Benefit Ass'n v. Beck*, 77 Ind. 208; *Connecticut Mut. Life Ins. Co. v. Union Trust Co., supra*.

It is true that by the terms of the policy the plaintiff, in order to have a right of action, was bound to furnish the company within a specified time "satisfactory proof of the death;" but this did not entitle the company to go further, as it seems to have done, and require of the plaintiff a statement by the physician of his knowledge concerning the previous complaints and ailments of the deceased, which, proximately at least, did not cause the death; and I see no reason at all why such statements, when so obtained, should become available to the company as evidence, in a suit upon the policy, of facts which could not be shown by the testimony of the one who made the statement. The law which declares communications between patient and physician confidential should not be evaded in any such way.

These statements excluded, the only evidence that remains to show that the deceased had, or had had, any disorder or complaint when he applied for the insurance, consists in the fact that four years before he raised blood on one occasion. The evidence shows that the deceased was a blacksmith, and had been of strong and robust appearance, and so continued until some months after the policy sued on was issued. The defendant's examining physician,—a specialist of noted skill in respect to diseases of the throat and lungs,—after a careful examination declared him sound, and to be "A No. 1 risk." Upon the particular occasion of blood-spitting in question he had been employed for some hours during a hot summer afternoon in heating and setting wagon-tires, and, in a heated condition, had drank freely of cold water. He at once felt ill, went home, took supper, and was about to retire, when he remarked that there was "something salt" in his mouth, and thereupon two or three times spat out small quan-

tities of blood, which he afterwards said came from his lungs. He went to consult his physician, and within a few days went to Wisconsin, where he stayed about two months, and then returned home well, and continued, as before stated, in apparent good health until and for some months after the policy of insurance upon his life was issued. It is not questioned that he died of *phthisis pulmonalis*. The plaintiff testified that he was taken sick with a cold in September, and died on the twenty-fourth of November following, the cause of the death, as she understood, being quick consumption.

In the opinion of the court, it cannot be said to appear upon the competent evidence in the case that the deceased made false answers to questions in the particulars charged, or in any respect which constitutes a breach of any warranty contained in the policy and application. The attendant circumstances, corroborated by subsequent long-continued health and by the medical examiner's report, strongly indicate a transient rather than settled cause for the single instance of blood-spitting shown to have occurred, and there remains in the case no evidence to justify a different conclusion. The expert testimony in the case was predicated upon hypotheses which are not supported by proof.

The plaintiff is entitled to recover the amount of the policy, with interest for two years and three months,—amounting in the aggregate to \$1,135,—with costs of suit. Ordered accordingly.

(September 10, 1885.)

Upon Motion for New Trial.

WOODS, J. It is insisted that the court erred in admitting in evidence the certificate of the examining physician, and in excluding from consideration the statements of Dr. Hadley in respect to diseases which the deceased had had before his last sickness. Upon the last point reference is made to *Insurance Co. v. Newton*, 22 Wall. 32; *Walther v. Mutual Life Ins. Co.* (Cal. Sup. Ct.) 13 Ins. Law J. 815; S. C. 4 Pac. Rep. 413; *Campbell v. Charter Oak, etc., Co.* 10 Allen, 213; *Moore v. Protection Ins. Co.* 29 Me. 97. These cases declare the general proposition that "the preliminary proofs presented to an insurance company in compliance with the condition of its policy of insurance are admissible as *prima facie* evidence against the assured;" but no one of them goes to the extent, either in terms or, as I conceive, in principle, of holding that statements by physicians which are by statute made confidential become available to the company as evidence because found in or connected with the preliminary proofs; especially when, as in this case, the statements in question are not concerning the last sickness or proximate cause of death.

In the opinion in *Masonic Mut. Ben. Ass'n v. Beck*, *supra*, it is conceded or implied that after the death of the patient the physician

v.24f,no.12—43

may testify at the instance or with the consent of "the party who may be said to stand in the place of the deceased;" but this was aside or beyond the question presented in that case. And there are explicit authorities to the effect that the restriction of the statute can be waived only by the one who makes the confidential communication. *Westover v. Aetna Life Ins. Co.* (N. Y. Ct. App.) 1 N. E. Rep. 104; *Pierson v. People*, 79 N. Y. 424; *Grattan v. Metropolitan Life Ins. Co.* 80 N. Y. 281; *Bowman v. Norton*, 5 Car. & P. 177; 1 Greenl. Ev. § 243.

It need not, however, be decided in this case whether or not the plaintiff might have waived the restriction. It is enough to say that, by including the statements in question in the preliminary proofs, she did not consent that they might be used in evidence against her in an action upon the policy of insurance.

DAVIS v. CHAPMAN.

(Circuit Court, D. Indiana. August 13, 1885.)

1. TAX SALE—INDIANA STATUTE—TITLE ACQUIRED BY HOLDER OF CERTIFICATE—STATUTE OF LIMITATIONS.

While the statute of Indiana provides that a certificate of sale of realty for taxes shall entitle the holder to possession, such certificate does not confer the right of possession unless the sale was regular and valid. And when one takes possession under the invalid certificate, he is accountable for rents; and, after receiving rents enough to repay the amount of his bid, penalties, and interest, will not be considered as holding a certificate which, constituting in the beginning a mere lien, can grow by lapse of time, under a statute of limitations, into a title at law, or into a defense against such a title. *Barton v. McWhinney*, 85 Ind. 481, followed, and *Ethel v. Butchelder*, 90 Ind. 520, distinguished.

2. SAME—MERGER.

The lien of a purchaser at an invalid tax sale of realty will be merged in the fee if that be obtained by the holder of the tax certificate; and if afterwards he lose the fee by failure to redeem from a sheriff's sale of the property, the tax lien will not be revived to such extent as to support a running of the statute of limitations, in respect to tax sales, during the time of the merger.

3. SAME—PURCHASE BY TENANT IN COMMON.

Where a tenant in common, with his own money, purchases the interest of his co-tenant at tax sale, but the sale is irregular and invalid, and vests him with a lien only upon the property, which by lapse of time may ripen into a title, but before that occurs he receives rents sufficient to reimburse him, he must apply the rents in that way and not permit the statute to run.

At Law.

J. M. Van Fleet and Hill & Lamb, for plaintiffs.

Harrison, Miller & Elam, for defendants.

WOODS, J. Ejectment to recover the undivided half of certain town lots in Warsaw, Kosciusko county, Indiana. Upon these lots are the Kirtley House and Kirtley House livery-stables; the house and stables

being separated by a public alley which divides the lots into two distinct parcels. The entire property was owned in 1858 by Joseph Popham, and afterwards by one Kirtley, who, before August 28, 1873, had conveyed an undivided half to the defendant, Chapman, who still owns it, and on that day conveyed the other half to Charles Ford, who, on the twenty-second day of July, 1875, mortgaged his interest to Nelson Davis. This mortgage was foreclosed December 11, 1875, by order of the Kosciusko circuit court; and by virtue of the decree the interest of Ford was duly sold on the twenty-second day of January, 1876, to the plaintiff, Rebecca Davis, assignee of the decree, who, after the expiration of a year, received a sheriff's deed, whereby she obtained a perfect legal title, which she still holds, unless it has been divested or defeated by reason of the facts yet to be stated.

On the eighth day of February, 1875, Ford's half of the property was sold to Chapman at tax sale for \$196.75, delinquent taxes of the years 1873-74, and the usual form of certificate of sale issued to the purchaser. The sale was of the undivided half of the entire property, and not of the different parcels separately. After two years Chapman surrendered his certificate and received an auditor's deed, and that being defective because not witnessed by the county treasurer, he took a second deed, dated December 30, 1877. On May 1, 1875, Chapman, being a tenant in common with Ford, claims to have taken exclusive possession of the entire property under and by virtue of his certificate of purchase at tax sale, and to have continued to hold by the same right to the present time. From the time of taking possession as stated, he received of the lessee of the entire property, who, it is claimed, attorned to him at that date, rent at the rate of \$100 per month. It does not appear that, upon taking or while holding the possession, he made any open or notorious claim of right hostile to his co-tenant, or that the co-tenant in fact had notice of his hostile intent or claim. On March 18, 1875, Chapman obtained in the Kosciusko circuit court a decree of foreclosure against Joseph Popham of a mortgage executed by Popham in 1858, upon the entire property; and on October 9, 1875, in the same court obtained a judgment against Ford upon notes alleged to have been given by Ford to Kirtley upon the purchase price of the part of the property conveyed by Kirtley to Ford, and at the same time obtained a decree declaring a vendor's lien upon that part of the property for the amount of the judgment; and by virtue of these decrees the property described in each was duly and separately sold by the sheriff, and bid off by Chapman, who, on November 15, 1875, received, and caused to be recorded, sheriff's deeds made in consummation of the sales. On the seventeenth day of February, 1876, the plaintiff instituted in the Kosciusko circuit court an action against the defendant to have the said decrees, and the sales made thereunder, annulled as against her, and on the second day of April, 1880, obtained a decree to that effect,

which remains in force. On May 6, 1880, the plaintiff demanded of the defendant to be admitted into possession and recognized as his co-tenant of the property. This the defendant refused. The complaint in this case was filed May 14, 1884.

The tax law of 1872, in force at the time of the tax sale mentioned, contains the following provisions: Sec. 199, (in effect,) that two or more parcels belonging to one person shall not be sold together, but each parcel must be sold separately to the highest bidder. Sec. 203: The certificate of sale "shall entitle the holder to the possession of the premises therein described." Sec. 250: "No action for the recovery of real property sold for non-payment of taxes shall lie, unless the same be brought within five years after the date of the sale." Sec. 256: "If any conveyance shall prove to be invalid and ineffectual to convey title, the lien which the state had on such land shall remain in force, and shall be transferred by such deed to the grantee, and vested in him, his heirs and assigns," etc.

Upon these facts counsel for Chapman insist that he has a complete defense under his tax title in the statute of limitation. To this counsel for the plaintiff reply (1) that the tax sale was invalid and gave the purchaser only a lien upon the property, and that that lien was merged and lost in the title which Chapman obtained by his purchases under the decrees against Popham and Ford; (2) that within four or six months after the sale Chapman received rents enough to cancel his lien, and by law was bound to apply the rents in that way; and (3) that, being a tenant in common with Ford and with the plaintiff, Chapman could not, under a tax sale, acquire a hostile title.

While the statute provides that a certificate of sale for taxes shall entitle the holder to possession, the supreme court of the state has explicitly decided that the certificate does not confer the right of possession unless the sale was regular and valid. *Barton v. McWhinney*, 85 Ind. 481. The case of *Ethel v. Batchelder*, 90 Ind. 520, was decided on the assumption that the sale was regular; and in the opinion it is said *obiter* that the right of possession under the certificate "carried with it the right to receive the rents of such real estate, and the absolute ownership of such rents, without liability to account therefor;" but this language, when interpreted and restricted by the facts of the case, means no more than the actual decision made, and that is, that when possession has been taken under a certificate of tax sale in all respects valid, a redemption from the sale cannot be had by an enforced application of the rents or rental value of the property, but "only in the manner prescribed by the statute." An explicit statutory mode of redemption having been provided, it was not for the court, in the absence, at least, of averment of insolvency of the holder of the certificate, or of other showing of equitable necessity, to say that redemption might be effected by an accounting for and application of rents and profits. The question of liability for rents after redemption, accomplished in the statutory way, was not before the court; and

it is hardly probable that it will ever be held that the holder of a tax title, even if valid, who has had possession under a certificate, after receiving back, within the time given for redemption, the amount of his bid, with the large penalties and interest allowed him by the statute, will be entitled to retain as his own rents and profits received or enjoyed during or for the time of his possession. The statute gives him the right to take possession under his certificate, and provides that within two years there may be a redemption, but is silent in respect to rents and profits in case redemption is effected. The plain and just legal inference in such cases is that the redemption shall relate back to the date of sale; and this done, accountability for rents follows. This, it seems to me, would be the rule in respect to sales upon execution and decrees of court, (sales on which something like the value of the property is supposed to be bid,) if the law, saying nothing of rents, gave the purchaser immediate possession under his certificate of purchase, subject to the owner's right of redemption within one year as now allowed. It would certainly shock the common sense of justice and right if in such cases the purchaser, besides receiving his money and large interest, could retain a year's rents and profits; and the courts, as it seems to me, would be slow to reach, as upon principle, and I believe upon authority, they would be under no compulsion to reach such a conclusion; certainly not in favor of claimants under tax sales, in respect to which, by common if not universal consent, a strict construction is employed, which concedes to the purchaser only what a nice judicial acumen cannot deny by turning against him every possible intendment deducible from the letter or spirit of the law.

But whether these views of the decision in *Ethel v. Batchelder* be right or wrong, there is no inconsistency between that and the decision in *Barton v. McWhinney*, from which, as well as from principles of justice and right, it follows logically and necessarily that if the tax sale be invalid, as the one in this case clearly was, because of the sale of two parcels together for one price, if for no other reason, the holder of the certificate who takes possession holds without right, and is accountable for rents; and, after receiving rents more than enough to repay the amount of his bid, penalties, and interest, ought not to be considered as holding a certificate which, constituting in the beginning a mere lien, can grow by lapse of time, under a statute of limitations, into a title at law, or into a defense against such a title. In opposition to this view, it is urged that the plaintiff has sued at law, and must recover upon the strength of her title, unaided by equitable considerations; and that the statutory time having run in the defendant's favor, no inquiry can be made in respect to the validity of the tax certificate under which he held possession. But we have seen already that the plaintiff has a perfect title at law; and consequently our inquiry is confined to the question whether or not a good defense is made out under the five-years limitation pre-

scribed by the tax law. It is a begging of the question to say that the lapse of five years or more between the date of the tax sale and the bringing of the action precludes inquiry in respect to the defendant's rights under the certificate before the period of limitation had gone by. The burden was upon the defendant to show that he held possession, or at least claimed right to the property, under the certificate, in such manner as to put and keep the statute running for the full period continuously in his favor. As already stated, his certificate at first clothed him with a lien only,—an equity,—but, by force of the statute, that equity might, in five years, have become a perfect defense to an action of ejectment. *Farrar v. Clark*, 85 Ind. 449. Did it do so, is the question; and this inquiry, being at every step about an equity, necessarily brings under review every pertinent consideration, whether of a legal or equitable nature.

In addition to the fact that soon after taking possession, and long before he made certain repairs upon the property, Chapman had received in rents more than enough to cancel his tax certificate, it may be observed that the proof fails to show that the statute ever commenced to run in his favor. He was co-tenant first with Ford, and after Ford with the plaintiff, of property of which he bought the co-tenant's undivided half at the tax sale; and it may well be doubted whether or not, under the circumstances, he can be allowed to assert title under his purchase. In *Bender v. Stewart*, 75 Ind. 88, it was held that a tenant in common could not, with funds derived from the common property, purchase the interest of his co-tenant at tax sale; and by the same principle, if he purchases with his own money, but the sale is irregular and invalid, and vests him with a lien only upon the property which, by lapse of time, may ripen into a title, but before that occurs he receives rents sufficient to reimburse him, he must apply the rents in that way, and not permit the statute to run. See the following authorities cited by counsel: *Cooley, Tax'n*, 346; 4 Kent, Comm. 371, note a; *Van Horne v. Fonda*, 5 Johns. Ch. 388; *Rothwell v. Dewees*, 2 Black, 618; *Lloyd v. Lynch*, 28 Pa. St. 419; *Maul v. Rider*, 51 Pa. St. 377; *Phelan v. Boylan*, 25 Wis. 679; *Dickinson v. White*, 21 N. W. Rep. 153.

In *Elston v. Piggott*, 94 Ind. 14, it is said: "The general rule unquestionably is that one tenant in common cannot, by purchasing an outstanding lien, acquire a title which will evict his co-tenant." To same effect, *Bissell v. Foss*, 114 U. S. 252-259; S. C. 5 Sup. Ct. Rep. 851.

But, aside from this view, it may be noted that, as between tenants in common, a purchase by one of the other's interest under an outstanding lien or claim is not necessarily hostile to the right of the other. The presumption is the other way, and in order to found a hostile right upon the purchase, except for reimbursement, an ouster must be shown, or at least notice to the co-tenant of the adverse claim, or such open and notorious assertion of it as to be equivalent to an

ouster. *Jenkins v. Dalton*, 27 Ind. 78; *Bowen v. Preston*, 48 Ind. 367; *Nicholson v. Caress*, 76 Ind. 24; *Vance v. Schroyer*, 77 Ind. 501.

Nothing of the kind is shown here. On the contrary, instead of an open assertion of title or right under the tax certificate, the defendant in November, 1875, claimed title under the decrees against Ford and Popham, and from February 17, 1876, to April 2, 1880, upheld that claim against the plaintiff, saying nothing of the tax title, which, if good, he might have brought forward as a complete bar to the plaintiff's action, and which, as a lien, he might have had declared and enforced, though at law strictly it had been merged in the title obtained under the decretal sales. If at any time it may be said that the evidence shows an assertion of exclusive right under the tax title by the defendant against his co-tenant, it was not until the sixth day of May, 1880, when he refused to admit the plaintiff into possession or to recognize her right. But the suit was brought before the end of five years from that time.

In the opinion of the court the defense claimed under the tax certificate fails upon the other ground named; that is, upon the doctrine of *merger*. The objection made to this view is that the plaintiff procured a decree against the defendant annulling the decrees which he had obtained against Ford and Popham, and setting aside the title which the defendant obtained by means of the sales under those decrees, and that she cannot, in the face of her own decree, now assert the validity of that title in order to support the alleged merger. This does not seem to the court conclusive on the point. Under the decree against Ford the defendant on the fifteenth day of November, 1876, acquired Ford's title, which was yet good at law, though liable to be divested if redemption from the sale to the plaintiff were not affected by the twenty-second day of January, 1877. During this time the legal title, with the right of redemption, was in the defendant. *Elston v. Piggott*, *supra*; *State v. Sherill*, 34 Ind. 57; *Felton v. Smith*, 84 Ind. 485; *Wilhite v. Hamrick*, 92 Ind. 594. But, claiming in himself the superior equity as well as the title, the defendant stood upon that claim until the court declared it void as against the plaintiff; but it was good in the beginning, remained good until the right of redemption was lost, and if he had recognized the plaintiff's right by redeeming from her purchase, it would never have been disturbed. The merger, therefore, was once complete at law, and must be deemed to continue unless for equitable reasons the lost right should be revived. But if the defendant can invoke equitable considerations in order to preserve or revive his lien, the plaintiff may have the benefit of the countervailing equities, which are certainly strong enough to forbid the preservation of the tax lien, in such manner as to enable him to say that he had been claiming title under it all the while, (when in truth he had not,) and that consequently the statute of limitation was all the time running in his favor. All that equity could concede to him under the circumstances, on account of the judgment against him

in favor of the plaintiff, would be the right to reassert his lien under the tax certificate, and perhaps to claim the statutory interest for the time of the merger, but not so as by relation back to support a fictitious running of this statute of limitation against the true owner.

The finding and judgment must be for the plaintiff. So ordered.

PRESTON *v.* FOELLINGER.

(Circuit Court, D. Indiana. August 4, 1885.)

SALE OF BUSINESS—NOTICE—LIABILITY FOR GOODS SOLD.

J. F. had for many years been engaged in business in Fort Wayne, Indiana, and in August, 1880, he sold out to the wife of his son, who bore the same name as himself, and she transferred the stock to her husband, who published in two papers in Fort Wayne the fact that he had purchased the business. He continued to use the old letter-heads in his correspondence, kept the old signs up, and carried on the store in the name of J. F., as theretofore. In November, 1880, T., a commercial traveler in the employ of plaintiff, who was acquainted with J. F., (the father,) went into the store and sold a bill of goods to the son,—the father being present,—and these and other goods ordered by letter were duly delivered. Neither T. nor plaintiff knew of the transfer of the business at the time of these sales, and subsequently the son failed, whereupon suit was brought against the father. *Held*, no fraud or intention to deceive being shown, that the father was not responsible.

At Law.

U. J. Hammond and Harris & Calkins, for plaintiffs.

R. S. Taylor and Ninde & Ellison, for defendant.

WOODS, J. The defendant for many years carried on a mercantile business in Fort Wayne, Indiana, under the name of "J. Foellinger." He owned the building in which the store was kept, and his name was upon the building. A sign bearing the name "J. Foellinger" was over the door, and also a street-sign in front. He used a letter-head as follows:

"'The Pioneer,' established 1840. Office of J. Foellinger, manufacturer of boots, and dealer in boots and shoes, No. 36 Calhoun st., Ft. Wayne, Ind."

He was of well-known financial ability. He had a son of the same name who had lived in Michigan for many years, and in the year 1879 came to Fort Wayne and entered his father's store as a clerk. The plaintiff was a wholesale merchant in Chicago, and had in his employ one Tyler, who resided in that city. Tyler had known the defendant for five years, and the plaintiff for about three years, and in November, 1880, was in the latter's employ as a commercial traveler. On August 26, 1880, the defendant sold the store to the wife of his said son, who a few weeks thereafter transferred the stock to her husband, who was a man without any means.

On August 28, 1880, there was printed, in an evening newspaper of general circulation in Fort Wayne, the following:

"Jacob Foellinger, Jr., has purchased the stock of boots and shoes of J. Foellinger, Sr., No. 36 Calhoun street, and will be pleased to greet his old friends and many new ones."

About the same time, a local notice was printed in a German newspaper, as matter of news, stating in German that the son had purchased his father's stock and would continue the business. No other published notice was given. The old signs remained over and in front of the door. The son used the same letter-heads and carried on the business in the name of J. Foellinger until he failed, in January, 1881. In November, 1880, Tyler went into the store and received an order upon the plaintiff for goods. The defendant was in the store at the time. Neither Tyler nor Preston had any knowledge of the transfer or sale by the defendant of his business until the failure. The son gave the order, and in answer to an inquiry made by Tyler for the style of the house, answered, "Jacob Foellinger." Upon the order being sent to the plaintiff, it was filled; and afterwards, during that month and the following, orders for additional goods were received under said letter-heads, signed "J. Foellinger," which were filled from time to time. These orders, as received, were, in the course of business and book-keeping in plaintiff's establishment, entered first upon an order-book, and carried from that to a sales-book, and from that to the journal, and finally from that to the ledger. These entries were made in the name "J. Foellinger," except upon the ledger, where it was written, "J. Foellinger, Sr." How this came to be so done the plaintiff's book-keeper was unable to explain, but his cashier and credit clerk, Mr. Wallace, testified on this point as follows: "It has always been my instruction to open accounts in the ledger, being sure that they are opened with parties that are responsible, and we found that out by reference to the book of R. G. Dun & Co. There we found 'J. Foellinger, Sr.'" The testimony of this witness also shows that it was not known to him or to the plaintiff that there were two of the name of Jacob Foellinger until after the claims in suit had become due, and steps taken for their collection.

Counsel for the plaintiff claim that the rules of law which govern the liability of retired partners apply to this case. Conceding, without deciding, the law of the case to be as claimed, the judgment of the court is that the defendant's liability to the plaintiff is not established. The goods were not in fact sold to defendant, but to another of the same name, who had succeeded to the business, of which due and ample public notice had been given at Fort Wayne, where the business had been conducted. *Young v. Tibbitts*, 32 Wis. 79; *Holtgreve v. Wintkner*, 85 Ill. 472; *Haynes v. Carter*, 12 Heisk. 7; S. C. 27 Amer. Rep. 747. The plaintiff had never dealt with nor known of the defendant or his business, and therefore could not have relied on, and, indeed, did not rely upon, his reputed responsibility. He was not misled by old signs and letter-heads, because he knew nothing of their past significance. His salesman who took the first order for goods had knowledge, it

seems, that the defendant had owned and conducted the business, and when he took the order perhaps believed him to be still in charge; but how and when he obtained that knowledge is not shown; it is, perhaps, not material to know. As agent for the plaintiff, who had had no previous dealings with the defendant, and, even if acting for himself, having had no former transactions, if not absolutely bound by the public notices given in the community of the change of ownership of the business, he was at least bound to know the person with whom he dealt, and, if he desired to bind another, to make proper inquiry to that end. As a rule that inquiry should be made of the person sought to be bound, and in this instance this was especially obligatory, because the defendant was at the time near by. But, negligent of this plain and unequivocal course, the salesman, according to his own testimony, inquired simply for the style of the house; showing that he was not acting upon the faith of the old signs about the door and elsewhere, which, so far as appears, he had not observed.

But, aside from these considerations, it seems, according to the decision of the Indiana supreme court in the case of *Richardson v. Snider*, 72 Ind. 425, that the knowledge possessed by plaintiff's salesman in respect to the defendant's former connection with the business, not having been obtained while acting in that agency, cannot avail the plaintiff. That decision is upon a case where the firm name remained unchanged though two of the partners had gone out, and it was held that the retiring members were in duty bound to give actual notice only to those with whom the firm had dealt, and that this included principals only, and not clerks, salesmen, or agents. On the general subject of retired partners' liability, see *Uhl v. Harvey*, 78 Ind. 26; *Backus v. Taylor*, 84 Ind. 503; *Lovejoy v. Spafford*, 93 U. S. 438; *Thompson v. First Nat. Bank*, 111 U. S. 529; S. C. 4 Sup. Ct. Rep. 689. It is, of course, not to be questioned that if the defendant intended the continued use of his name, either for the purpose of lending his credit, or for the purpose of enabling his son to practice deceit in this respect, he ought to be held responsible upon all liabilities incurred. *Speer v. Bishop*, 24 Ohio St. 598; *Elverson v. Leeds*, 97 Ind. 336. There was no such intention in this case; and the only plausible ground for imputing misconduct or bad faith to the defendant is the continued use of the old signs and stationery. But this, in itself, was certainly not wrong, and the notice of the change which was immediately published excludes any reasonable inference of a wrongful purpose. The names being the same, there is no more reason why the son should not use the signs and letter-heads left by the father than others obtained upon his own order; proper precautions being taken, as was done, to prevent deception. As used by him, the name on the signs and letter-heads meant and were intended to mean the son, not the father, and this new customers were bound to know, unless misled by act of the defendant. If the defendant had died, there could be no doubt on the point, and yet the possi-

bility of deceit and fraud by the son upon parties ignorant of the death would have been the same. The question in every such case, as I suppose, is one of actual misleading or deception; and in respect to the case presented it is enough that the plaintiff did not in fact sell his goods to the defendant, and cannot say that he was misled by any act of the defendant into a belief that the defendant was the purchaser.

Finding and judgment for defendant.

When a partnership is dissolved, or a known member retires from the firm, until such dissolution or retirement is duly notified, the power of each to bind the rest continues in full force, although as between the partners themselves a dissolution or retirement is a revocation of the authority of each to act for the others.¹

After dissolution and notice the power of each partner to bind the others ceases.²

It is of course assumed, in what has been above written, that, after a firm is dissolved, one partner dealing with a person who has no notice of the dissolution may bind his copartners only in transactions in the usual course of business.³

Where a change takes place in a firm by the retirement of some of its members, and the same firm name is used after such retirement, the retiring members can only relieve themselves from liability for the future transactions of the firm by giving actual notice of such retirement to former customers who continue to deal with the firm. As to these, the old partnership is presumed to continue the same as it was when they commenced to deal with it, until in some way they have actual notice of the change.⁴

It makes no difference how notice is given, so that actual notice of a change in the firm is brought home to the former correspondents.⁵ Notice of the

¹ Mulford v. Griffin, 1 Fost. & F. 145; Faldo v. Griffin, Id. 147; Parkin v. Caruthers, 3 Esp. 248; Williams v. Keats, 2 Stark. 290; Brown v. Leonard, 2 Chit. 120; Dolman v. Orchard, 2 Car. & P. 104; Tabb v. Gist, 1 Brock. 33; Bradley v. Camp, Kirby, 77; Southwick v. McGovern, 28 Iowa, 533; Kennedy v. Bohannon, 11 B. Mon. 118; Amidown v. Osgood, 24 Vt. 278; Lamb v. Singleton, 2 Brev. 490; Heroy v. Van Pelt, 4 Bosw. 60; Howell v. Adams, 68 N. Y. 314; Schorten v. Davis, 21 La. Ann. 173; Dickinson v. Dickinson, 25 Grati. 321; Southern v. Grim, 67 Ill. 106; Buffalo City Bank v. Howard, 35 N. Y. 500; Hunt v. Hall, 8 Ind. 215; Newcomet v. Brozman, 69 Pa. St. 185; Price v. Towsey, 3 Litt. 423; Merritt v. Pollys, 16 B. Mon. 355; Ketcham v. Clark, 6 Johns. 144; Grady v. Robinson, 28 Ala. 289; Spears v. Toland, 1 A. K. Marsh. 203; Thurston v. Perkins, 7 Mo. 29; Princeton, etc., T. Co. v. Gulick, 16 N. J. Law 161; Bernard v. Torrance, 5 Gill & J. 383; 1 Lindl. Partn. *406. See, however, Brisbane v. Boyd, 4 Paige. 17.

² See Cronly v. Bank of Ky. 18 B. Mon. 405; Whitesides v. Lee, 1 Scam. 548; Lane v. Tyler, 49 Me. 252; and the cases cited in note (1.)

³ Whitman v. Leonard, 3 Pick. 177.

⁴ Lindl. Partn. *415; Graham v. Hope, Peake, (N. P.) 154; Page v. Brant, 18 Ill. 37; Holtgreve v. Wintker, 85 Ill. 470; Stall v. Cassady, 57 Ind. 234; Tudor v. White, 27 Tex. 534; Davis v. Willis, 47 Tex. 154; Dickinson v. Dickinson, 25 Grati. 321; Little v. Clarke, 36 Pa. St. 114; Kenney v. Altwater, 77 Pa. St. 34; Carmichael v. Greer, 55 Ga. 116; Holland v. Long, 57 Ga. 36; Ennis v. Williams, 30 Ga. 691; Stewart v. Sonneborn, 51 Ala. 126; Shamburg v. Ruggles, 83 Pa. St. 148; Vernon v. Manhattan Co. 17 Wend. 524; Austin v. Holland, 69 N. Y. 571; Bank of Com. v. Mudgett, 44 N. Y. 514; Polk v. Oliver, 56 Miss. 506; Lowe v. Penny, 7 La. Ann. 356; Denman v. Dosson, 19 La. Ann. 9; Pope v. Risley, 23 Mo. 185; Johnson v. Totten, 3 Cal. 343; Williams v. Bowers, 15 Cal. 321; Deering v. Flanders, 49 N. H. 225; Zollar v. Janvrin, 47 N. H. 324; Scheffelin v. Stevens, 1 Winst. Law, (N. C.) 106; White v. Murphy, 3 Rich. Law, 369; Hutchins v. Hudson, 8 Humph. 426; Kirkman v. Snodgrass, 8 Head, 370; Prentiss v. Sinclair, 5 Vt. 149.

⁵ Holtgreve v. Wintker, 85 Ill. 471.

dissolution may be shown either by direct or circumstantial evidence sufficient to establish the fact that the person seeking to enforce the partnership liability knew of the dissolution.¹ Circumstances such as leave no rational doubt in the mind that one knew of the dissolution are as satisfactory as direct and positive proof.² Evidence of mere notoriety of the dissolution alone is not, however, admissible to prove such notice.³ Knowledge of any facts, however acquired, sufficient to put an ordinarily prudent man upon inquiry will charge one knowing such facts with notice of whatever other facts a reasonable investigation would have disclosed.⁴

Persons having no knowledge of a partnership are not entitled to notice of its dissolution;⁵ and, as to all persons who have not had dealings with the firm, notice of the dissolution by publication in some newspaper of general circulation is sufficient, whether such notice is seen by the parties to be charged therewith or not.⁶

When, however, a partner retires, and gives notice of his retirement, but nevertheless allows his name to be used as if he were still a partner, he will continue to incur the liability of a partner.⁷ The mere fact, however, that a partnership name has been kept over the door after the dissolution of the firm, it is held, is not alone sufficient to warrant a recovery upon a note signed in the firm name;⁸ and simple forbearance, after notice of retirement given by advertisement, to prevent the use of the name of the retiring partner, does not, as it seems, necessarily amount to an authority to use the name of the retiring partner as before; and unless his name is used by his authority he is not liable on the ground that he holds himself out as a partner.⁹

Tested by the foregoing rules, there would seem to be no reasonable doubt of the correctness of the decision of the principal case; for it distinctly appears that the plaintiff had had no previous dealings with, nor even knew of, the defendant or his business; and the person buying the goods simply used his own name, as he had a right to do.

M. D. EWELL.

Chicago, September 1, 1885.

¹ See *Laird v. Ivens*, 45 Tex. 622; *Lovejoy v. Spafford*, 93 U. S. 430; *Coddington v. Hunt*, 6 Hill, 595; *Mauldin v. Branch Bank*, 2 Ala. 502.

² *Irby v. Vining*, 2 McCord, 379.

³ *Pitcher v. Barrows*, 17 Pick. 361.

⁴ See *Young v. Tibbitts*, 32 Wis. 79; *Ransom v. Loyless*, 49 Ga. 471.

⁵ *Chamberlain v. Dow*, 10 Mich. 319.

⁶ *Lindl. Partn.* *415; *Godfrey v. Turnbull*, 1 Esp. 371; *Wrightson v. Pullan*, 1 Starkie, 375; *Godfrey v. Macauley*, 1 Peake, (N. P.) 209; *Newsome v. Coles*, 2 Camp. 617; *Shurlds v. Tilson*, 2 McLean, 458; *Watkinson v. Bank of Pa.* 4 Whart. 482; *Galliot v. Planters' Bank*, 1 McMul. 209; *Mauldin v. Branch Bank*, 2 Ala. 502;

Lucas v. Bank of Darien, 2 Stew. 280; *Lansing v. Gaine*, 2 Johns. 300; *Prentiss v. Sinclair*, 5 Vt. 149; *Graves v. Merry*, 6 Cow. 701; *Polk v. Oliver*, 56 Miss. 566; *Simonds v. Strong*, 24 Vt. 642; *Martin v. Searles*, 28 Conn. 43; *Martin v. Walton*, 1 McCord, 16.

⁷ *Lindl. Partn.* *410; *Williams v. Keats*, 2 Starkie, 290; *Dolman v. Orchard*, 2 Car. & P. 104; *Emmet v. Butler*, 7 Taunt. 600; *Brown v. Leonard*, 2 Chit. 120; *Freeman v. Falconer*, 44 N. Y. Sup. Ct. (12 Jones & Sp.) 132; *Wait v. Brewster*, 31 Vt. 516.

⁸ *Boyd v. McCann*, 10 Md. 118.

⁹ See *Lindl. Partn.* *410; *Newsome v. Coles*, 2 Camp. 617.

SMITH and others v. COVENANT MUT. BEN. ASS'N OF GALESBURG, ILL.

(Circuit Court, E. D. Wisconsin. May, 1885.)

1. LIFE INSURANCE—MUTUAL BENEFIT ASSOCIATION CERTIFICATE CONSTRUED—DESIGNATION OF BENEFICIARIES BY WILL—FAILURE TO MAKE WILL—RIGHT OF HEIRS TO BENEFITS.

The Covenant Mutual Benefit Association issued a certificate by which it constituted B. a member of the association, with all the rights and privileges of the same, upon the following conditions and agreements: "That at any time during the continuance and before the termination of this contract, upon due notice and satisfactory proofs of the death of the aforesaid member having been filed with the secretary of the association, he having in all respects complied with the conditions of this certificate, an assessment shall be levied upon all the members holding certificates in force at the time of the death of the said member, for the full amount named in their respective certificates: provided, however, that when the aggregate of such assessments would exceed the limit of his certificate, then the assessment shall be levied ratably, according to the certificate held by each, for an aggregate amount not less than the limit of this certificate, and the sum so collected on such assessments (less all amounts which may be added for expense and collection costs) the association hereby agrees well and truly to pay, or cause to be paid, as a benefit to his devisees, as provided in last will and testament, or, in the event of their prior death, to the legal heirs or devisees of the holder of this certificate, * * * within ninety days from the date of the acceptance of said evidence of death, any assessment or other indebtedness of said member to the association being first deducted therefrom; but in no case shall the payment under this certificate exceed \$2,500." *Held*, that the certificate, fairly and reasonably construed, meant that if the insured should choose to make a last will in which devisees should be named, then such devisees were to become the beneficiaries, and entitled to receive and recover the sum collected by assessment on account of the certificate, but that he might, if he chose, leave his estate to be divided among legal heirs, as the law should direct its division; and in that event, as no devisees would exist, the benefits of the certificate would accrue to his heirs, and they would be entitled to enforce payment in a suit on the certificate.

2. SAME—ACTION BY HEIRS—LEVY AND COLLECTION OF ASSESSMENT.

In order to entitle the heirs of the insured to recover in an action at law on such certificate, they must allege and show that the association has levied an assessment upon certificate holders to pay the death loss, and has collected the amount of such assessment, and has failed to pay the sum so collected to such heirs, as the beneficiaries entitled thereto.

At Law.

Small & Hopkins, for plaintiff.*Jenkins, Winkler & Smith*, for defendant.

DYER, J. On the eighteenth day of January, 1881, the defendant association issued its certificate by which it constituted Benjamin F. Smith a member of said association, with all the rights and privileges of the same, upon the following conditions and agreements:

"That at any time during the continuance, and before the termination of this contract, upon due notice and satisfactory proofs of the death of the aforesaid member having been filed with the secretary of the association, he having in all respects fully complied with the conditions of this certificate, an assessment shall be levied upon all the members holding certificates in force at the time of the death of the said member, for the full amount named in their respective certificates: provided, however, that when the aggregate of

such assessments would exceed the limit of this certificate, then the assessment shall be levied ratably, according to the certificate held by each, for an aggregate amount not less than the limit of this certificate, and *the sum so collected on such assessments* (less all amounts which may be added for expense and collection costs) the association *hereby agrees well and truly to pay*, or cause to be paid, as a benefit to his devisees as provided in last will and testament, or, in the event of their prior death, to the legal heirs or devisees of the holder of this certificate, * * * within ninety days from the date of the acceptance of said evidence of death, any assessment or other indebtedness of the said member to the association being first deducted therefrom; but in no case shall the payment under this certificate exceed *twenty five hundred dollars.*"

This is a suit upon this certificate, brought by the plaintiffs as the legal heirs of Benjamin F. Smith, who died intestate. The plaintiffs' complaint sets out fully the provisions of the certificate, and then alleges that notice and proof of death were duly given; that the insured on his part fully complied with all the conditions of the certificate to be performed by him, but that the defendant has not paid, and refuses to pay the plaintiffs the sum of \$2,500 named in the certificate; and judgment is demanded for that sum, with interest.

The defendant demurs to the complaint on the ground that it does not state facts sufficient to constitute a cause of action. In support of the demurrer, it is urged (1) that the complaint is fatally defective, since it does not allege that the insured left devisees under a last will who were first to take under the certificate, and that such devisees have died, by reason whereof the legal heirs of the insured are entitled to claim the amount of the insurance; (2) that there is no allegation in the pleading that the association has levied an assessment upon its members to pay the loss, or, having levied an assessment, has collected the same, and failed to pay over the sum collected.

The questions raised by the demurrer are novel, and not free from difficulty. The certificate is partly printed and partly written; and before it was completed as a contract of insurance, there was in it a blank space after the words "paid as a benefit to," which was followed by the words in print, "or, in the event of * * * prior death, to the legal heirs or devisees of the holder of this certificate," etc. When the certificate was filled up, the words "his devisees, as provided in last will and testament," were written in the space after the words "paid as a benefit to," and the word "their" was inserted after the words "or in the event of." The contention of counsel for the defendant is that no liability was created to pay to the legal heirs of the insured, except in the event of the prior death of devisees; that the word "their" refers to the word "devisees;" that if the insured made no will,—as it is conceded he did not,—there were no devisees, and as there were no devisees to die, the contingency never arose when the association became obligated to pay to the legal heirs of the holder of the certificate; hence that this action cannot be maintained by the present plaintiffs,—and it was suggested on the argument that if an

action would lie at all on the certificate, it would lie only in favor of the administrator of the estate of the insured. This argument is ingenious, but in our judgment unsound. The certificate, it is true, is very awkwardly worded; but, as the contract of the association, it should be so construed, if possible, as to give it efficacious meaning, rather than to defeat the intention of the parties and destroy its character as an obligation.

It must be presumed that the association intended by this certificate to pay to somebody as beneficiary whatever sum should be collected by assessment from other certificate holders, not exceeding the sum specified in the certificate. The vitality of the contract was not to depend upon the fact that the insured should make a last will and testament, in which devisees should be named, nor do we think that a remedy upon the contract in favor of the legal heirs of the insured was intended to be made absolutely dependent upon the prior existence and death of such devisees. The insured might die intestate. It could not have been in the contemplation of the parties that in that event there was to be no beneficiary entitled to sue upon the contract. The certificate, fairly and reasonably construed, means, we think, that if the insured should choose to make a last will in which devisees should be named, then such devisees were to become the beneficiaries entitled to receive and recover the sum collected by assessment on account of the certificate. But no obligation was imposed upon the insured to make a last will. He might, if he chose, leave his estate to be divided among legal heirs as the law should direct its division; and, in that event, as no devisees would exist, the benefits of the certificate would accrue to the heirs. In other words, the effect of the contract is that if the insured has made no will, and if, therefore, no devisees are in existence, his legal heirs shall become the beneficiaries entitled to enforce payment in a suit upon the certificate. This view of the rights of the parties accords with the sense and meaning of the contract.

The only case cited by defendants' counsel in support of his contention upon this point is *Worley v. Northwestern Masonic Aid Ass'n*, 10 FED. REP. 227, and, at first glance, the opinion of Judge LOVE, concurred in by Judge MCCRARY, seems opposed to the views we here express. But we think that case is distinguishable from the one at bar. In the case cited, as we conclude from the reported statement of facts, the defendant contracted to pay to the devisees of the decedent certain sums of money, and this was the extent of its obligation. In no specified contingency was the money to be paid to any other persons than devisees. It appears that the decedent made no will, and therefore, as there were no devisees, the administrator brought suit on the policy, and it was held that he could not maintain the action because the sum which the corporation expressly and only agreed to pay to the devisees of the deceased was not a part of the estate, and therefore was not recoverable as such by the ad-

ministrator. Expressions in the opinion of the court indicate that in the view taken of the case even the legal heirs of the decedent could not have recovered on the certificate; but the sole question in judgment was whether the administrator could maintain the action, and in that view it may be conceded, for the purposes of the present discussion, that the case was rightly decided. It was there said that neither the decedent nor the defendant corporation intended by their contract to provide for the widow, heirs, orphans, or creditors of the decedent, but only for his devisees, and as there were no devisees, there was no beneficiary in existence who could enforce the contract. In no contingency was the insurance to be paid to any other persons than devisees. Without, therefore, questioning here the correctness of the ruling upon the precise point there decided, we think that decision does not meet the case at bar, and that the plaintiffs are the present holders of the legal interest in the certificate in suit.

The remaining point raised by the demurrer presents a more serious question, namely: Conceding that the heirs of the decedent are the legal beneficiaries entitled to the benefits conferred by the certificate, what are the rights of the parties respecting a recovery upon the certificate on failure of the association to pay the death loss? The theory upon which the suit is brought is that, as in the case of an ordinary life policy of insurance, the plaintiffs are entitled to recover the full sum named in the certificate, without regard to the levy of any assessment upon certificate holders, or the collection by the association of any amount so levied. After deliberate consideration of the question, we are of opinion that this is an erroneous view of the relations and rights of the parties under the certificate. The association covenants in its agreement, not absolutely to pay the sum of \$2,500, but to levy an assessment upon all members holding certificates at the time of the death of the deceased member, and to pay the sum so collected on such assessment as a benefit to the designated beneficiaries, such payment in no case to exceed the sum of \$2,500. Thus it is apparent that the obligation of the association is only to pay whatever amount is collected from other certificate holders, not exceeding the sum named. Suppose that no assessment whatever is made, or suppose, an assessment being made, nothing is collected, is the association liable, absolutely, for the sum named in the certificate, in an action like the present? If not, what is the remedy for failure to levy an assessment, or for failure to collect the amount of an assessment actually made but not responded to by the holders of certificates? If it appeared that an assessment had been levied, and the amount thereof had been collected, but its payment to the beneficiaries refused, there would be no doubt, in the absence of other grounds of defense, of the plaintiff's right to recover in a money action the sum so collected, not exceeding \$2,500. But this state of the case is not alleged. And, indeed, it was admitted on the argu-

ment that no assessment was levied to pay this loss, and therefore no sum had been collected for that purpose by the association from certificate holders. Hence the difficulties above suggested.

It seems clear that the right acquired by virtue of the certificate held by the decedent was to an assessment upon all members holding certificates, and the payment of the amount collected on such assessment within a prescribed period of time, the assessment not to exceed the limit of the particular certificate. We were at first disposed to think that it was incumbent upon the plaintiffs, in any view of the case, to make a demand for an assessment in order to lay the foundation of a recovery. But we are now convinced that the duty to make an assessment was imposed by the contract, and if the association failed in this duty, the beneficiaries had the right, by appropriate proceedings, to compel the performance of it. Undoubtedly a court, in such a proceeding, could enforce the discharge of that duty by compulsory measures against the officers and managers of the association, or, perhaps, through its own officers, by making the necessary assessment and collection at the cost of the association, or of the certificate holders assessed. It is quite clear that every certificate holder agreed to look for payment to the specific mode set out in the certificate; that is, by assessments and collections within a certain limit as to the amount to be assessed. The holders of certificates are co-members of the association, who have, in effect, agreed to insure each other, and have stipulated as to the mode in which their liability to the heirs or devisees of a deceased member may be ascertained and enforced. But this plan would be defeated altogether if such heirs or devisees could obtain a judgment against the association for the amount limited in the certificate, without regard to any assessment or any amount collected on an assessment, and enforce payment in the ordinary mode in which judgments for money are enforced. To this it may be replied that the association is liable to suit for breach of covenant if it fails to make the required assessment. This may be so. But, if so, what would be the measure of damages? To say that the measure of damages would be the amount of the certificate, with the interest from the date when it should have been paid, and to give judgment therefor against the association, would be to ignore the fact that the parties have provided a specific mode for the payment of the sum named in the certificate, viz., an assessment against and collection from the living members. The ordinary life policy rests upon the promise of the company to pay the sum therein named. A policy-holder in such a company is under no obligation to pay anything for the benefit of the holders of other policies. Here the insured pays seven dollars to insure a member, and agrees to meet mortuary assessments from time to time, as set out in the conditions of the certificates. The association does not contract absolutely itself to pay the sum named in any certificate, but, as we have seen, only that it will assess the living members and

pay over, within a certain time, the sum collected on such assessment.

The scheme is a peculiar one, but we do not perceive how the court can avoid its peculiarities and impose upon the association an obligation directly to pay money which it did not in that form assume. We hold, therefore, that, to entitle the plaintiffs to recover in their present form of action, they must allege and show that the association has levied an assessment upon certificate holders to pay the death loss, and has collected the amount of such assessment, and has failed to pay the sum so collected. In short, to maintain this action, it must appear that the association has in its hands the money collected by assessment which it ought to pay to the plaintiffs as the beneficiaries entitled to the same. If the association has failed to make the required assessment, or, having made an assessment, has neglected to collect the same, the plaintiffs' remedy is in some other form of action or proceeding.

The demurrer to the complaint is sustained, with leave to the plaintiffs to amend within 30 days, as they shall be advised.

Mr. Justice HARLAN heard the arguments of counsel, and concurs in this opinion.

UNITED STATES *v.* BOYD and others.

(*Circuit Court, S. D. New York. July 22, 1885.*)

CUSTOMS DUTIES—FRAUDULENT ENTRY OF GOODS AS FREE—ACTION TO RECOVER DUTIES.

Where merchandise, which was subject to the payment of duties, upon which no duties were paid by the importers, because they procured the merchandise to be entered and delivered to them free of duty, and without any examination by the customs officer, by means of false and fraudulent representations to the secretary of the treasury that the merchandise was imported for the use of the United States, which induced that officer to issue a permit for the entry of the merchandise free of duty, has been thus falsely entered, the United States may maintain an action to recover the duties unpaid.

At Law.

This suit for recovery of duties arose upon facts similar to those stated in the case of *U. S. v. Boyd*, *post*, 692.

Stanley, Clarke & Smith, for defendants.

John Proctor Clark, Asst. U. S. Atty., for plaintiff.

WALLACE, J. This action is brought to recover duties. The complaint, which is demurred to, alleges in substance the importation by the defendant into the port of New York of dutiable merchandise from a foreign country, which was subject to the payment of duties, upon which no duties were paid by them, because they procured the

merchandise to be entered and delivered to them free of duty, and without any examination by the customs officer, by means of false and fraudulent representation to the secretary of the treasury that the merchandise was imported for the use of the United States, which induced that officer to issue a permit for the entry of the merchandise free of duty.

It is insisted, in support of the demurrer, that an appraisement of the merchandise and liquidation of the duties by the proper customs officer are conditions precedent to the right of the government to collect the duties; and that in the absence of such appraisement and liquidation, the only remedy of the government is to proceed for a forfeiture of the merchandise under section 12 of the act of June 22, 1874, known as the "Moiety Act."

The demurrer is without merit. It is a very ancient doctrine that debt lies for customs due upon merchandise even though the goods are forfeited for non-payment of duties. The authorities are cited in the opinion of STORV, J., in *U. S. v. Lyman*, 1 Mason, 481. Where goods were smuggled, or where the possession of the goods was relinquished by the customs officer through fraud or mistake, the duties were recovered in the English exchequer by information, and the importer might be called upon by information in equity to disclose the amount and value of the goods for the purpose of ascertaining the amount of duties payable. *Attorney Gen. v. Cresner*, 1 Parker, 279. In the case of *Meredith v. U. S.* 13 Pet. 486, where the language of the statute imposing duties upon imported merchandise was substantially the same as that employed in the statutes in force when the merchandise in suit was imported, the supreme court held that the right of the government to the duties accrues, in the fiscal sense of the term, when the goods arrive at the port of entry; and that the debt for the duties is then due, although it may be payable afterwards according to the regulations of acts of congress, as where a bond is given for the duties, or a deposit of the goods is made by the importer, in which case the importer is entitled to the time of credit allowed by law. There are many other decisions of the supreme and circuit courts to the same effect, which need not be cited, but it is proper to refer to the cases of *U. S. v. George*, 6 Blatchf. 406, 415, and *U. S. v. Cobb*, 11 FED. REP. 76, as bearing more directly upon the questions involved here. In the first of these cases BENEDICT, J., uses the following language:

"It is said that there could be no legal liability for duties because no duties can be 'collected, levied, and paid' as duties unless the merchandise is in the possession and control of the government; that, as soon as property is fraudulently withdrawn, the power to collect duty ceases; and fines, penalties, and forfeitures are imposed. But the law is otherwise. Duties are not simply a charge on merchandise to be collected only by the custody of the property. They are also a personal charge against the importer—a debt created by law which may be collected by a civil action wholly irrespective of the possession of the goods."

The case of *U. S. v. Cobb* is directly in point. There certain merchandise had been so classified by the instructions of the secretary of the treasury as to permit it to be imported free of duty, and, although dutiable, by oversight was entered free, and was delivered to the importers without examination or appraisal. A suit was subsequently brought to recover the duties to which the merchandise was subjected, and the court held the action maintainable. The court said:

"They [the duties] are due, although the goods have been smuggled, or for any reason never come into the hands of the customs officer, or the statute proceedings have never been instituted, or, through accident or mistake or fraud, no duties or short duties have been paid; and the importer is not discharged of his debt by the delivery to him of the goods without payment."

It is not necessary to decide whether the government can at the same time proceed for a forfeiture of the merchandise for the non-payment of duties, and for a recovery of the duties in an action of debt, as that question does not arise upon the pleadings. Upon principle it would seem very plain that the defendants, who have deprived the government by their fraudulent acts of an opportunity to appraise the goods and liquidate the duties, cannot complain because such proceedings were not taken.

The demurrer is overruled.

UNITED STATES v. BOYD and another.

(*Circuit Court, S. D. New York. June 12, 1885.*)

1. CUSTOMS DUTIES—PROSECUTION FOR ATTEMPTING TO ENTER GOODS FREE—RIGHT TO DUTIES, WHEN ACCRUES—ACT OF JUNE 22, 1874, § 12.

As the right to duties accrues by the importation of merchandise with an intent to unlade, and immediately upon the importation the duties become a personal charge and debt upon the importer, the United States is deprived of duties, within the meaning of section 12, act June 22, 1874, (Supp. Rev. St. 79,) the moment it becomes entitled to them and they are withheld by the importer, and it is immaterial whether its officers retain the merchandise or not.

2. SAME—FRAUDULENT LETTER TO SECRETARY OF TREASURY.

There is nothing in section 12 of the act of 1874 that limits its application, as regards fraudulent attempts to enter goods free, to proceedings at the custom-house only, and it is applicable to such attempts wherever made.

The defendants were indicted under section 12 of the act of June 22, 1874, for the fraudulent entry of 35 cases of imported plate-glass as free, by means of a false and fraudulent letter. The government had previously procured from the defendants a large quantity of their own plate-glass, for immediate use in the construction of the United States court-house and post-office building at Philadelphia, at a discount from the domestic price equal to the rate of duties, under an agreement with the defendants that they might import, free of duty,

new glass to the same amount to replace that furnished to the government. The proofs tended to show that under this arrangement the defendants had previously imported, and entered free of duty, a much larger quantity of glass than sufficient to replace what they had thus supplied to the government. The indictment charged, and the proof showed, that the defendants addressed to the supervising architect at Washington the following letter:

"NEW YORK, May 29, 1884..

"*C. M. Bell, Esq., Supervising Architect, Treasury Depart.*—SIR: We are informed that the steamer Alaska is bringing us 35 cases of plate-glass, marked E. A. B., and numbered 1 to 35, imported to replace that furnished from stock for the U. S. court-house and post-office building at Philadelphia, Pa. This importation, and the 29 cases heretofore admitted, make 64 of the 81 cases furnished to said building, leaving a balance of 17 cases yet to be imported. We have the honor to request that the necessary instructions may be sent without delay to the collector of the port of New York to admit the above 35 cases free of duty, in the usual manner. The Alaska is expected to arrive to-morrow. Very respectfully, E. A. BOYD & SONS."

By means of said letter, exhibited to the treasury department, the following free permit was obtained:

"WASHINGTON, D. C., May 31, 1884.

"*Collector of Customs, New York*—SIR: By request of the supervising architect of the treasury department, dated this day, you are hereby authorized to admit to entry, free of duties and charges, thirty-five (35) cases plate-glass, marked 'E. A. B.,' numbered from 1 to 35, inclusive; said goods having been imported at your port in the Alaska for the use of the court-house and post-office building at Philadelphia.

"Very respectfully,

H. F. FRENCH, Acting Secretary."

Upon arrival of the glass this free permit was presented to the New York custom-house by the defendants' brokers, and an order obtained from the collector for the free delivery of the glass to the defendants. Afterwards, and before the glass could be delivered from the ship, the delivery was stayed, and the glass subsequently seized for forfeiture. The defendants were also indicted for the fraud, and were found guilty by the jury, whereupon a motion was made for a new trial.

Elihu Root, U. S. Atty., and *John Proctor Clarke*, Asst. U. S. Atty., for the United States.

Stanley, Clarke & Smith, for defendant.

Before WALLACE, BENEDICT, and BROWN, JJ.

WALLACE, J. This is a motion for a new trial. The defendants were convicted upon an indictment for a violation of section 12 of the act of congress of June 22, 1874, (Supp. Rev. St. 79,) enacting—

"That any owner, importer, consignee, agent, or other person who shall, with intent to defraud the revenue, make, or attempt to make, any entry of imported merchandise by means of any fraudulent or false invoices, affidavit, letter, or paper, or by means of any false statement, written or verbal, * * * by means whereof the United States shall be deprived of the lawful duties, or any portion thereof, accruing upon the merchandise, or any portion thereof embraced or referred to in such invoice, affidavit, letter, paper, or statement,

* * * shall for each offense * * * be imprisoned for any time not exceeding two years," etc.

The evidence upon the trial authorized the jury to find that the defendants imported certain dutiable merchandise into the port of New York, and before it was unladen obtained a permit from the secretary of the treasury allowing it to be entered free of duty; that the permit was obtained by means of a letter written by them, the contents of which were intended to be and were actually communicated to the secretary of the treasury; and that this letter contained a false and fraudulent statement which was intended by the defendants to induce, and which did induce, the secretary of the treasury to direct the permit. It appeared, however, that before the merchandise was actually delivered to defendants by the officers of the customs it was ordered into a public store for examination by the collector, where it has ever since remained pending proceedings for a forfeiture. The counsel for the defendants requested the court to instruct the jury that the defendants should be acquitted because there was no evidence to show that the United States had been deprived of the lawful duties upon the goods. This request was refused, and its refusal presents the only serious question for consideration upon this motion.

No point was made upon the trial that the defendants had not made an entry of their merchandise, nor was it claimed that they had paid the duty. The contention for the defendants, therefore, rests upon the assumption that the United States is not deprived of duties upon imported merchandise unless it is deprived of the merchandise; in other words, that it is not deprived of duties so long as it possesses the means of securing and collecting them. This is not sound. The right to duties accrues by the importation of merchandise with an intent to unlade, and immediately upon the importation the duties become a personal charge and debt upon the importer. *U. S. v. Lyman*, 1 Mason, 482; *U. S. v. Aborn*, 3 Mason, 130; *Prince v. U. S.* 2 Gall. 204; *U. S. v. Vowell*, 5 Cranch, 368. The United States is deprived of duties the moment it becomes entitled to them and they are withheld by the importer. It is quite immaterial whether its officers retain the merchandise or not. If they do so, the United States may, perhaps, more effectually enforce its claim for duties than it could if the merchandise were delivered to the importer; but it is entitled to the duties whether it may be able to collect them out of the merchandise or not. An importer is not entitled to a permit for the delivery of dutiable goods until he has paid the duties. From the time the defendants retained the permit for the delivery of their goods the duties were withheld which accrued to the United States.

If it were necessary to decide the question, it might be held that it is not the meaning of the statute that the making of an entry of imported merchandise by a false statement, etc., is not an offense unless the United States is actually deprived of duties by means thereof. The qualifying phrase, "by means whereof the United States shall be

deprived of the lawful duties," applies as well to an attempt to make a false entry as to the making of the entry. The attempt is made a crime equally with the completed act. Now, it is apparent that the United States cannot be deprived of duties by a mere attempt to make fraudulent entry; and there could be no conviction for such an attempt if it is necessary to prove that the United States has actually lost the duties by means thereof. For this reason it would seem that the qualifying words are used to describe the nature of the intent to defraud,—the character of the scheme,—and are not intended to make the result of the act or attempt an ingredient of the offense. If the act or attempt is to enter merchandise by a false statement, etc., of a character which is calculated to deprive the United States of duty, the statute is satisfied. The use of the future tense is consistent with this interpretation. If the statute had used the word "will" instead of "shall," no one would doubt that this would be the meaning. "Shall" and "will" are frequently used indiscriminately, and it is apparent from the reading of the whole section that "shall" was used here in the sense of "will" or "may." As is stated in Sedg. St. Const. Law: "The words 'may' and 'shall' have been a fertile source of difficulty in the interpretation of statute." Page 438. The decisions arising upon statutes in which "shall" has been construed to mean "may" and "may" to mean "shall" are too numerous and familiar to need citation.

The instruction requested for the defendants was properly refused, and the motion for a new trial is denied.

BROWN, J. One of the principal points urged in behalf of the defendant is that in making the entry of the goods in question as free, he did not make use of any false paper, or false statement, within the meaning of section 12 of the act of 1874; that the only paper made use of in making the free entry was the direction issued to the collector contained in the letter of the secretary of the treasury authorizing the free entry of the goods; and that the letter written by the defendant, or by his direction, to the supervising architect at Washington, designed to be shown, and which was shown, to the secretary of the treasury for the purpose of procuring his direction, although the statements in this letter were false, was a remote cause only, and was not made use of in making the free entry of the goods at the custom-house. The goods in question, being dutiable, could only come in as free, if designed for the use of the United States, upon the special order or direction of the secretary of the treasury. No entry of them as free could be made at the custom-house on the mere application of the defendant in the usual manner. Application for the free entry had necessarily to be made to the department at Washington, either there by the defendant directly, or through the custom-house here. Under these special circumstances, such an application there must be deemed one of the steps belonging to an attempt to enter the

goods, and consequently any false paper presented, and designed by the defendant to be presented, to the secretary of the treasury for the purpose of obtaining the order for the free entry, cannot be considered as a remote or indirect cause only, but as the direct procuring cause of the free entry. The subsequent acts of the collector in conformity with the direction of his superior in entering the goods as free, were merely a formal compliance with what had already been determined upon the defendant's application in Washington. In effect, the attempt to enter these goods as free was made at Washington, on application to the head of the department, and not, as in ordinary cases, upon application at the custom-house here.

There is nothing in section 12 of the act of 1874 that limits its application, as regards attempts to enter goods, to proceedings at the custom-house only. The real purpose of the act, to prevent and punish frauds, as well as its general language, require it to be applied to attempts to enter goods wherever made. Had the defendant in this case deposited the letter in question at the custom-house for the same purpose with which it was sent to Washington, and the letter had then been forwarded by the custom-house officials to the department at Washington for action, and the same order from the secretary subsequently received, and the same free permit thereupon issued, it would not have been doubted that the deposit of the letter at the custom-house was a part of the attempt to make a free entry of the goods. It is clearly immaterial that the defendant sent his letter directly to Washington for the purpose of influencing the action of the secretary of the treasury as to ordering a free permit. The attempt to make the entry began when this letter was forwarded for the purpose of influencing the secretary's action. The letter was so used, and its statements being false, the offense described by section 12 was committed.

See *U. S. v. Boyd*, ante, 690.

BATE REFRIGERATING Co. v. GILETT and others.

(Circuit Court, D. New Jersey. August 19, 1885.)

PATENTS FOR INVENTIONS—VIOLATION OF INJUNCTION—CONTEMPT—ATTACHMENT.

Motion for attachment of defendants, for contempt of court in violating an injunction, refused; the affidavits not showing personal service of the motion on defendants, except upon one of them, and the evidence showing conclusively that the one so served had no control as agent over the parties alleged to have continued to infringe complainant's patent after issuance of the injunction.

Attachment for Contempt.

Dickerson & Dickerson, for the motion.

John R. Bennett and Geo. De Forest Lord, contra.

NIXON, J. On November 14, 1881, an injunction was issued by this court against the defendants in the above-stated suit, commanding them, and each of them, to desist from making, using, selling, or in anywise counterfeiting or imitating the invention or improvement described in and secured by the letters patent No. 197,314, for "improvement in processes for preserving meats during transportation and storage," issued to John J. Bates, November 20, 1877, and by the patentee assigned to the complainant corporation. Application is now made to the court for an attachment against Vernon H. Brown, individually, and Vernon H. Brown, Albert H. Brown, Vernon C. Brown, and George F. Wilde, members of the firm of Vernon H. Brown & Co., the general agents in the United States for the Cunard Steam-ship Company, and each of them, for contempt of court in violating the said injunction. It does not appear by the affidavits filed that either of said persons named, except Vernon H. Brown, has had a personal notice served upon him of the motion in this case. Instances have doubtless arisen, and will again arise, where a substituted service has been and will be accepted by the court in the place of a personal service; but the proper practice in all such cases is to apply to the court, assign satisfactory reasons, and thus obtain its order in advance for the substituted service. No step of the kind was taken in the present case.

Evidence has been offered to show that the Cunard Steam-ship Company has violated the injunction by shipping on board two of its steamers, to-wit, the *Cephalonia* and *Catalonia*, plying between the port of Boston, in the United States, and the port of Liverpool, in England, meats placed in refrigerators embodying the process of the complainant's patent. But the proof is clear and undisputed that Vernon H. Brown, who was personally served with notice to appear and show cause, has no control over the cargoes of the said steamer, and was not responsible for the acts complained of.

The motion for an attachment must be refused.

JENNINGS and others v. KIBBE and others.

SAME v. DOLAN and others.

(Circuit Court, S. D. New York. January 10, 1885.)

1. PATENTS FOR INVENTIONS—DESIGN FOR FRINGED LACE FABRIC—INFRINGEMENT.

As the novelty of design patent No. 10,448, for a fringed lace fabric having a fringe made of a series of stems connected to the fabric and not to each other, "with loops at both sides of a central stem or rib along its entire extent," appertains to the fringe alone, it is not infringed by nubias having such fringes

in which the similarity arises from the body of the nubias and not from the fringe.

2. SAME—LACE PURLING—PATENT No. 218,032—ANTICIPATION.

Letters patent No. 218,032, for an improvement in lace purling, on examination of the evidence adduced, *held* valid.

In Equity.

Antonio Knauth and A. v. Briesen, for plaintiff.

John R. Bennett, for defendant.

WHEELER, J. These suits are brought upon design letters patent No. 10,448, dated February 12, 1878, and granted to Warren P. Jennings for a design for a fringed lace fabric, and letters patent No. 218,032, dated July 29, 1879; and granted to Abraham G. Jennings and Warren P. Jennings for an improvement in lace purling. The design patent has before been adjudged to be valid in this court between the same parties to one of these cases, but upon different infringing articles. *Jennings v. Kibbe*, 20 Blatchf. C. C. 353; S. C. 10 FED. REP. 669. The design is for a lace fabric having a fringe made of a series of stems connected to the fabric and not to each other, "with loops at both sides of a central stem or rib along its entire extent." The infringing articles are nubias having such fringes of stems; but the stems have two central ribs, with loops projecting alternately at the sides, and not on both sides along its entire extent. There are so many of these things that the differences are necessarily small, and small differences make different designs. The patent is not for a design for a nubia, but of a fringed lace fabric, and the novelty of the patented design appertains to the fringe, and not to the rest of the fabric, by the terms of the patent. Nubias with this fringe might appear to be the same as those with the patented fringe, if the fringe should not be observed as such; but observation of that would discover the difference readily. The similarity would arise from the body of the nubias, rather than from the fringe, and as fringed fabrics the designs as to the fringes appear to be different. This patent is not, therefore, infringed by this article.

The novelty of the invention described in the other patent is denied. The anticipation relied upon is a sample in a book of samples of the defendant Dolan, purporting to contain samples of books made and sold before that invention. No article of that manufacture is shown besides the sample, and that is shown to have been put in the book since the invention and since controversy about it. The evidence of the defendants tends to show that the same one was taken out and replaced. The appearance of the book indicates that a sample of different color and size had been in that place. The force of the evidence depends upon the identity of that sample. So much doubt is thrown about it upon the whole proof as to bring it below the degree of certainty requisite to defeat a patent. After repeated examinations, serious doubts remain about the production of that article as claimed. The proof should overcome these doubts in order to

invalidate the patent, and as it does not, the patent stands as valid.

The infringement seems to be clear, unless the patent is limited to the particular mode of reticulation described. The pillars of the fabric appear to be precisely like those of the patent. The reticulation appears to be in all respects the equivalent of that of the patent. The pillars are really the principal things, and the substance of the invention appears to be taken.

Let there be a decree for the orators accordingly for an injunction and account in each case, without costs, except on the accounting:

ALBANY STEAM TRAP Co. v. FELTHOUSEN and another.

(Circuit Court, N. D. New York. August 22, 1885.)

PATENTS FOR INVENTIONS—STEAM-HEATING APPARATUS.

On rehearing, former opinion (20 FED. REP. 633) adhered to.

In Equity.

Dickerson & Dickerson, for plaintiff.

E. H. Bottum, for defendants.

BLATCHFORD, Justice. Although a rehearing was granted by the court, held by the circuit judge and the district judge, sitting together, as to the second Blessing patent, the reasons which prevailed with them to grant it are not presented, while the grounds on which they held, at the original hearing, that, on a proper construction, the second Blessing patent was not infringed, are set forth in the decision in 22 Blatchf. C. C. 169, 175; S. C. 20 FED. REP. 633. It was held that there was no infringement of the Merrill patent, or of the first or the second Blessing patent. No rehearing has been granted as to the Merrill patent, or as to the first Blessing patent. In the first decision it was said, referring to the Merrill patent and the three Blessing patents:

"The object of the invention in each of these patents was, as in the Merrill patent, to return the waters of condensation automatically to the boiler, to accomplish the same result upon similar principles, but by different and improved mechanism. In view of the prior state of the art, and of the construction given to the Merrill or foundation patent, it may be said, at the outset, that the claims now to be examined should be confined within exceedingly narrow limits. Each inventor must be restricted to the specific improvement and the particular device described and claimed by him."

It was held that there was a material difference between the defendants' apparatus and its mode of operation, and the plaintiff's apparatus and its mode of operation, as shown in the second Blessing patent.

In view of the recent decisions of the supreme court as to reissues, the claims of the second Blessing patent cannot be construed more

broadly than the claims of the original. The reissue was applied for more than four and one-half years after the original was granted. The reissue was taken solely to enlarge the claims. The descriptive parts of the two specifications are alike. The claims are enlarged and generalized. The defendants' apparatus does not infringe any claim of the original patent, and, therefore, does not infringe any claim of the reissue, properly construed. The first claim of the reissue discards the short pipe of the first claim of the original, which short pipe is not found in the defendants' apparatus. The other claims of the reissue must be construed as discarding the short pipe, in order to make out infringement. The short pipe is an element in each of the claims of the original patent.

There must be a decree for the defendants as to the second Blessing patent.

SPoonER v. DORN and another.

(Circuit Court, N. D. Illinois. July 27, 1885.)

1. PATENTS FOR INVENTIONS—NOVELTY—SPoonER BABY-JUMPERS.

Patent No. 138,209, granted April 22, 1873, to Alvah F. Spooner, for an improved baby-jumper, *held* valid.

2. SAME—INFRINGEMENT—SPoonER AND RAYMOND BABY-JUMPERS.

Patent No. 138,209, granted April 22, 1873, to Alvah F. Spooner, for an improved baby-jumper compared with the device constructed under the Raymond patent, and *held* infringed thereby.

In Equity.

Manahan & Ward and *Chas. H. Roberts*, for complainant.
Saml. Kerr, for defendant.

BLODGETT, J. The complainant in this case seeks an injunction and accounting against defendants for the alleged infringement of patent No. 138,209, dated April 22, 1873, issued to Alvah F. Spooner, for an "improvement in baby-jumpers." The leading feature of the device covered by this patent is an iron rod, to the lower end of which a wooden saddle is fixed, upon which the child is seated, and to which a band is fastened for the purpose of holding the child in place; said rod having a rearward curve above the band for the purpose of allowing free action of the child's head, or, in other words, so that the suspending rod shall not interfere with the head or upper part of the child's body. This rod is attached to the suspension straps in such a manner that the whole structure swings vertically, and the child, being seated in the saddle, and duly fastened by the waistband or straps, is enabled to use its feet and legs for the purpose of giving motion to the jumper.

The first claim of the patent is "the frame, *a*, formed of a half-round metal bar in the shape shown, with bend, *a*, and ring, *b*, and

the saddle, B, substantially as and for the purposes herein set forth."

The defendants deny infringement, and deny the validity of complainant's patent for want of novelty.

The defendant's device, which is constructed under a patent issued to one Raymond, consists of a seat, or saddle, suspended in a frame formed by a bifurcated or double wire or rod, curved substantially in the same manner as the single rod in the Spooner device; and it seems to me that it substantially embodies the principle and mode of operation shown in the Spooner patent. The saddle differs slightly from that shown by Spooner, but only to such an extent as to be allowed as a mechanical change, while the curvature or rearward bend of the suspending rod shown by Spooner is exactly imitated in the double suspending rod of the defendant.

Upon the question of novelty reference is made to a large number of prior devices, but an examination of them fails to disclose any device embodying in principle the backward-curved suspension rod of the Spooner patent; and, from the proof, I feel compelled to say that Spooner seems to have been the first to adopt this mode of suspending the device for seating the child. That the defendant's device, under the Raymond patent, is more ornate than the simple and plain device shown in the complainant's patent, is probably true, and possibly the Raymond device might have been entitled to a patent as an improvement upon that of complainant; but it manifestly appropriates the essential feature and elements of the complainant's patent. I must therefore find for the complainants, and direct a reference to a master to take an account of damages.

HUBEL v. TUCKER and others.

(Circuit Court, S. D. New York. July 21, 1885.)

PATENTS FOR INVENTIONS—INTERFERENCE—EFFECT OF DECISION OF PATENT-OFFICE—REV. ST. § 4918.

In a suit between interfering patentees under Rev. St. § 4918, the decision of the patent-office in favor of one of the parties is not *res adjudicata* upon the question of priority of invention between them, and a bar to further litigation in the circuit court.

In Equity.

C. Willis Betts, for complainant.

J. P. Fitch, for defendants.

WALLACE, J. The complainant, as owner of letters patent No. 275,092, issued to him as assignee of Taylor, April 3, 1883, files his bill alleging interference between his patent and a patent issued to William A. Tucker, No. 305,336, September 30, 1884. The prayer for relief is that the latter patent be declared void because of the al-

leged priority of invention of complainant's assignor. The defendants, by a plea, set up as a defense that the Tucker patent was issued by the patent-office after a decision in interference proceedings between the two patents in favor of Tucker, and insist upon that decision as a bar to the suit. The plea has been set down for argument, and the single question is whether in a suit between interfering patentees, under section 4918 of the Revised Statutes, the decision of the patent-office in favor of one of the parties is *res adjudicata* upon the question of priority of invention between them, and a bar to further litigation in this court. The language of that section is so explicit that it would seem to be unnecessary to resort to other provisions of the patent law in order to ascertain its meaning. As is said by LOWELL, J., in *Union Paper-bag Machine Co. v. Crane*, 1 Ban. & A. 494: "It is not ambiguous, but gives a court of equity power to decide between interfering patents without any exception or limitation." It saves the rights of any person interested in either of the interfering patents, as well as those of any person interested in the working of the invention claimed under either of them, to obtain relief against the interfering patent by a suit in equity against the owner. As no patent can come into existence under section 4904, if, in the opinion of the commissioner, it interferes with one already granted, the section in question plainly contemplates, either that his decision upon an interference may be reviewed, or that it is only to be reviewed by a court of equity when he has overlooked the existence of the prior patent. That it is not intended to be confined to cases in which he has not passed upon the question of priority of invention is apparent from the provisions of section 4915, by which the rights of the defeated party in an interference proceeding are carefully saved by allowing him to appeal to the supreme court of the District of Columbia, or to resort to a remedy by a bill in equity. The provisions of this section denote incontestably that the decision of the commissioner is not to be conclusive if the defeated party choose to contest his decision by a direct attack upon the interfering patent in a court of equity. It may very well be held that where the defeated party does not adopt the statutory mode of contesting the decision of the patent-office upon the question of priority of invention, the decision should be held conclusive. The decisions in *Peck v. Lindsay*, 2 FED. REP. 688; *Holliday v. Pickhardt*, 22 O. G. 420; S. C. 12 FED. REP. 147; *Hanford v. Westcott*, 16 O. G. 1181; *Shuter v. Davis*, 24 O. G. 303; S. C. 16 FED. REP. 564,—are to this effect. They do not throw any light upon the present question, because this is purely one of statutory construction. The cases of *Wire Book-sewing Machine Co. v. Stevenson*, 11 FED. REP. 155. and *Peck v. Collins*, 70 N. Y. 376, are authorities in support of the conclusions thus reached.

The plea is therefore overruled.

THE WESTERLAND.

THE C. H. VALENTINE.

(District Court, S. D. New York. July 3, 1885.)

COLLISION — HARBOR REGULATIONS — IMPROPER ANCHORAGE — RUNNING INTO OBVIOUS DANGER.

Where the schooner C. H. V. anchored nearer the Jersey City shore than the harbor regulations permitted, and in a situation that involved clear and obvious danger of collision upon the backing out of the steamer W. in the strong ebb-tide, and the schooner, being notified in time and requested to drop astern, neglected to do so, though she might have done so without difficulty, and the steamer thereupon backed out, and a collision ensued, *held*, that both were in fault, and the damage and costs were divided; the schooner, for not dropping astern after seasonable notice; the steamer, for running out into an obvious danger, instead of first procuring the harbor master to enforce the regulations, or offering to assist the schooner astern.

In Admiralty.

Jas. K. Hill, Wing & Shoudy, for libelant Curtis and the schooner C. H. Valentine.

Biddle & Ward, for Randle and the steam-ship Westernland.

BROWN, J. The above are cross-libels brought in behalf of the respective owners of the schooner Valentine, and of the Belgian steam-ship Westernland, to recover the damages sustained by each, arising from a collision which occurred in the North river in the afternoon of December 13, 1884, about opposite Morris street, Jersey City, some 200 yards from the shore. The schooner was at anchor, and the steam-ship, in backing out with the aid of tugs in the ebb-tide, was carried down against the schooner, so that the bows of the latter struck the port quarter of the steamer, doing some injury to both. My conclusions of fact are as follows:

1. The schooner was at anchor at considerably less than the required distance of 300 yards from the Jersey shore; probably less than 200 yards.

2. The tide was strong ebb; there had been a freshet in the river, and the current ran down all day.

3. The mate of the schooner, who was on board, received several timely warnings of the necessity of dropping down the stream, in order to make room for the steamer to come out at her appointed time. There was no difficulty in the schooner's dropping far enough astern to be out of danger, had the mate been disposed to do so. Measures for this purpose were not taken until some time after the steamer had started, and the collision was seen to be impending. The schooner had plenty of spare cable; and had attention been given to the steamer, even when she started, there was still time to have dropped astern, out of the way of danger. The schooner must therefore be held liable for anchoring inside of the prohibited limits, and in a place of danger;

and after repeated notice of the necessity of moving, for having neglected the means of doing so that were at her command, and persistently remaining in the way of the Westernland.

4. It was not customary for the steamer to come out upon the ebb-tide. The difficulty of holding her up against the strong ebb was well known, and the danger of collision with the schooner was perceived and understood by all who were engaged in taking the steamer out. In this situation it was not enough for the steamer merely to give notice to the schooner, as she certainly did, in ample time. Although the schooner was negligent, and in an improper place, the steamer had no right either to run her down recklessly, or to move out in a way that, as was perceived beforehand, was almost certain to result in collision. I do not doubt that in the act of backing out, and in the working of the tugs, all was done by the steamer that was practicable to be done to keep her up; but she was not justified in starting until her way was free from obvious probable danger. She should first have proffered aid to move the schooner, and if that were not accepted, she should have applied to the harbor master to enforce the regulations. The paramount duty of vessels to avoid collisions by all reasonable and practicable means must be inflexibly enforced.

I must therefore hold the steamer also in fault. The result is that the damages must be divided, and a reference ordered to compute the amounts if the same are not agreed upon. There being cross-claims, and both held in fault, the costs will be also divided.

LIEBMAN v. CITY AND COUNTY OF SAN FRANCISCO.

(Circuit Court, D. California, August 24, 1885.)

1. STATUTES OF STATE—CONSTRUCTION BY STATE COURTS, HOW FOLLOWED BY FEDERAL COURTS.

In construing state statutes the United States courts will follow the construction adopted by the state courts, unless it conflicts with or impairs the efficiency of some principle of the United States constitution, an act of congress, or a rule of commercial or general law.

2. MUNICIPAL BONDS—SAN FRANCISCO—MONTGOMERY AVENUE OPENING—PETITION OF PROPERTY OWNERS—RECITALS IN BONDS.

The petition of property owners was essential to the validity of the proceedings to open Montgomery avenue, in San Francisco, under the act of April 1, 1872; and to maintain an action on the bonds issued, the sufficiency of the petition must be affirmatively shown, as it cannot be conclusively presumed from the recitals in the bonds.

3. SAME—BONDS ISSUED BY CORPORATION COMPOSED OF CITY OFFICERS ACTING UNDER SPECIAL STATUTE—LIABILITY OF MUNICIPALITY.

The city and county of San Francisco is not bound by recitals contained in the Montgomery avenue bonds issued by the board of public works under the act of April 1, 1872, such board of public works being a distinct corporation composed of officers of the city, acting independently of it, under the provisions of a special statute.

4. SAME—RIGHT OF PARTY LIABLE ON BOND TO HEARING BEFORE JUDGMENT.

A party liable on a bond is entitled to his day in court, in person, or by his representative, before a binding judgment, determining the validity of the bond as against him or his property, can be rendered.

5. SAME—MONTGOMERY AVENUE BONDS NOT CITY OR COUNTY BONDS.

The Montgomery avenue bonds are not bonds of the city or county of San Francisco, and the city and county cannot be sued thereon.

At Law.

D. M. Delmas, A. L. Rhodes, and J. P. Hoge, for plaintiff.

Garber, Thornton & Bishop, for defendant.

Before FIELD, circuit justice, and SAWYER, circuit judge.

FIELD, Justice. This is an action against the city and county of San Francisco to compel the payment of 20 coupons for interest, each amounting to \$30, attached to certain instruments designated in the pleadings as "Montgomery Avenue Bonds." The plaintiff prays for judgment; that the coupons are valid obligations of the city and county; that there is due by it, upon each of them, the sum of \$30, with interest from the date of its maturity at the rate of 7 per cent. per annum; that the city and county pay the amount thus adjudged due from the special tax to be annually levied, assessed, and collected for that purpose, pursuant to the act of the legislature of April 1, 1872; and that the plaintiff recover against it for the costs of this action.

The validity of the bonds to which the coupons are attached, and, of course, the validity of the coupons also, depends upon that act, and the compliance in their issue with its requirements. The object of the act was to open and establish a public street in the city and county of San Francisco, to be called Montgomery avenue, and to take private lands therefor. It described a strip of land by metes and bounds,

and declared that it was taken and dedicated for such street; and that, when paid for, the title thereto should vest in the city and county for that purpose, as the title of other public streets was vested. It provided that the value of the property taken, the damages to improvements thereon, or adjacent thereto, and all other expenses incidental to the proceeding, should be considered the cost of the opening of the avenue, and should be assessed upon lands within a described district in proportion to the benefits accruing therefrom, to be ascertained by a board of public works created for that purpose. That board was to consist of the mayor, the tax collector, and the surveyor of the city and county of San Francisco; and whenever the owners of a majority in frontage of the property which was to bear the burden of the improvement, as they were named in the last preceding annual assessment roll for the state, city, and county taxes, should petition the mayor of the city and county, in writing, for the opening of the avenue according to the provisions of the act, the board was to proceed to organize by the election of a president, and then to the performance of its prescribed duties. It was, among other things, to ascertain and report the cash value of the land taken and the damages caused to the property along the line and within the course of the avenue; also, the benefits accruing from its opening to the lots within the prescribed district.

The report was to remain at the office of the board for 30 days for the inspection of parties interested, and notice that it was thus open for inspection was to be published for 20 days in two daily papers in the city and county. Any person interested who was aggrieved by the action of the board, *as shown in its report*, might, within the 30 days, apply, by petition to the county court setting forth his interest in the proceedings, and his objections thereto, for an order on the board to file with the court its report, with such other documents or *data* as might be pertinent thereto, which were used by it in preparing the report. And the court was authorized to hear the petition, and the board could appear in response to it, and testimony could be taken in the matter. After hearing and consideration, it was in the discretion of the court to approve and confirm the report, or to refer it back to the board, with directions to alter or modify it in specified particulars. From the order of the county court an appeal could be taken to the supreme court of the state, to review the matters complained of. Upon the final confirmation of the report the board was required to prepare and issue bonds in sums of not less than \$1,000 each, for the amount necessary to pay and discharge all the damages, costs, and expenses incurred. The bonds were to be known and designated as the "Montgomery Avenue Bonds," and made payable in 30 years from their date, and to bear interest at the rate of 6 per cent. per annum, payable semi-annually at the office of the treasurer of the city and county. Coupons for the interest were to be attached to each bond. The bonds were to be signed by all the members of the board,

and its seal was to be affixed to each. The coupons were to be signed by the president.

Any person to whom damages for lands were awarded, upon tendering to the board a satisfactory deed of conveyance of the property to the city and county, was entitled to have bonds issued to him equal to the amount awarded. The act also provided for the assessment and levy of an annual tax upon the property benefited for the payment of interest upon the bonds, and to create a sinking fund for the redemption of the principal, the assessment to be "adjusted and distributed according to the enhanced values" of the respective parcels of land as fixed in the final report of the board. But the act declared that the city and county of San Francisco should not, in any event whatever, be liable for the payment of the bonds, nor any part thereof, and that any person purchasing them, or otherwise becoming the owner of any bond or bonds, accepted the same upon that express stipulation and understanding. The following is a copy of one of the bonds and coupons issued under the act. The others are similar in form, differing from each other only in their number.

STATE OF

CALIFORNIA.

Board of Public Works.

City and County (Number 205) San Francisco.

(Vignette.)

\$1,000.

MONTGOMERY AVENUE BOND.

\$1,000.

In Conformity

with an act passed by the people of the state of California, represented in senate and assembly, entitled "An act to open and establish a public street in the city and county of San Francisco, to be called Montgomery avenue, and to take private lands therefor," approved April 1, 1879, the treasurer of the city and county of San Francisco, state of California, will pay, at his office in said city and county, to the holder hereof, one thousand dollars in United States gold coin, with interest at the rate of six per cent. per annum, payable semi-annually in like gold coin, upon surrender of the corresponding coupons, and that the principal sum is redeemable within thirty years from the date of these presents.

It being understood and agreed that this bond may be redeemed by said treasurer as provided in said above-mentioned act of the legislature of the state of California.

In witness whereof, the mayor, the tax collector, and city and county surveyor of said city and county of San Francisco, composing a board of public works, have respectively signed these presents, and the president of the board of public works has signed the annexed coupons as of the first day of January, 1873.

{ Seal of the }
{ Board of Public Works. }

WILLIAM ALVORD,

President of the Board of Public Works and Mayor of the City and County of San Francisco.

ALEXANDER AUSTIN,

Tax Collector and Member of said Board of Public Works.

RICHARD H. STRETCH.

City and County Surveyor and Member of said Board of Public Works.

§30.

Board of Public Works.

Coupon No. 15.

Montgomery } The treasurer of the city and county of San Francisco will
 M. A. B. } pay bearer, at his office, thirty dollars, six months' interest.
 Av. Bond. }

On bond }
 No. 205. }

{ Due 1st January,
 1881.

WM. ALVORD,

President of Board of Public Works.

From this brief statement of the act of April 1, 1872, three things distinctly appear: (1) That the petition of the owners of a majority in frontage of the property to be charged with the cost of the improvement was essential to the validity of all subsequent proceedings taken for the opening of the avenue, including, of course, the issue of the bonds; (2) that in no event could the city and county be held liable on the bonds, and necessarily, therefore, not on the coupons attached; and (3) that every person purchasing or becoming the owner of any bond took the same on that express stipulation and understanding.

The act in question was before the supreme court of the state, and the subject of exhaustive consideration, in *Mulligan v. Smith*, 59 Cal. 206. That was an action of ejectment to recover land claimed by the plaintiff under a deed executed to him upon a sale of the premises for the non-payment of a taxed levied thereon to raise a fund to pay the interest on the bonds. In the lower court, evidence was introduced which tended to show that the petition to the mayor, which was the essential initiatory step to the proceedings for opening the avenue, had not been signed by the owners of a majority in frontage of the property to be charged, as shown by the names on the assessment roll of the previous year; and the court found that such was the fact. In the supreme court it was contended, as it had been in the court below, that evidence to impeach the correctness of the petition in this respect was inadmissible; and also that as the petition was sufficient on its face, and had been accepted by the mayor as sufficient, the defendant was estopped from questioning its validity, or the validity of the proceedings under it; and also that such estoppel followed from the judgment of the county court confirming the report of the board. But the supreme court held the evidence admissible, and that the defendant was not estopped from showing the insufficiency of the petition, either by the action of the mayor in accepting it, or the judgment of the county court; that while it might be true that the mayor was called upon in the first instance to decide upon the sufficiency of the petition, there was nothing in the statute which made his determination conclusive, and precluded an inquiry into its validity whenever the proceedings under it came up for judicial consideration. In no part of the statute, said the court, did it appear that provision was made for notice to the property owners of the proceedings authorized to be taken before the mayor, or by the board, or in the county court. Neither the mayor nor the board was re-

quired to give notice of any kind until the board had completed the report of its work. And the notice then required was one of a general nature, by publication, and was only that the report was open for inspection. Though any property owner aggrieved by the action or determination of the board, as shown in its report, could have made his objections to the county court, they could not extend to the character or sufficiency of the petition. "Nowhere in the statute," said the court, "is the petition made part of the report, or of the data or documents used in making it. Nor is it anywhere required that the board or the mayor shall return it to the court, or file it there or elsewhere. The court had, therefore, no jurisdiction of the petition; no power to adjudge upon its execution; and it could not assume jurisdiction of it, or by its judgment decide upon its sufficiency and validity so as to conclude the defendant." These conclusions of the court were concurred in by all its members, and sustained in separate opinions of marked ability and learning by three of them. All agreed that evidence to show the defect in the petition, in not being signed by owners of a majority in frontage of the property to be charged, was admissible, and that the defect existing invalidated all the subsequent proceedings. "When, therefore," said the court, "the legislature prescribed that a petition from the owners of a majority in frontage of the property to be charged with the cost of the improvement was necessary to set the machinery of the statute in motion, no step could be taken under the provisions of the statute until the requisite petition was presented. It was the first authorized movement to be made in the opening of the avenue. When taken, officers who were to constitute and organize a board of public works were authorized to organize. Until it was taken, they had no such authority. They could not legally act at all; or, if they acted, their proceedings would be unauthorized and void. The presentation of the petition required by the statute was therefore essential."

The authorities cited in the several opinions show that similar conclusions have been reached by the highest courts of other states, in analogous cases. Indeed, the rule is fundamental that where private property is to be taken for a public improvement, upon the petition of a majority of those who are to bear its burden, the petition of such a majority must be made before proceedings for the appropriation of the property can be had. This is a condition which must be strictly followed. A failure to comply with it will vitiate all subsequent proceedings. No one, indeed, would contend that proceedings had in such cases, without the petition of any of the owners, would be valid; and a petition of a less number of the owners than that designated by the statute would be equally ineffectual. If one less than the required number may be omitted, so may all. Nor is the rule at all affected by the doctrine that in a certain class of cases evidence of such compliance is conclusively found in the action of officers required to consider and determine that fact. That doctrine, as we shall pres-

ently see, only applies to estop the obligors of a bond, and can have no bearing or consideration in the present case, where the bonds to which the coupons in controversy are attached are neither in form nor in law the obligations of the city and county.

The construction given by the supreme court of the state to the act of April 1, 1872, if not absolutely binding upon the judges of the federal courts, in cases arising under it, is certainly not to be disregarded and rejected, except for the most cogent and persuasive reasons, such as would leave little doubt of the error of the state court. Conflicts between state and federal tribunals, in the interpretation of state statutes, are always to be avoided if possible. The federal courts will therefore follow the exposition of the state courts, unless it conflicts with or impairs the efficiency of some principle of the federal constitution, or of a federal statute, or a rule of commercial or general law. In this case there is no such conflict or impairment. No principle of federal law is invaded, or rule of commercial or general law disregarded. The construction given is one we should unhesitatingly adopt, had the supreme court, the legitimate expounder of state statutes, never spoken on the subject.

There was, it is true, an intimation by one of the judges, in his opinion in *Mulligan v. Smith*, that in an action upon the bonds, that being an action upon contract, a different rule might exist, and that an estoppel might arise against the defendant. It was, however, only an intimation to mark a possible distinction in the proofs required in the two forms of action. No question as to the effect of the bonds as evidence was before the court. And it is plain that if, to recover in the ejectment, it was essential to establish the validity of the proceedings leading to the levy of the tax to pay the interest on the bonds, it must be essential to establish the validity of the proceedings leading to the issue of the bonds themselves, and, of course, the sufficiency of the petition upon which the proceedings were founded, unless such sufficiency is, from the character of the instruments, and the recitals in them, to be conclusively presumed. In the ejectment case, a comparison of the petition with the assessment roll of the previous year disclosed the fact that a number less than the majority of the owners in frontage, as shown by the names on the assessment roll, appeared on the petition. The subsequent proceedings were therefore from this defect, wholly unauthorized. The essential initiative to them had never been taken.

The question here is whether, assuming that an action will lie against the city and county on the coupons, will the sufficiency of the petition be presumed; or, what will amount to the same thing, will the defendant be estopped from denying its sufficiency, so as to allow the admission in evidence of the coupons, without other proof than the production of the bonds to which they were attached?

There are numerous cases where municipal bonds have been authorized by statute, upon a vote of a majority of the citizens of a city,

county, town, or other locality, and officers designated to ascertain and report as to the vote taken, and issue the bonds. When, in such cases, the bonds refer to the statute, and recite a compliance with its provisions, and have passed, for a valid consideration, into the hands of *bona fide* purchasers, without notice of any defect in the proceedings, the obligors have been held to be estopped from denying the correctness of the recitals. The doctrine on this subject is well stated by the supreme court of the United States in the recent case of *Puna v. Bowler*, 107 U. S. 539; S. C. 2 Sup. Ct. Rep. 718. "This court," is the language used, "has again and again decided that if a municipal body has lawful power to issue bonds, or other negotiable securities, dependent only upon the adoption of certain preliminary proceedings, such as a popular election of the constituent body, the holder in good faith has the right to assume that such preliminary proceedings have taken place, if the fact be certified on the face of the bonds by the authorities whose primary duty it is to ascertain it." This doctrine is not accepted in many of the state courts, and has, in some instances, met with earnest dissent from judges of the supreme court. It must, however, be conceded that it is the settled doctrine of that court; but to its application the recitals must clearly import a compliance with the statute under which the bonds were issued. If, fairly construed, they are consistent with any other interpretation, they will not estop the municipal corporation in whose name they are made from showing that they were issued without authority of law. *School-district v. Stone*, 106 U. S. 186; S. C. 1 Sup. Ct. Rep. 84; *Supervisors Carroll Co. v. Smith*, 111 U. S. 556; S. C. 4 Sup. Ct. Rep. 539. And the recitals, when full, will estop only the obligors of the bonds; they cannot estop others who are not parties to them; they cannot affect strangers to the transaction. In both particulars the alleged recitals in the avenue bonds are inoperative to create any estoppel against the city and county. There is no statement of any fact in the clause called a recital. The clause is a mere caption to an order or promise of the board of public works that the treasurer of the city and county of San Francisco will pay to the holder the sum of one thousand dollars. "In conformity with the act," the title of which is given, says the instrument, "the treasurer will pay." Read in connection with what follows, it imports that the treasurer will pay the amount designated in accordance with the act,—that is, out of the fund to be provided by it,—and that the holder can look to no other source of payment. There is nothing in the clause which would reach the petition, and import that it had conformed to the requirements of the statute. But the fact which disposes of this question of recitals, and any alleged effect attributed to them in the present case, is that the so-called bonds to which the coupons in controversy were attached are not obligations of the city and county. They are not executed by it, or under its seal, or by its agents or officers, but by certain parties constituting

the board of public works. The fact that certain officers of the city and county are made members of the board to appraise the property taken, and the injuries and benefits caused by the opening of the avenue, and to issue the bonds, does not constitute them agents of the city and county, and render their work as such board, or the bonds issued by them, the work or the bonds of the city and county; no more than if they were constituted a board to establish a university, and prescribe the studies to be pursued in it, would make them the agents of the municipality for that purpose. Agents can only exercise the powers of their principals; they cannot lawfully exceed them. Here the city and county, as a municipality, is not authorized to open the avenue, to appraise the value of the property taken, or the amount of injuries received by or benefits conferred upon the owners of property along the line of the avenue, or to sign and issue its bonds to the parties injured. In all these matters the board acts independently of the municipality. It is made the agent of the state to carry out a public improvement directed by its statute, and not the agent of the city and county. This branch of the case is more fully considered by my associate, and I fully concur in his views.

The foundation upon which the doctrine of estoppel from recitals in municipal bonds rests is that the officers signing the bonds and inserting the recitals are agents of the municipality, and authorized to bind it by their acts and representations. The principle which gives rise to the estoppel, as well stated by the defendant's counsel, is that it would be inequitable to permit a municipal corporation to take advantage of the falsity of solemn declarations of such agents within the scope of their authority. But if the officers making the recitals are not such agents, there is no room for the doctrine of estoppel. Their recitals, on no conceivable principle, can in such cases bind the corporation. It follows that if any action can be maintained upon the coupons against any defendant, the validity of the proceedings upon which the bonds were issued must be established by affirmative proof of the sufficiency of the petition, which was the essential initiative to them. But the question is not before us, whether an action can be maintained against any other party; it is enough that we are of opinion that the present action cannot be maintained against the city and county of San Francisco. The plaintiff asks for judgment that the coupons are valid obligations of the city and county; that there is due, by the city and county, upon each of the coupons, \$30, with interest; that the city and county pay the amount thus adjudged due, out of the special tax to be levied under the act, and that the plaintiff recover his costs of the action. Such judgment could not be rendered upon the facts stated in the complaint. The statute to which the complaint refers, and upon which alone the judgment is sought, declares, in express terms, "that the city and county shall not, in any event whatever, be liable for the payment of

the bonds, nor any part thereof," and "that any person purchasing said bonds, or otherwise becoming the owner of any bond or bonds, accepts the same on that express stipulation and understanding."

As already stated, the so-called bonds, which, in fact, are only orders or promises of the board of public works that the treasurer will pay to the holder the amounts designated, cannot be the foundation of any liability of the city and county; and that such liability is sought to be charged appears from the prayer for judgment, although the discharge of that liability is to be had out of funds to be raised by the special tax for which the act provided.

The asserted ground of the action is that it is essential to establish the validity of the bonds, as a preliminary to an application for a *mandamus* to levy the special tax. Counsel assume that the validity of the bonds issued by one party can be determined in an action against another in no way named in them, nor liable for their payment. We do not so understand the law. We have not met with any adjudged case to that purport. On the contrary, we have always supposed that the party actually liable on a bond must have his day in court, in person, or by his representative, before a judgment determining its validity as against him or his estate could be regarded as having any binding force. Such liability cannot be vicariously imputed to him, or charged upon his estate. If the action be to charge particular property, of which there is no representative, there is a defect in the law, which the legislature, and not the courts, must supply.

It is true that in the enforcement of bonds of municipal bodies, which are to be paid from funds raised by taxation, general or special, the validity of the bonds must first be established by the judgment of the court,—that is, the demand against the municipality on the bonds must be first carried into judgment; then a *mandamus* will issue, which is in the nature of an execution. It is the executory process for the enforcement of the judgment recovered. It can only issue to command the corporation against which the judgment is rendered, or its representatives or officers, to levy the tax prayed, just as an execution on an ordinary money judgment can only be issued against the property of the judgment debtor. Whether, when the judgment against the municipality is rendered, the writ is to direct a general or special tax upon all or a portion of the property within its limits, or only upon a particular class of property, real or personal, will depend upon the directions of the statute providing for the payment of the indebtedness created. The judgment, however, must, in all cases, be against the corporation to which, or to whose representatives or officers, the writ is directed. It is the liability of the corporation established by the judgment which is to be discharged by the levy of the tax prayed, and not the liability of any other body.

The several cases cited by counsel in support of their contention in no respect militate against these views, but, on the contrary, illus-

trate and confirm them. In all of them the bonds were issued in the name, or were in law the obligations, of the municipality against which the judgment was prayed, though in some of them the funds for the payment of the judgment were to be collected by a special tax upon the property of a particular district. It would serve no useful purpose to comment at length upon the cases in verification of this statement. Every one who may take an interest in the subject will find, upon examination of them, its correctness sustained.

One of the counsel of the plaintiff indulges in his brief in some strictures upon the action of the city and county of San Francisco, with respect to these bonds, characterizing it as "dishonest and dishonorable repudiation." The accusation falls harmless in the face of the statute under which the bonds were issued, declaring that the city and county "*shall not, in any event whatever, be liable for the payment of the bonds, nor any part thereof,*" and "that any person purchasing said bonds, or otherwise becoming the owner of any bond or bonds, accepts the same upon *this express stipulation and understanding.*" Nor can the legislators of the city and county be subjected to any just imputation of a want of regard to the honor and credit of the municipality in refusing to order the levy of a tax to pay the interest on the bonds, so long as the judgment of the highest tribunal of the state, the constitutional expounder of its laws, remains unreversed, declaring that the proceedings on which the bonds were issued, were taken in disregard of the conditions imposed by the legislature, and therefore were absolutely null and void. If property of citizens has been taken and is retained for an avenue of the city without compensation, upon proceedings not warranted by law, some other remedy must be sought by the parties injured than such as consists in affirming the validity of those proceedings in face of the judgment of that tribunal.

It follows from the views expressed that no recovery can be had upon the facts disclosed in the complaint, and the motion of the defendant to exclude all evidence in support of its allegations must be granted; and it is so ordered.

SAWYER, J., (*concurring.*) This case having been regularly called for trial, the plaintiff offered in evidence the bonds and coupons set out in the complaint, to the introduction of which the defendant objected, on the ground that the complaint does not state a case sufficient to justify the introduction of any evidence whatever; or, in other words, that the facts stated in the complaint do not make a case which entitles the complainant to any judgment or relief against the defendant, or upon which the defendant is in any respect liable to be sued. The counsel of both parties treated the objection as, in effect, a demurrer to the complaint, on the ground that the facts set out, taken as true, do not constitute a cause of action, and they argued the question very elaborately on that hypothesis.

The first question that meets us at the threshold of the discussion is whether the defendant—the municipal corporation, the city and county of San Francisco—is, in any sense, the obligor on the bonds, or whatever the instruments in suit may be properly termed, or whether it is in any way a party to the transaction out of which these instruments arose, in such sense as to cast any liability or duty upon the municipality in its corporate capacity.

In my judgment the instruments sued on are not bonds of the city and county of San Francisco, and the city and county of San Francisco, in its corporate capacity, does not stand in any such relation to these obligations as renders the corporation liable to be sued upon them for any purpose. The act under which the instruments sued on purport to have been issued is not an amendment of the city charter, and it does not purport to enlarge the powers or duties of the corporation, or of its officers, in their capacity as officers or agents of the corporation. It does not confer any authority whatever upon the corporation to do any act in its corporate capacity, or impose any duty or obligation upon the municipality relating to the opening and dedication to public use of Montgomery avenue. The corporation is not authorized to do the acts necessary to the opening and dedication of the street to the public use contemplated by the act, or required to see that the costs of the work, upon completion, shall be collected or paid; in short, the corporation, as such, is neither required nor authorized to perform any act in relation to the opening and dedication of the avenue, or in relation to payment therefor, when accomplished. Clearly, it seems to me, the state has undertaken to do this work through the instrumentalities chosen by itself, of which instrumentalities the corporation called the city and county of San Francisco is not one. Some of the officers of the city, it is true, are designated as instrumentalities for carrying out the scheme provided for; but, in carrying it out, they do not act by virtue of any authority derived under the charter of the corporation, or any act amendatory of the charter, or enlarging its powers, or under the authority of the corporation, but they act solely by authority of the act in question, independently of any act of the corporation; their designation by their official titles being only *descriptio personarum*, to indicate the particular parties chosen for the work.

The act describes a specific tract of territory, within the city and county of San Francisco, by metes and bounds, and then declares that "it is hereby taken and dedicated for an open and public street, and, *when paid for as hereinafter provided*, the title thereto shall vest in the said city and county for such purposes forever, as the title of other public streets in said city and county now is vested." This, with a provision for subsequent improvement and care, is the only one in the whole act in which the city and county, in its corporate capacity, is brought into any relations with the improvement contemplated; and this relation only commences after the work of dedication and open-

ing is fully completed *and paid for* by the agencies, and in the manner appointed by the act. The expenses of dedication to public use, and opening the avenue, are to be paid for by assessments on a district of land specifically described and designated by the act as benefited by the improvement. The board of public works provided for is not a board of public works *of the city and county of San Francisco*, with powers derived under the charter of the city, or any act enlarging those powers, or acting by authority of the corporation or its charter. It is not one of the branches of the municipal government. This board is a special board of public works created by the statute, without any reference to the powers and duties of the corporation to carry out this particular improvement undertaken by the state, without reference to or any action of the corporation, and without consulting its pleasure. It is, it is true, composed of three persons, who are also officers of the corporation, and their official name is used to designate the individuals who are to constitute the board. But their individual names might just as well have been used, or any other three persons, having no connection with the corporate government, might have been appointed to perform precisely the same acts; and had this been done, there would be just as good ground for considering them agents of the corporation, and not instrumentalities employed by the state itself to carry out its purposes, as there is now to consider the board as an agent of the municipality, and not an instrumentality of the state. Doubtless, the legislature might have enlarged the powers of the corporation, or conferred the authority or imposed the duty upon it to perform the contemplated work, but it did not see fit to do so. "The mayor, tax collector, and city and county surveyor" of the city and county of San Francisco,—that is to say, the persons who, for the time being, fill those offices,—are "created a board of public works within the meaning and intent of this act, and, as such board, are hereby authorized, empowered, and directed to perform all and singular the duties herein enjoined upon the board of public works as herein provided." A salary of \$2,000 per annum is allowed to each for his services in such board, payable out of the "Montgomery avenue fund," to be assessed upon the property benefited as a part of the expenses of opening the avenue. Section 25 provides that "the board of public works shall provide itself with an *official seal*, which shall be used to verify such acts of the board as are herein described to be done under the seal of the board;" thus, apparently, making it an independent corporation, or *quasi* corporation, for the purposes of the act. Section 8 requires the board, at the proper stage of proceedings, to prepare and issue bonds for an amount in the aggregate "necessary to pay and discharge all said damages, costs, and expenses;" "said bonds shall be known and designated as 'Montgomery Avenue Bonds,' and the bonds shall be signed by all the members 'of the board,' and the seal thereof shall be affixed to each bond." There is nothing to authorize the issue of bonds by or in the name

of the municipal corporation. They are to be issued by the board specially created for the purpose, under its own seal, provided for by the act, and not under the seal of the municipal corporation, and not signed by the mayor as mayor or agent of the city. Under section 11 a fund sufficient for the purpose for payment of the coupons and redemption of the bonds is to be levied, assessed, and collected "in the same manner as other taxes in said city and county are levied, assessed, and collected upon lands within the district supposed and determined by the act itself to be benefited. Thus the same machinery and instrumentalities used for collecting *other state* as well as city taxes are adopted for assessing and collecting the special tax provided for the purposes of the act. The moneys so collected are to be paid, not into the *treasury* of the city and county, as a part of its corporate funds, but to the *treasurer* of the city and county, personally designated for the purpose, and is "to constitute the Montgomery avenue fund," "to be paid out by said *treasurer only* in payment of the coupons attached to said bonds, * * *" and "in redeeming the bonds issued in pursuance of the provisions of this act."

The fund thus provided is set apart for this specific purpose, having no connection with the funds of the municipality under the sole charge and management of the board of public works, and the person who happens, for the time being, to be treasurer. The municipal corporation, as such, has no power or authority over it,—nothing whatever to do with it. Nor has the board of supervisors, the legislative and governing body of the corporation. It is under the exclusive authority and control of the agents of the state, especially designated by the act to carry out the will and purpose of the state, as manifested by the act.

As if not enough to declare its purpose to make the improvement, to designate its own instrumentalities, and point out the mode of executing its will, leaving nothing to be done on the part of the corporation, or of its legislative and governing body, and to carefully avoid bringing the corporation or its legislative body into any relations whatever with the work, and as if to cut off all possibility of doubt upon the subject, it was expressly provided, in the last section but one of the act, "*that the city and county of San Francisco shall not, in any event whatever, be liable for the payment of the bonds, nor any part thereof, provided to be issued under this act; and any person purchasing said bonds, or otherwise becoming the owner of any bond or bonds, accepts the same upon that express stipulation and understanding.*" Thus the statute in no provision authorizes the city and county of San Francisco, in its corporate capacity, or by the board of supervisors, its legislative and controlling body, or otherwise, to do anything in the matter of opening and dedicating to public use Montgomery avenue, or to meddle with the funds provided for the purpose, or to assume any obligation or responsibility in the matter. The act imposes no obligation or duty upon the corporation or upon its con-

trolling body, nor does it even confer any power to act in any manner in regard to the work of opening Montgomery avenue, while, on the contrary, it expressly provides that it "*shall not, in any event whatever, be liable for the payment of the bonds, nor any part thereof, provided to be issued under this act.*"

The act does not authorize the issue of any bonds of the corporation, and the board of public works must have so understood the statute, for it did not, in fact, issue any such bonds. The instruments set out in the complaint, neither in substance, in form, nor in law, can be regarded as bonds of the city and county of San Francisco. They do not purport upon their face to be such, and there was no authority in the board to make them such. The only provisions in the whole act which bring the municipal corporation, in its corporate capacity, into any relations with the opening of the avenue are the provisions in sections 1 and 16 relating to its disposition after the work is both done and paid for, as provided in the act,—after the will of the state has been carried out, and the purpose of the act fully accomplished. The provision of section 1 is that the land described, "taken and dedicated for an open public street," "*when paid for, as hereinafter provided*, the title hereto shall vest in said city and county for such purposes forever, as the title of other public streets in said city and county is vested." Thus, after opening and dedicating the avenue to public use, and *paying for it* in the manner provided, which was the task assumed to be performed by the state, the street is donated to the city; and until all this is fully accomplished, the city, in its corporate capacity, has nothing at all to do with the matter. And then, as a consideration for opening and dedicating the land for the avenue, procuring and vesting the title in the city and county, section 16 imposes an obligation on the corporation to, *thereafter*, sewer, grade, sidewalk, plank or pave the avenue, as in the case of other streets already dedicated to public use. The provision is:

"The said Montgomery avenue, *when opened*, shall be sewered, graded, sidewalked, and planked and paved by the municipal authorities in accordance with the rules, regulations, statutes, and ordinances applicable to the other public streets of the city and county of San Francisco."

Thus the state assumes the duty and work of dedicating and opening Montgomery avenue, and providing for payment by a fund assessed upon the property determined by itself to be specially benefited by the improvement, and, when its task is fully accomplished, turns the avenue over to the municipal corporation, to be thereafter improved, under its direction and authority, in the same manner as other public streets are improved, in pursuance of the powers conferred on it by its charter. And, until the avenue was thus opened and turned over to the municipality, the city and county, through its legislative controlling body or otherwise, had no corporate control over or relation to the matter, and had nothing to do with it.

These bonds were issued in connection with that portion of the

work assumed by and carried on exclusively by the state, and under its direction, and with which the corporation had no concern. The board of public works, and other parties designated by the Montgomery avenue act to perform the duties therein indicated, performed such duties solely by authority of that act. The duties were not performed by virtue of any authority of the municipal charter, or of any other act conferring power or authority upon the municipal corporation. The consent of the corporation was in no way obtained or asked. The acts were solely performed in pursuance of the express, direct command of the statute itself, wholly irrespective of the will or the charter powers of the corporation. They were not performed in the exercise of corporate powers, and they were in no sense corporate acts. The authorities are numerous establishing the proposition that parties so acting by express direction of the statute, without the authority of the municipal corporation, and not acting by virtue of the powers conferred on the corporation by its charter, do not act as officers or agents of the corporation, and the corporation not being the principal, their acts are not the acts of the corporation,—they are but the agencies employed by the directing power for the accomplishment of its own purposes.

The following are some of the authorities establishing this self-evident proposition, and it will be sufficient to cite the cases, without analyzing or commenting upon them in detail: *Sheboygan Co. v. Parker*, 3 Wall. 96; *Horton v. Town of Thompson*, 71 N. Y. 521; *Board Park Com'rs v. Detroit*, 28 Mich. 244, 245; *People v. Chicago*, 51 Ill. 17; *Hoagland v. Sacramento*, 52 Cal. 149; *Tone v. Mayor*, 70 N. Y. 165; *New York & B. S. M. & L. Co. v. Brooklyn*, 71 N. Y. 584. In *Horton v. Town of Thompson*, *supra*, the court said:

"In the present case no action on the part of the town in its corporate capacity, or on the part of any of its officers, was required by the act, or was taken. The money was to be borrowed, and the bonds issued by commissioners to be appointed in the manner prescribed by the law. These commissioners were in no sense town officers, nor did they represent the town." Page 521.

The strongest case cited in opposition to the views expressed, and to support the position that the opening of Montgomery avenue was a municipal and not a state undertaking, for which the municipal corporation is liable, is that of *Sage v. City of Brooklyn*, 89 N. Y. 189. But there were several clauses in the statute involved in that case, upon which the court relied and rested its decision, that are wholly wanting in the Montgomery avenue case. "Thus," says the chief justice, who delivered the opinion of the majority of the court, "by the third section it is declared that the lands 'shall be deemed to have been taken by the city of Brooklyn for public use.'" *Id.* 197. "That the improvement of Sackett street was regarded by the legislature of the state as a city and not a state improvement, also plainly appears from the supplementary act, chapter 592, Laws 1873. The park commissioners were, by that act, authorized and directed to improve Sackett

street by grading, paving, planting shade-trees, constructing carriage-ways, etc., and by the fourth section the city was required to issue its bonds for the purpose of raising money to pay the expenses of the improvement, and the money collected on assessments was directed to be paid to the commissioners of the sinking fund for the redemption of the bonds." Id. 198. Thus, by the express terms of the statute, the land was "*deemed to be taken by the city,*" and the city was expressly made *primarily liable*, and required to issue its own bonds, and reimburse itself from assessments on the property benefited. There is nothing of this kind in the Montgomery avenue act, and nothing even looking in that direction. So, also, referring to section 16 of another act as applicable, the chief justice says: "The direction in section 16, that the comptroller shall pay the land damages, is *absolute and unqualified*. It is not a direction to pay them out of the assessments when collected, or out of any particular fund." Id. 199. Again: "The city, under that statute, [Supplemental Act 1873,] was required, *primarily*, to advance the necessary funds. The provision in the act of 1873 furnishes a strong inference in favor of the claim that the legislature, by incorporating section 16 of the charter into the act of 1868, intended to impose upon the city the duty, either *primary or ultimate*, of paying the land-owners." Id. 200. On these and other similar provisions the decision was rested. Yet, in the face of these strong provisions of the statutes, showing that the acts in question were intended to be municipal and not state acts, and expressly imposing the liability on the city, those two able judges, of long service and ripe experience, EARL and RAPALLO, dissented, in a clear and cogent opinion, and held the work to be a state and not a municipal work, for which the corporation was not liable. Said Mr. Justice EARL in the case:

"The land was taken and appropriated by the direct act of the legislature, and, by the same act, the park commissioners were appointed to enter upon the land and make the improvement. They were not agents of the city, but state agents. They were not officers of the city, and, in what they did, they did not represent the city, and had no authority in any way to bind it, and could in no way make it responsible for these awards. They had the precise authority conferred upon them by the act, and no other; and the liability of the city for their acts, or for the land taken, or awards made, is not so much as hinted at by the act. For the position that the park commissioners were not agents of the city, for whose acts the city could be made responsible, the cases of *Maximilian v. Mayor*, 62 N. Y. 160; *Tone v. Mayor*, 70 N. Y. 157; and *New York & Brooklyn Saw-mill & Lumber Co. v. City of Brooklyn*, 71 N. Y. 580, are abundant authority. The general rule, as deduced from these cases, is that a municipality is not liable for the acts or omissions of an officer in respect to a duty specifically imposed upon him which is not connected with his duties as agent of the corporation, and that such a corporation is only liable for the acts or omissions of officers in the performance of duties imposed upon the principal." Id. 204.

But, conceding the case to be well decided, the court, in its decision, rested upon express provisions of the statute, making the city

of Brooklyn responsible, and the case now in hand is entirely different. There is no such provision in the Montgomery avenue act. That act is absolutely barren of any such or similar provisions.

The other cases apparently most confidently relied on to show the liability of the city are *Jordan v. Cass Co.* 3 Dill. 185, and *Davenport v. County of Dodge*, 105 U. S. 238. The bonds in the former case were issued by the county in the name of the county, by express direction of the statute. In the latter case the bonds were issued by the county commissioners, the governing body of the county, *in pursuance of an express provision of the statute*, for a precinct indebtedness. It was held by the supreme court, following the construction adopted by the supreme court of Nebraska, that the county was liable upon the bonds under the statute authorizing the issue of county bonds for the precinct indebtedness, but it was held that the indebtedness was to be satisfied out of funds collected from the precinct. In *Meath v. Phillips Co.* 108 U. S. 555, S. C. 2 Sup. Ct. Rep. 869, the supreme court, referring to this case and the case of *Cass Co. v. Johnson*, 95 U. S. 360, said:

"In the case of Cass county, the law provided in terms for an issue of bonds *in the name of the county*; and in that of the county of Davenport, we construed the law to be, *in effect, the same*. Consequently, there were, in those cases, *obligations of counties*, payable out of special funds."

These cases are therefore entirely different from the case under consideration. On the contrary, the case of *Meath v. Phillips Co.*, just cited, is decisive in favor of the proposition maintained in this opinion, that where the state, or some other district or organization, employs certain officers, designated by their official names, of a city or county, in pursuance of the statute, as agents or instrumentalities for accomplishing its own proper purposes, such officers, in performing the acts thus required, do not act as officers or agents of such city or county, but as agents or instrumentalities of the state, or other district or organization, for which the services required by the statutes are performed. 108 U. S. 554, 555; S. C. 2 Sup. Ct. Rep. 869.

It is clear to my mind, both upon principle and authority, that the city and county of San Francisco is not in substance, or in form, an obligor, or party in any sense to, the bonds and coupons sued on; that under the Montgomery avenue act it could not have been legally made an obligor or party to the bonds issued in pursuance of the act; and that, in its corporate capacity, it has no relation to those bonds, and no duties to perform in connection therewith. The duties to be performed, whatever they may be, in connection with the bonds and coupons in suit, by parties who are also officers of the city and county San Francisco, are, in my judgment, to be performed by them under the provisions of the statute, as agencies or instrumentalities of the state, and not as agents or officers of the city. It follows, necessarily, that the city and county of San Francisco, in its

corporate character, is in no respect chargeable with any liability of any kind upon the instruments sued on.

There being no liability of any kind, and no duty to perform by the municipality, in its corporate capacity, in relation to said instruments, no action or judgment can be rendered in the case that will avail anything as a foundation for proceeding by *mandamus* to compel the assessment and collection of a fund for the payment of the coupons, and ultimate redemption of the obligations in question. For that, or any other purpose, looking to the collection of the money claimed to be due, the action might just as properly be brought against the city of Oakland as against the city and county of San Francisco.

The property holders of the district liable to be assessed, under the Montgomery avenue act, with respect to their lands, and the indebtedness in question, do not, under the act, stand, in any respect, in privity with the corporation,—the city and county of San Francisco,—and, in relation to the instruments in suit, the municipality does not represent either the owners or the lands. Any judgment against the city, in this action, could not bind or conclude the owners or their property, neither being, in any sense, parties or privies to parties to the suit. The judgment, under such circumstances, could not afford any valid or legal foundation for proceedings by *mandamus* against the parties charged with the duty of assessing and collecting the Montgomery avenue bond tax; for in that capacity they are not officers, agents, or instrumentalities of the municipal corporation; and they are not in privity with it. A *mandamus*, in the national courts, is in the nature of process to execute a valid judgment; and it must be against the judgment debtor or obligor, or some one representing the judgment debtor or obligor. A proceeding by *mandamus* against the parties charged with assessing and collecting the tax in question, based upon a judgment in this case, would be very much like proceeding by an execution against B., to satisfy a judgment against A., between whom there is no legal relation whatever, affected by or affecting the judgment.

If the views expressed are sound, the complaint presents no cause of action against defendant, and the facts alleged, and offered to be proved, are wholly immaterial. It would be but a waste of time to occupy the attention of the court in taking testimony which cannot prove, or tend to prove, any valid cause of action. The complaint is wholly insufficient, and the pleadings present no material issue. For the reasons stated in this opinion, and in the opinion of the presiding justice, in which I concur, the objection to the introduction of the evidence offered must be sustained.

In re SUN HUNG and another.

(Circuit Court, D. California. August 24, 1885.)

HABEAS CORPUS—APPEAL TO SUPREME COURT—REV. ST. § 764—ACT OF MARCH 3, 1885.

The right of appeal to the supreme court in *habeas corpus* cases under Rev. St. § 764, as amended by the act of March 3, 1885, is absolute, and not dependent upon the discretion of the judge to allow or deny.

Application to Allow Appeal to Supreme Court.

J. C. B. Hebbard, for petitioner.

SAWYER, J. This is an application for the allowance of an appeal to the supreme court, under the recent act of congress giving an appeal in these cases. The case was brought to this court by appeal from the district court, and the appeal is on a question of fact, whether these two parties were born in the United States. The testimony is extremely slender, and uncorroborated, and the judgment in the district court was therefore affirmed. The act is very general and comprehensive in its provisions, and I was in doubt whether or not the right of appeal is absolute, or whether I have any discretion to refuse to allow the appeal. Had I the discretion, I certainly should deny an appeal in this case. I think it is a case with which the supreme court should not be troubled. I do not think there is enough in it to justify taking it up. There is no question of law involved. If there is no discretion in these cases, every case of *habeas corpus* of this character, whichever way decided, can go to the supreme court on appeal. Upon examination I have come to the conclusion that I have no discretion in the matter, and that the right of appeal is absolute. I think the act must have passed without due consideration; without appreciating the effect or the consequences of an unlimited right of appeal. There should, in my opinion, be an appeal in some cases. A petitioner ought not always to be compelled to wait until the judges disagree. Very important questions arise under the Chinese restriction acts, which the judges themselves are not clear upon, in which there ought to be a decision of the supreme court of the United States, and in which the judges earnestly desire such a decision. These acts involve international considerations and international questions of the highest importance; but, in my judgment, there should be some limit to the right of appeal in these matters. Perhaps the right ought not to rest upon the discretion of the judges who have tried the cases, because it would be a delicate matter for them in some cases to deny an appeal from their own judgments. Certainly, in addition to an appeal, where there is an opposition of opinion in this class of cases, wherever a judge finds a question of law upon which he is not clear, he alone, in my judgment, should be entitled to certify that question up for final decision of the supreme court, where the matters are of so much importance as are often involved in the construction of the

Chinese restriction acts. There have been several questions raised before and decided by me which I should have been very glad to certify up, and should have certified up for an authoritative decision of that tribunal had I been authorized to do so.

I think there should be no appeal on a mere question of fact, unless there is additional testimony to be taken before the supreme court. In this class of cases, the judge who hears the evidence and sees the witnesses is certainly in a much better situation to determine a question of fact than the supreme court could be on the written record of what occurs before the court of original jurisdiction. On the question of fact, it seems to me, there ought not to be an appeal. However, congress may think otherwise. I merely make the suggestion on the question of policy. On an important question of law affecting the rights and liberty of parties under the constitution and laws of the United States, on which any judge entertains a reasonable doubt, and which he thinks should be determined by the supreme court, there certainly should be an appeal. Where the judge has decided the case, and feels confident of the correctness of his decision, there should be some such limitation as this: The party appealing should be required to present a copy of the record, and an assignment of alleged errors, to one of the justices of the supreme court, for his examination, to see whether the appeal is frivolous, or whether there is really anything in it that justifies the allowance of an appeal; and such justice should have some discretion in the matter of allowing an appeal.

There certainly could be no objection to intrusting that discretion to a justice of the supreme court, whatever objection there might be to intrusting such power to the court that heard the case. Such a rule is prescribed by the recent act authorizing writs of error in certain criminal cases to remove them from the district court to the circuit court. In such a case, the party who desires the writ of error is compelled to prepare a copy of the record, and lay it before the circuit judge of the court to which the case is to be taken for review, and if he deems it to present a question of sufficient doubt to justify a hearing in the appellate court, he is authorized to allow a writ of error. I have had occasion to pass upon several cases of the kind, and to deny the writ in some, as frivolous. If the judge thinks the application frivolous, and there is no point worthy of consideration, he is authorized to deny the writ. I see no good reason why a similar provision should not be made applicable, at least, to the justice of the supreme court, so that, when the circuit court has decided for or against a petitioner on *habeas corpus*, the party feeling aggrieved should take the record to a justice of the supreme court, and allow him to determine whether the appeal is frivolous, or whether there is some real question that is worthy of consideration, and give him discretion to allow or deny the appeal, as he deems the justice of the case requires. Such a provision, with the limitation that there should

be no appeal on questions of fact, would, perhaps, afford the proper remedy.

Viewing this question as I do, and believing the right of appeal to be absolute, and that I have no discretion in the matter, I allow the appeal, and shall fix the bail-bond at \$2,000, with a bond of \$300 to cover costs.

In the *Case of Ty Moy*, on appeal, which is an application of a similar character, the appeal will be allowed, and the same bonds fixed.

On the day following the allowance of the appeal, the attorneys of the parties being present, the circuit judge made the following additional observations:

I desire to add some observations to what I said on yesterday in this case. In allowing the appeal, the opinion was expressed that there ought to be no appeal on a question of fact. It has since occurred to me that, in view of the object and policy of the law, perhaps it might be held, without a very greatly overstrained construction of the statute, that the appeal only lies upon questions of law. Undoubtedly the principal object of the statute is to procure an authoritative construction of the constitution, law, or treaty under which the question arises, and thereby protect the legal rights of the petitioner; and, if I could see my way clear, I should limit appeals to cases presenting questions of law only. But, as was stated yesterday, the language of the statute is very broad and comprehensive. Combining the two provisions of the statute into one, it reads: "From a final decision of such circuit court, an appeal may be taken to the supreme court," "in the case of any person alleged to be restrained of his liberty in violation of the constitution, or of any law or treaty of the United States." This is "a case" in which such restraint is alleged; and the statute does not, in terms, nor by plain inference, limit the appeal to the legal points involved in "the case." The law points in this case, had they been reached, under the settled decisions, so far as the courts of this circuit can settle them, would have been decided in favor of petitioners. It was held in *Look Tin Sing's Case*, 21 FED. REP. 905, Mr. Justice FIELD delivering the opinion, and three other judges concurring, that a child born in the United States, of Mongolian parents, residing at the time in the country, is a citizen, and entitled to enter the United States as such, irrespective of the restriction act. But this case was determined upon a mere question of fact whether the petitioners were born in the United States. This question on the construction of the statute as to a right of appeal on a mere question of fact was not suggested, nor did it occur to me under the broad language of the statute, before allowing the appeal. It may be that the supreme court may feel justified in limiting the ap-

peal to questions of law. I suggest the point, without expressing a decided opinion as to how it should be ultimately decided; but, for the purposes of this case, rule against it. It is a point, at least, that the government, which has intervened, is entitled to have considered and determined by the supreme court; and the public interests require that it should be so determined. Should the appeal be thus limited, it would obviate, to a great extent, if not wholly, the great inconvenience now apprehended from the act.

The allowing of this appeal will enable the supreme court to authoritatively determine the point at an early day, as the attorney general, at the opening of the next term of court, in October, can move to dismiss the appeal, on the ground that an appeal does not lie, under the act, upon a mere question of fact; the law applicable to the facts, assuming the petitioners to have been born in the United States, having been already settled in their favor. I suggest this course, and, on an intimation from the United States attorney that this suggestion will be promptly acted upon, I shall suspend final action on any other application for an appeal on questions of fact till an opportunity is had to obtain a decision of the supreme court on the point suggested. It is expected, however, that prompt action will be taken.

- SHARON v. HILL.

(Circuit Court, D. California. August 5, 1885.)

[In the matter of the report of the examiner in chancery in relation to proceeding on the examination of witnesses, August 3, 1885.]

1. CRIMINAL JURISDICTION OF UNITED STATES COURTS—PUBLIC BUILDINGS.

A United States court has exclusive jurisdiction of offenses committed in places in California purchased by the United States, with the consent of the state legislature, for the erection of a custom-house and other necessary public buildings, and so used.

2. CONTEMPT—DRAWING DEADLY WEAPON AT EXAMINATION OF WITNESSES BEFORE EXAMINER IN CHANCERY.

Drawing a pistol and threatening the life of counsel during the examination of witnesses before an examiner in chancery, appointed by a circuit court in a suit pending therein, in judge's chambers, in a building on land under the exclusive jurisdiction of the United States, is a contempt of court, and punishable as such, and also an offense against the statutes of the United States, and punishable by indictment or information.

3. SAME—PUNISHMENT AS CONTEMPT.

When no special end in the administration of justice would be accomplished by proceeding summarily on process for contempt, the court may waive such process and leave the United States to proceed to punish the offense under the statute.

4. SAME—COUNSEL CARRYING WEAPONS INTO COURT.

A member of the bar, who appears in court armed with a deadly weapon, is not only guilty of a contempt of court, but also of professional misconduct, and should be suspended or disbarred.

On August 4, 1885, before FIELD, circuit justice, and SAWYER, circuit judge, the examiner in chancery appointed in this case to take the testimony of witnesses, made the following report to the court:

THE EXAMINER'S REPORT.

In the Circuit Court of the United States, for the Ninth Circuit, and District of California.

William Sharon v. S. A. Hill. (No. 3,138.)

To the Honorable; the Circuit Court of the United States, for the Ninth Circuit, and District of California:

I, the undersigned, examiner in chancery of said court, conforming to the request of counsel for complainant in the above-entitled cause, do certify:

At a regular session of the examination in the above-entitled cause, on the third day of August, 1885, at my office in the appraisers' building, San Francisco, California, being the time and place to which said examination was regularly adjourned, there were present William M. Stewart, Esq., and Oliver P. Evans, Esq., of counsel for complainant; W. B. Tyler, Esq., of counsel for respondent; the respondent *in propria persona*; and B. U. Piper, recalled as a witness on behalf of complainant in rebuttal. During the examination of said Piper, the respondent, who was sitting at the table, engaged in reading a deposition of Susan Elizabeth Smith, made herein, became apparently much excited. Following is a transcript setting forth a portion of the proceedings taken from the notes of the reporter:

The Respondent. I won't sign my deposition unless it contains everything that I said about Stewart's family. He don't dare to take me up on it. I won't sign that evidence unless that is put in.

The Examiner. Don't talk about it now.

The Respondent. It has got to go in.

The Examiner. This is no proper time for bringing up any matter of that kind. A witness is under examination.

The Respondent. When I see this testimony, I feel like taking that man Stewart out and cowhiding him. I will shoot him yet; that very man sitting there. To think he would put up a woman to come here and deliberately lie about me like that. I will shoot him. They know when I say I will do it, that I will do it. I shall shoot him as sure as you live; the man that is sitting right there; and I shall have that woman, Mrs. Smith, arrested for this, and make her prove it.

The Examiner. Those are not matters which should be brought up now. Don't talk in this way when a witness is under examination.

The Respondent. I say no jury will convict me for shooting a man that will bring a woman here to tell such things on me. They have never dared, when they put me on the stand, to ask me a question against my character yet,—never dared. If they have got so much against it, why didn't they dare ask me some questions when I was on the stand?

The Examiner. Mr. Tyler, can you put a stop to this interruption?

The Respondent. Mrs. Smith said nothing here about my being in a weak condition in Dr. Murphy's office,—that has been put in the testimony,—and that I wanted her to play nurse to me. She was a nurse to me, and I paid her for it.

The Examiner. Mr. Tyler, can you put a stop to this? I find that I cannot, and unless you can, I shall have to adjourn the examination and bring this matter to the attention of the court. This thing has gone altogether too far already, and unless it can be stopped here I certainly shall adjourn the examination.

Mr. Tyler. Let us get through this afternoon, anyway.

The Respondent. I know the woman he is living with, and he brought his wife out here to cover it up. I will expose the whole thing; about the child and all.

The Examiner. Will you remain quiet until this examination is completed?

The Respondent. I don't know whether I will remain quiet without I get that man's life. I get so worked up when I read this testimony of Mrs. Smith.

The Examiner. Let me take that testimony until after the examination is over.

The Respondent. I expect you had better.

The Examiner. You may finish reading Mrs. Smith's testimony after the close of the session. I hope, now, I shall not be compelled to bring your misbehavior to the attention of the court; for if I should do so, the court will surely punish you for contempt.

The Respondent. That would be nothing unusual if Stewart asked it.

The Examiner. I shall ask it in this instance, because my duty compels me to do so. You persist in interrupting the proceedings, and it is impossible for the examination to go on. If you will wait until we get through with this examination, if you have anything to say, then it will be a more appropriate time to say it.

The Respondent. I can hit a four-bit piece nine times out of ten.

The Examiner. If you interrupt the proceedings any further, I shall adjourn the examination and call the attention of the court to this matter, and it won't be my fault if the court does not take such measures as will put a stop to such interruptions. I have at all times been disposed to be as tolerant and lenient with you as possible, but toleration should have a limit, and the limit has been reached. Early in the proceedings the court suggested that I ought to be very lenient with you, and, in conformity to that suggestion, as well as from my own inclination, I have treated you with the greatest consideration and forbearance all through.

The Respondent. That is enough; you needn't say anything more.

The Examiner. But I propose to say something more.

The Respondent. All right; then I'll talk.

The Examiner. Since the commencement of the examination in this case, your offensive conduct has frequently disturbed the orderly course of the proceedings, and I have tried in every way which my imagination could suggest to check you,—by considerate treatment, by ignoring your misbehavior, by courteous protest and persuasion, by rebuke, by appeals to your counsel, by threatening to report your conduct to the court. But, instead of abating, the evil is constantly growing worse. Now this thing must stop.

The respondent ceased speaking at this point, and the examination proceeded. In addition to the above-quoted remarks of respondent, she made further statements defamatory of the character of people not connected with the case, which remarks are deemed not necessary to be repeated in this report. The examination of the witness Piper having been concluded, Victor Craig was recalled as a witness on behalf of the complainant in rebuttal. Pending his examination, the respondent drew a pistol from her satchel and held it in her right hand, the hand resting for a moment upon the table, with the weapon pointed in the direction of Judge EVANS, the hand and weapon being then dropped to her lap, beneath the table. At this time Mr. Stewart had left the room. Judge EVANS, noticing the action of the respondent, said:

"What do you want? Do you want to shoot anybody?"

The Respondent. I am not going to shoot you just now, unless you would like to be shot, and think you deserve it.

Mr. Evans. No; I would rather not be.

The Examiner. Unless you will give that pistol into my custody, I shall adjourn the examination and report this matter to the court.

The Respondent. I am not going to shoot anybody. I will give it into your custody.

The Examiner. I will adjourn this examination until to-morrow. Won't you give me that pistol?

The respondent complied with the request, and allowed the examiner to take her pistol.

Mr. Evans. We don't desire to proceed any further, under the circumstances. We ask that this matter be reported to the court.

The Respondent. You shall not slander me. These men know they need it, and I told the supreme court they knew they needed it.

Mr. Evans. I shall decline to proceed any further.

The examination was adjourned by the examiner to August 4, 1885, at 10 o'clock A. M.

It may be proper to add that upon previous occasions respondent has brought to the examiner's room, during the examination, a pistol, and has sat for some length of time holding it in her hand, to the knowledge of all persons present at the time.

Respectfully submitted,

S. C. HOUGHTON, Examiner, etc.

On August 5th the report was considered by the court, Mr. Justice FIELD, and SAWYER, circuit judge, being present.

In Equity.

William M. Stewart and Oliver P. Evans, for complainant.

W. B. Tyler, for defendant.

FIELD, Justice, (*orally*.) In the case of *William Sharon v. Sarah Althea Hill*, the examiner in chancery appointed to take the testimony has reported to the court that very disorderly proceedings took place before him on the third instant; that at that day, in his room, when counsel of the parties and the defendant were present, and during the examination of a witness by the name of Piper, the defendant became very much excited, and threatened to take the life of one of the counsel, and that, subsequently, she drew a pistol, and declared her intention to carry her threat into effect. It appears, also, from the report of the examiner, that on repeated occasions the defendant has attended before him, during the examination of witnesses, armed with a pistol. Such conduct is an offense against the laws of the United States, punishable by fine and imprisonment. It interferes with the due order of proceedings in the administration of justice, and is well calculated to bring them into contempt. I, myself, have not heretofore sat in this case, and do not expect to participate in its decision; I intend in a few days to leave for the east, but I have been consulted by my associate, and have been requested to take part in this side proceeding, for it is of the utmost importance, for the due administration of justice, that such misbehavior as the examiner reports should be stopped, and measures be taken which will prevent its recurrence. My associate will comment upon the laws of congress which make the act committed by defendant a misdemeanor, punishable by fine and imprisonment. The marshal will be directed to disarm the defendant whenever she comes before the examiner, or into court, in any future proceedings, and to appoint an officer

to keep strict surveillance over her, in order that she may not carry out her threatened purpose. This order will be entered:

Whereas, it appears from the report to this court of the examiner in chancery, in this case appointed to take the depositions of witnesses that on the third day of August, instant, at his office, counsel of the parties appeared, namely: William M. Stewart, Esquire, and Oliver P. Evans, Esquire, for the complainant, and W. B. Tyler, Esquire, for the defendant, and the defendant in person, and that during the examination before said examiner of a witness named Piper, the defendant became excited and threatened the life of one of the counsel of the complainant present, and exhibited a pistol with a declared purpose to carry such threat into effect, thereby obstructing the order of the proceedings and endeavoring to bring the same into contempt:

And whereas, it further appears, that said defendant habitually attends before the said examiner carrying a pistol: it is ordered, that the marshal of this court take all such measures as may be necessary to disarm said defendant, and keep her disarmed and under strict surveillance while she is attending the examination of witnesses before said examiner, and whenever attending in court, and that a deputy be detailed for that purpose.

Mr. Clerk, enter the order.

Mr. Justice SAWYER will explain for the benefit of counsel the statutes of congress. It is to be observed here that the block embracing this building and the custom-house is under the exclusive jurisdiction of the United States. Every offense committed within it is an offense against the United States, and here the state has no jurisdiction whatever. This fact seems to have been forgotten by parties.

SAWYER, J., (*orally.*) The occasion, I think, calls for some observation on my part in regard to this matter. The taking of testimony in this case has been going on for a long time. During the progress of the case many things had occurred that were exceedingly unpleasant, but through the considerate and commendable forbearance of the examiner and of counsel, a point had been reached where the testimony was nearly completed, and it was hoped would soon be closed without further interruption, when the incident occurred which imperatively required this report from the examiner. The occurrence is one of great gravity. The lives of officers of the court, in attendance before a branch of the court, in the performance of their duties as counsel, being in danger, the examiner justly felt that he could no longer refrain from reporting the action of the defendant without a violation of official duty. In connection with this matter, I shall call attention to some facts and some points of law that may not be within the knowledge of the party implicated, and may even have escaped the notice of counsel, in order that such offenses against the laws of the United States may not in future be ignorantly committed. Of course, we are all familiar with the maxim that everybody is supposed to know the law, yet, in point of fact, it often occurs that many do not. I shall therefore proceed to state some provisions of the statutes in relation to transactions of the kind reported that may not have attracted notice, in order to guard against any such future mis-

conduct as will lead to serious difficulties and necessitate severe punishment. As was remarked by the presiding justice, this building is under the exclusive jurisdiction of the United States. The block on which it stands has been purchased by the United States from the state of California, by the consent of the legislature, for the erection of the public buildings upon it; and it is by the constitution thus placed under the exclusive jurisdiction of the United States. All offenses committed in this edifice, or upon the block of land upon which it stands, are offenses against the United States, punishable exclusively by the national courts. This point was authoritatively decided at the last term of the supreme court of the United States, in the case of *Fort Leavenworth R. Co. v. Lowe*, 114 U. S. 525; S. C. 5 Sup. Ct. Rep. 995. Every offense recognized by law, from the highest down to a simple assault, committed in this building, or on this block, is an offense against the United States, and punishable as such by the courts of the United States. The United States statutes have not defined specifically, in terms, every offense, but they have defined a number of the graver class, and then made a general provision covering all others. Section 5391, Rev. St., provides as follows:

"If any offense be committed in any place which has been, or may hereafter be, *ceded to and under the jurisdiction of the United States*, which offense is not prohibited, or the punishment thereof is not specially provided for, by any law of the United States, such offense shall be liable to and receive the same punishment as the laws of the state in which such place is situated, now in force, provide for the like offense, when committed within the jurisdiction of such state."

Thus an act not specifically made an offense by the statutes of the United States, but which is an offense under the laws of the state wherein performed, is made, by this general provision, also an offense under the laws of the United States, and punishable by the same penalties which are inflicted under the laws of the state. Under the provisions referred to, the acts, as reported by the examiner in this case, constitute at least two, if not three, offenses against the United States,—perhaps four. Section 5399 (omitting that portion relating to other matters) provides as follows:

"Every person who, by threats, endeavors to influence, intimidate, or impede any officer in any court of the United States in the discharge of his duty, or by threats or force obstructs or impedes, or endeavors to obstruct or impede, the due administration of justice therein, shall be punished by a fine of not more than five hundred dollars, or by imprisonment not more than three months, or both."

In this matter, as reported by the examiner, there was an obstruction of an officer,—the examiner in chancery of this court,—and of counselors of the court, who are officers of the court, in the discharge of their respective duties, and also an impeding of the due administration of justice. The obstruction resulted in an adjournment of

the examination, as neither counsel nor examiner were willing to proceed in face of the menace offered to counsel, accompanied by the exhibition of a pistol, by the defendant in the suit. Again, the Penal Code of this state makes the following provision; and the general statute which I have read, making all offenses in the state which are not specifically defined in the statute of the United States offenses against the United States, and punishable by the same penalty as in the state, makes this an offense against the United States. Section 417, Penal Code Cal., provides that—

“Every person who, not in necessary self-defense, in the presence of two or more persons, draws or exhibits any deadly weapon in a rude, angry, and threatening manner, or who, in any manner, unlawfully uses the same in any fight or quarrel, is guilty of a misdemeanor.”

Another section provides that the punishment for misdemeanors, not otherwise specially provided for, shall be by “imprisonment in the county jail not exceeding six months, or by a fine not exceeding five hundred dollars, or both.” Pol. Code, § 19. Again, section 467 of the Penal Code of California provides as follows: “Every person having upon him any deadly weapon, with intent to assault another, is guilty of a misdemeanor.” And there are various other cognate offenses, all of which are offenses against the United States, by adoption in the section which I have already read. As before remarked, every offense which is committed in this building, or on this block, from the highest down to an assault, is an offense against the United States, exclusively punishable by the courts of the United States; and attention is called to this, so that parties may not in future unwittingly commit any of these offenses, and subject themselves to the penalties inflicted by the law.

This report of the examiner having been made, it imperatively calls for some action by the court. It cannot be passed unnoticed. It is proper to observe that counsel for the opposing party have exhibited great moderation, and have only sought the protection of their lives. They have not asked the court to proceed to punish defendant for the contempt committed. They only ask, and it is certainly a very moderate and reasonable request, that they shall not be required to practice their profession in the circuit court of the United States at the muzzle of their opponent's pistols. The court, of its own motion, the matter having been brought to its attention, might well proceed upon the case as reported, as a gross contempt of court. It is unquestionably a contempt. It is a contempt committed before an officer lawfully taking testimony in this case, the proceeding being a part of the trial of the case, in the chambers of the judge adjoining the court-room; the examiner being an adjunct of the court—a part of the court itself. This act reported is undoubtedly as distinctly and clearly a contempt of court as though committed in the presence of the judge, in the court-room, while in the act of trying a case, either with or without a jury. This point is well discussed by Judge

HAMMOND, of the district of Tennessee, in *U. S. v. Anonymous*, a case of much milder type of contempt, 21 FED. REP. 761.

But these same acts, which constitute a contempt in this case, also constitute several offenses under the laws of the United States, punishable in the ordinary course of criminal proceedings. There are but two objects of proceeding by process for contempt. One is to punish a contempt already committed, as a past offense, where, perhaps, the criminal statutes do not cover the case, or, in some cases, where they do, but where the exigencies of the occasion require a more summary and prompt remedy; and the other object is to enforce the performance of some duty or act which is still in the power of the party to perform. So far as future action is concerned, we have endeavored to provide for the safety of counsel by the order which we have just made, requiring the marshal to see that the defendant does not enter the room of the examiner, or the chambers of the judge, or the court-room, while armed; and also by calling attention to the liability to criminal punishment for other similar acts that may be performed in the future. As to the past offense, we might well proceed to punish the acts reported as a gross contempt of court. But where the same acts constitute both a contempt of court, which could be punished as such,—that is to say, as a past contempt,—and at the same time constitute an offense against the laws of the country which may be punished on indictment or information, though sometimes it is necessary to promptly vindicate the court by means of the more summary process for contempt, as a general rule, it is desirable to proceed criminally, if, in the ordinary exercise of the criminal jurisdiction of the court, it can just as well be done. In such cases, where there is no special end in the administration of justice to be attained by a proceeding for contempt, it is deemed better to adopt the more deliberate mode of procedure applicable to the enforcement of the criminal laws of the country. We have not been asked to proceed by process of contempt, and as there appears to be no special call for hasty action, we deem it advisable, under the circumstances of this case, to proceed in the more deliberate, careful, and less harsh proceeding, under the charge of the government, than to proceed by process for contempt. We shall therefore waive the process for contempt; and the attention of the United States attorney having now here been called to the breach of the laws, as reported by the examiner, we shall leave the matter to such course of proceeding as he may deem it his duty to take, to enforce the criminal laws of the country.

Immediately after the announcement of the decision, the following colloquy occurred, illustrating the views of the court as to the character of the professional conduct of members of the bar who enter the temple of justice armed. It is deemed of sufficient impor-

tance to the public and the bar to justify appending it, as a note, to the decision:

Mr. W. B. Tyler. If the court please: Of course I deprecate any such acts as those in the court-room, or in the examiner's office, as much as anybody; but I would suggest that there be an addition made to that order of the court, and that is that nobody be allowed to enter that room armed during the progress of this examination. I think it is necessary, I think it is proper, and there is no more reason—

Justice Field. We have no evidence that anybody has gone into the room armed. We have only made a rule to apply to what is brought to our knowledge.

Mr. Tyler. As his honor, Judge SAWYER, remarked, several very unpleasant things have occurred in there that perhaps your honor has no more evidence of—

Justice Field. I know nothing of them, of course.

Judge Sawyer. We considered that matter to which you refer, Mr. Tyler, and we had no evidence of anything of that kind. Nobody but counsel could be guilty of any such breach of propriety; and, after calling attention to the statutes of the United States, and to the fact that carrying arms for an unlawful purpose is an offense against the statutes, we hardly expect that any member of the bar of this court will presume to enter the examiner's room or the court-room armed. We cannot presume that members of the bar will be guilty of any such professional misconduct.

Justice Field. I may add here, further, that any lawyer who so far forgets his profession as to come into a court of justice armed ought to be disbarred from practice.

Mr. Tyler. Witnesses are sometimes armed.

Judge Sawyer. Witnesses, it is true, may come into court armed; but, with the admonition we have given, and as there has been no evidence that witnesses have come before the examiner armed, we think it hardly advisable to anticipate any difficulty in that direction. We apprehend that witnesses will be likely hereafter to conduct themselves with propriety.

Mr. Tyler. I would say to his honor, Judge FIELD, that, although I thoroughly concede everything he says, in certain instances, yet where a lawyer has information that a witness will come armed, he will very likely do as I myself have done,—come armed, to protect himself.

Justice Field. Then you would act very improperly. You should report the fact to the court and let the man carrying arms be arrested.

Judge Sawyer. When you have any such information, you should have the party put under bonds, or apply to the court in advance for protection.

Justice Field. Any man, counsel or witness, who comes into a court of justice armed, ought to be punished, and if he is a member of the bar, he ought to be suspended or removed permanently. That is the doctrine that ought to be inculcated from the bench everywhere. So far as I have the power, I will enforce it.

Mr. Tyler. So should I enforce it.

Justice Field. The reason that you give for carrying arms in court is not a good reason.

Mr. Tyler. Where witnesses do come armed—

Justice Field. Then report the fact to the court; that is the proper way.

Mr. Tyler. That will not stop a bullet.

Judge Sawyer. Then arrest the parties in advance, and put them under bonds, or apply to the court to have them examined and disarmed before permitting them to enter the court. The laws are very severe.

Mr. Tyler. The laws are very severe, but it is harder on the man that gets the bullet.

Justice Field. I don't mean to say that there may not be times in the history of a country, in certain communities, when everybody is armed. That was the case in the early days of California, when people traveled armed; but at this time, when law is supposed to be supreme, when all good men are supposed to obey it, and where counselors are sworn to obey the law and to see it properly administered, the carrying of arms into a court cannot for a moment be tolerated.

Mr. Tyler. Your honor will excuse me one minute, as this is a personal matter, and a little personal reflection on myself, in view of another proceeding which has taken place—

Justice Field. I know nothing of any other proceeding—

Mr. Tyler, (interrupting.) But as you have expressed your opinion that a lawyer who, under any circumstances, should come into a court of justice armed should be disbarred, and that was my exact case, I certainly have a right to explain that circumstance. During the trial of a case in the superior court—

Justice Field. We do not care about hearing of that. We cannot go into that matter at all.

Mr. Tyler. Don't you consider that to make that assertion as an absolute assertion, when it applies directly to a member of the bar of this court, and has nothing to do with this matter, that the member may answer? You have made that assertion, and I went into a court-room armed with a pistol, for the purpose of preserving, as I supposed, my father's life and my own; and now I make the explanation.

Justice Field. It is not worth while to pass any words with the court. We do not take our rules of procedure from the state courts, and if any lawlessness is permitted there, we should not be governed by that fact. I trust I never shall be called to preside over a federal court where any lawyer will presume to come into it armed, and if he does, I shall exercise such authority as is vested in me to prevent it. Whatever may have been done in a state court, I know nothing about.

PARMELEE and another v. A. BURRITT HARDWARE CO.

(Circuit Court, D. Connecticut. August 13, 1885.)

PATENTS FOR INVENTIONS—INVENTION—PARMELEE FIRE-EXTINGUISHER.

Letters patent No. 218,564, granted August 12, 1879, to Henry S. Parmelee, for an improved automatic fire-extinguisher, wherein the inventor made a sensitive extinguisher by placing the seal at the extreme outer end of the water-pipe, and so near the distributor that, when the joint of the seal was melted, the seal itself was forced into the distributor, and the water was left unobstructed, describe a patentable invention, and are valid.

2. SAME—INFRINGEMENT.

The defendants' extinguisher is an infringement, it not being imperative that the seal should be so constructed that the water should be below the joint.

In Equity.

Charles E. Mitchell and Benj. F. Thurston, for plaintiffs.

John K. Beach and John S. Beach, for defendants.

SHIPMAN, J. This is a bill in equity to restrain the alleged infringement of letters patent No. 218,564, granted August 12, 1879, to Henry

S. Parmelee, for an improved automatic fire-extinguisher. The disclaimer, which is a part of the specification, and the two claims of the patent, clearly point out the character and extent of the invention. The specification says:

"I am aware that fire-extinguishers have been provided with seals within the body of the casing of the distributor, and in connection with a valve arranged therein, and hence I make no claim to such construction. In my improvement the seal is located on the outer end of the water-conduit, connected with the perforated distributor, whereby the seal is not only protected against accidental displacement, and also from dust and dirt from the ceiling overhead, but is exposed most prominently to the action of the heat, which has direct entrance to the seal through the perforations in the distributor."

The claims are as follows:

"(1) In an automatic fire-extinguisher, the combination, with a perforated distributor, of a seal attached to the extreme outer end of the water-conduit, connected with the perforated distributor; said seal being retained in place by metal fusible at a low temperature, substantially as set forth. (2) In an automatic fire-extinguisher, the combination, with a perforated distributor, of a seal secured by fusible solder to the extreme outer end of the water-conduit, connected with the distributor, and at a point within the body of the said perforated distributor, substantially as set forth."

The seal shown in figure 1 of the drawings and in the wooden model which is an exhibit in the case, is a flat disk or cap, the flange of which incloses the end of the water-pipe. The bottom of the cap is upon the end of the pipe, and the cap is secured by solder between the outer surface of the pipe and the inner surface of the flange. The patented device differs from the devices shown in the English patent to Lewis Roughton, of July 5, 1861, and in the United States patent to Brown & Foskett, of August 10, 1875, in the location of the seal, whereby the extinguisher is rendered more sensitive to the influence of heat and more prompt in its beneficial action. The Roughton device is complex and expensive, and has a quantity of metal near the seal which prevents prompt action of heat upon it. The Brown & Foskett seal is placed in the pipe leading to the T-shaped outlet to which the distributor is secured. The Parmelee seal, when the joint is melted, is forced into the distributor. The Brown & Foskett seal is delivered, when released, into a pipe attached to the opposite end of the T piece. The distinction between the Parmelee device and its predecessors is manifest and is patentable. The inventor made a sensitive extinguisher, by placing the seal at the extreme outer end of the water-pipe, and so near to the distributor that, when the joint of the seal was melted, the seal itself was forced into the distributor and the water was left unobstructed.

The defendant's extinguisher has, instead of a flat cap, a semi-spherical cap at the extreme end of the water-pipe, but the flanges of the cap pass into the end of the pipe, instead of passing upon the outside of the end. Quoting from the testimony of Mr. Quimby, one of the defendant's experts, his description of the seal:

"The Burritt seal is a short, hollow cylinder, having one closed hemispherical end. The exterior surface of this cylinder is secured by fusible solder to the interior of a nipple provided upon its exterior at both ends respectively with male screw-threads, the thread at one end being for engagement with the female thread-funnel within the neck of the perforated distributor, and the thread at the other end of the nipple being for effecting the connection of the nipple with the water-pipe. I understand that the special object in making the closed end of the seal in the Burritt extinguisher hemispherical is to increase the tendency of the seal to roll around the interior of the distributor after the seal has been released, and been projected into the distributor. As a consequence of this hemispherical shape of the closed end of the seal, the water contained within the conduit extends both above and below the soldered joint which is to be fused."

The defendant contends that the fact that in the Burritt device the water extends above the soldered joint of the seal, whereas the water in the Parmelee device does not surround the joint, takes the Burritt device out of the Parmelee patent; and reliance is placed upon a clause in the specification which says:

"As the seal is secured within the distributor, which is usually made of metal, the rise of the temperature in a room or compartment will raise the temperature of the metal of which the distributor is made, and thus melt or fuse the joint between the seal and the distributor more readily than if water surrounded or was above the seal."

The patentee was here referring to the advantage which his invention possessed over a previous invention which he had patented in 1874, in which the seal inclosed the distributor, and consequently the water filled the distributor and the space between it and the cap, and thus "surrounded the joint, and seriously retarded the melting of the solder;" but the patent now in suit, though a narrow one, is not to receive the extremely narrow construction which the defendant gives. According to the construction of one of its experts a flat Burritt seal would be within the patent, while a dome-shaped one would not be, and in the opinion of another expert a Parmelee flat-cap would be without the patent, if the flanges were inside instead of outside the extreme outer end of the water-pipe. The gist of the invention was the location of the seal upon the extreme outer end of the water-conduit and connected with the distributor; but it is not imperative that the seal should be so constructed that the water should be below the fusible joint.

Let there be a decree for the plaintiffs for an injunction and an accounting.

v.24F,no.13—47

CRANDALL and others v. PLANO MANUF'G Co. and others.

(Circuit Court, N. D. Illinois. August 3, 1885.)

PATENTS FOR INVENTIONS—ROYALTIES—JURISDICTION IN EQUITY.

The licensor in a license under letters patent having a plain, adequate, and complete remedy at law, cannot maintain a bill in equity for an accounting of royalties accruing under the license.

In Equity.

Banning & Banning, for complainants.

Colburn & Thacher, for defendants.

BLODGETT, J. The bill in this case is demurred to on the ground that the complainants, by the showing of the bill, have a plain, adequate, and complete remedy at law. The bill shows the issue of letters patent to one Bramer for certain devices pertaining to mowing-machines, and a license from Bramer to the defendant to use the patent, for which it was to pay as royalty the sum of three dollars for each machine, with the right to an abatement in case of prompt payment. The death of Bramer after making the license, and the appointment by him of complainants as executors of his will and trustees of the patent, is also averred. The bill charges that a large sum is due the complainants under this license, both for royalties which accrued before Bramer's death as well as since, and that the complainants do not know, and are unable to ascertain, the exact number of machines made by defendants, for which royalties are due under the license; and that complainants have demanded an accounting and payment as to the royalties so due, but that the defendant has failed to comply with such demands. It is also charged that through the defendant W. H. Jones, who is the president of the defendant company, some kind of settlement has been made with the heirs and devisees of Bramer for the sum of \$3,000, for which the note of the defendant company has been given, when, in fact, as much as \$15,000 was due under the license, and that such pretended settlement is wholly void as against the complainants, who have the sole right to collect said royalty. The prayer is that the Plano Manufacturing Company be required to account with the complainants, and pay over all royalties, at the rate of three dollars for each machine not heretofore reported and paid for.

I can see no reason why the complainants have not a "plain, adequate, and complete remedy at law," under the terms of the license as stated in the bill. The only question to be established is the number of machines made by the defendants under the license, which they have not accounted and paid for heretofore, and this can be established as readily and completely in a suit at law as in equity. Section 724, Rev. St., clothes the courts of law with full power to compel the production of books and papers in evidence under all circumstances

where they might be compelled to produce the same in chancery cases; and this power, with the unquestioned right of complainant to examine all the agents and employes of the licensee as witnesses, seems to me to give all the facilities required for a complete remedy at law. The fact that this licensee has, by its president, obtained some kind of settlement with the heirs and legatees of Bramer can, it seems to me, cut no figure upon the question of jurisdiction in equity at the suit of complainants. If the defendants have, by their dealings with these heirs and legatees, acquired a defense as to this claim for royalties which can only be set up in a court of equity, they are the proper parties to invoke the aid of that court for that purpose. If the relations between the trustees and the heirs or devisees of Bramer were such that the payment to the heirs and legatees might furnish an equitable defense to an action on this license, then the defendant may be obliged to come into a court of equity; but that does not clothe the complainant with the right to do so.

The decision of the supreme court of the United States in *Root v. Railway Co.* 105 U. S. 189, seems to proceed upon the ground that all patentees have an adequate remedy at law in suits against infringers, except in cases where there is a right to an injunction as part of the relief sought; but that in all cases where the only question is as to the amount of profits and damages, and the complainant is not entitled to an injunction, the remedy is at law. This being the rule of jurisdiction as against the infringers, there is certainly less ground for going into a court of equity to recover the royalty stipulated in a license where there is no question of infringement or the validity of the patent to be considered, but the only question is as to how much is due from the licensee under his contract.

The demurrer to the bill is sustained, and leave given to the complainants to amend by the next rule-day.

TOLEDO MOWER & REAPER Co. v. JOHNSTON HARVESTER Co. and others.

(Circuit Court, N. D. New York. August 17, 1885.)

PATENTS FOR INVENTIONS—JURISDICTION—INFRINGEMENT—PATENT ABOUT TO EXPIRE.

Where a bill filed 26 days before the expiration of the patent sets forth that plaintiff has the exclusive right to make and sell the patented article, and is exercising such right and is able to supply the market, and that defendants are making and selling machines in large quantities embodying the invention, and threaten to put on the market, after the expiration of the patent, machines made before its expiration, and prays for an injunction restraining the sale, after as well as before the patent expires, of machines unlawfully made before it expires, it states a case within the jurisdiction of a circuit court and is not demurrable.

In Equity.

Parkinson & Parkinson, for plaintiff.

Cogswell, Bentley & Cogswell, for defendants.

BLATCHFORD, Justice. This bill is brought for the infringement of letters patent granted to John S. Davis, March 10, 1868, for an improvement in reapers and mowers, for 17 years from that day. The bill was sworn to February 9, 1885, and filed February 12, 1885. The plaintiff is alleged to be a corporation of Ohio; the defendant corporation, a corporation of New York; and the other defendants, its officers and citizens of New York. The bill avers that the plaintiff, from December 23, 1881, has been continuously engaged in making and selling machines, under and in accordance with the patent, at Toledo, Ohio, and elsewhere in the United States, and has been and is prepared to fully supply the market therefor, and is the owner of the patent, and has invested and expended large sums of money and been to great trouble in and about the invention, and for the purpose of carrying on the business of making, selling, and introducing to the public, in Toledo and elsewhere in the United States, and, among other places, in the Northern district of New York, machines embodying the invention, and making the same profitable to itself and useful to the public; that the invention has been and is of great benefit and advantage, and has, by the efforts of the plaintiff and its predecessors in title, been made extensively and favorably known to the public, and many machines were made according to the invention, and sold by the plaintiff and its predecessors in title; that it has reserved to itself the entire right to make, use, and sell under the patent, and has granted no licenses to make thereunder; that the defendants, in infringement, have made and sold machines containing the invention, and still continue to do so, and are threatening to make the said machines in large quantities, and to supply the market therewith, and to sell the same; that said acts of infringement are being carried on by the defendants jointly in the Northern district of New York and in Toledo, where the plaintiff has built up a trade in the machines, and is prepared to supply the market therewith; that the defendants are now, in the Northern district of New York, making large quantities of the machines containing the invention, and preparing and intending to put upon the market and sell for use, during the season of 1885, in said district, and in and about Toledo, and elsewhere in the United States, such machines so manufactured prior to the expiration of the patent; that they have large quantities of the machines on hand, which they are offering for sale; and that the use of the invention by the defendants, and their avowed determination to continue the same, encourage and induce others to infringe the patent. The bill prays for an account of profits, and for an injunction restraining the defendants from further constructing or selling or using any of the machines, and from selling or putting into use, as well after as before the expiration of

the patent, "any infringing machines unlawfully made or acquired, in whole or in part, during the term thereof; and that all infringing machines now in possession or use of the said defendants may be destroyed, or delivered up to your orator for that purpose." It also prays for a decree for damages in addition to profits, and for an increase of damages, and a provisional injunction. The defendants demur (1) for want of ground for equitable relief; (2) for want of equitable jurisdiction; (3) because the bill shows that the remedy, if any, is at law.

This case does not fall within the ruling in *Mershon v. J. F. Pease Furnace Co.*, *infra*. In the present case, the bill was filed 26 days before the patent expired. There was time to give notice of a motion for a provisional injunction, and to obtain it. Moreover, the bill sets forth special circumstances for equitable relief, in that the plaintiff has retained the exclusive right to make and sell, and is exercising it, and is able to supply the market, and the defendants are making machines containing the invention, and threaten to make them in large quantities, and intend to put on the market in the season of 1885 infringing machines made before the patent expires, and have large quantities on hand which they are offering for sale; and the bill prays for an injunction restraining the sale, after as well as before the patent expires, of machines unlawfully made before it expires. Such a case is like that of *Crossley v. Beverly*, Webst. Pat. Cas. 119, commented on in *Smith v. London & S. W. Ry. Co.* Kay, 408, and like the cases, in this circuit, of *American Diamond Rock Boring Co. v. Sheldon*, 18 Blatchf. C. C. 50; S. C. 1 Fed. Rep. 870; and *American Diamond Rock Boring Co. v. Rutland Marble Co.* Id. 146; S. C. 2 Fed. Rep. 356.

The demurrer is overruled, with costs, and the defendants are assigned to answer the bill by the rule-day in October next.

MERSHON v. J. F. PEASE FURNACE CO.

(Circuit Court, N. D. New York. August 17, 1885.)

PATENTS FOR INVENTIONS—JURISDICTION—REMEDY AT LAW—REV. ST. §§ 723, 4921.

A bill for infringement of a patent, and for an account of profits and damages, and for injunction, provisional and perpetual, but setting forth no special ground for equitable relief, is demurrable, where the patent will expire four days after the filing of the bill, and three days after the service of the subpoena, and where, by the rules of the court, a notice of eight days, of a motion for an injunction, is required.

In Equity.

Forbes, Brown & Tracy, for plaintiff.

Duell & Hey, for defendant.

BLATCHFORD, Justice. This is a bill in equity brought for the infringement of reissued letters patent No. 4,695, granted to the plaintiff, January 2, 1872, for an improvement in dampers for hot-air furnaces, for the unexpired term of 17 years from May 5, 1868, on which date the original letters patent No. 77,512 were granted to the plaintiff. The bill prays for an account of profits and damages, and for injunctions provisional and perpetual, but it sets forth no special ground for equitable relief. The bill was sworn to April 29, 1885, six days before the patent would expire. It was filed May 1, 1885, and the subpoena to appear and answer was served May 2, 1885. The defendant interposes a demurrer for want of equity, which also alleges want of jurisdiction in the court, because the plaintiff has an adequate remedy at law. It is provided by section 723, Rev. St., that "suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law." If there is such a remedy at law, when the defendant is brought into the court of equity; if there is not, in good faith, at that time, a case in which the court of equity could, by the exercise of its jurisdiction in the ordinary course of procedure, give to the plaintiff the most moderate measure of equitable relief which he prays, or would be entitled to, on his allegations; if the coming into the court of equity appears to be a pretense to avoid a court of law; the court of equity should not entertain the case. The jurisdiction conferred by section 4921, Rev. St., is "to grant injunctions according to the course and principles of courts of equity, to prevent the violation of any right secured by patent, on such terms as the court may deem reasonable; and, upon a decree being rendered in any such case for an infringement, the complainant shall be entitled to recover, in addition to the profits to be accounted for by the defendant, the damages the complainant has sustained thereby; and the court shall assess the same, or cause the same to be assessed under its direction." Not only, as is suggested in *Root v. Railway Co.* 105 U. S. 189, 206, does the language of section 4921 seem to make the power to award profits and damages dependent upon the power to grant an injunction, but the general "course and principles of courts of equity" make the right to an account dependent on the right to an injunction. *Higginbotham v. Hawkins*, L. R. 7 Ch. App. 676; *Baily v. Taylor*, 1 Russ. & M. 73; *Smith v. London & S. W. Ry. Co.* Kay, 408. In speaking here of "power" and "right," I refer to entertaining the suit at all, and not to the power to give proper relief, in an equity suit properly brought, where the patent expires during the pendency of the suit. This power was exercised in *Lake Shore Co. v. Car-brake Shoe Co.* 110 U. S. 229, S. C. 4 Sup. Ct. Rep. 33, and in *Consolidated Valve Co. v. Crosby Valve Co.* 113 U. S. 157, S. C. 5 Sup. Ct. Rep. 513.

In the present case, the sole object of the bill plainly appears to be to obtain pecuniary compensation, in the shape of profits or dam-

ages, in a case where no injunction of any kind could be obtained; for, by the rules of the court, a notice of eight days of a motion for an injunction is required. The coming into a court of equity under such circumstances will not be permitted. *Betts v. Gallais*, L. R. 10 Eq. 392. As the bill does not show that an action at law for damages would be an inadequate remedy for the wrongs complained of, and no *bona fide* ground for equitable relief is presented, the demurrer is allowed, with costs.

MAGIN v. MCKAY.

SAME v. WELKER.

(Circuit Court, N D. New York. August 20, 1885.)

PATENTS FOR INVENTIONS—ANTICIPATION—INVENTION—APPARATUS FOR COOLING AND DRAWING BEER.

Patent No. 248,646, granted to Charles Gordon, October 25, 1881, for an improvement in apparatus for cooling and drawing beer, *held void* as to claims 1, 3 and 4.

In Equity.

George B. Selden, for plaintiff.

Josiah Sullivan, for defendants.

BLATCHFORD, Justice. These suits are brought on letters patent No. 248,646, granted to Charles Gordon, October 25, 1881, for an "improvement in apparatus for cooling and drawing beer." The specification says: "My invention relates to an improved apparatus having for its object the keeping of beer, ale, or other liquid at a low temperature during the operation of drawing the same for consumption; and it consists in surrounding the supply-pipe through which the beer is delivered to the faucet with a cold-air passage, for the purpose of maintaining a low temperature in the liquid in the supply-pipe. My invention also consists in surrounding the cold-air passage and the faucet with a non-conducting jacket, and in the combination with the ice-box, and the lower chamber for storing the beer, of the supply-pipe and the cold-air passage communicating between the ice-box and chamber, as hereinafter more fully set forth." A keg of the liquid is placed in a chamber in the cellar. A supply-pipe leads upward from it to a faucet from which the liquid is drawn for consumption. An outer pipe surrounds the supply-pipe, leaving an air space around it, its whole length, from the lower chamber to an upper ice-box, through which the supply-pipe passes, and with which the outer pipe is connected. As many supply-pipes as are used may pass through the air space. A non-conducting jacket surrounds the outer pipe. The air, cooled by the ice in the ice-box, and the water produced by the

melting of the ice, flow down through the air space and reduce the temperature of the liquid in the supply-pipe. An air-forcing apparatus connected with the keg forces up the liquid. A pipe packed with a non-conducting substance surrounds the faucet. There are four claims: (1) The combination of the ice-box, supply-pipe, faucet, and cold-air passage surrounding the supply-pipe; (2) the combination with the ice-box of the supply-pipe and faucet, the latter having its jacket; (3) the combination with the ice-box, supply-pipe, and faucet, of the cold-air passage and the non-conducting jacket of the latter; (4) the combination of the ice-box, supply-pipe, faucet, lower chamber, and cold-air passage communicating between the ice-box and the lower chamber.

In the McKay suit infringement is alleged of claims 1 and 4; in the Welker suit, of claims 1, 3, and 4. Gordon made his invention in June, 1879. So far as claims 1 and 4 are concerned, the invention was anticipated by an apparatus invented and put in use by one Meinhard, in Rochester, New York, in the summer of 1877, and which was continued in use about four years. That apparatus had the upper ice-box, the supply-pipe, the faucet, the lower chamber, and the cold air-passage surrounding the supply-pipe, and communicating between the ice-box and the lower chamber. It had three faucets, each with a supply-pipe. Each supply-pipe led separately to a barrel in the lower chamber, and each was surrounded by a cold-air passage, created, as to its upper part, by a surrounding tin pipe, and as to its lower part by a rubber hose, which embraced closely the lower end of the tin pipe. The water of the melted ice, and the cold air, flowed down around the supply-pipe into the lower chamber. The lower ends of the three pieces of rubber hose went into the lower chamber through a common opening, and it was not tightly closed around them. But the apparatus was a practical and successful one, and embodied the same principle as that of Gordon. It may have been inferior in degree in utility and perfection, but the invention was there, and the apparatus continued in use for nearly two years after Gordon obtained his patent. It did not contain the non-conducting jacket surrounding the outer wall of the cold-air passage, which is a feature in claim 3 of the patent, but there was no patentable invention in adding a non-conducting jacket to the elements found in claim 1, or to those found in claim 4. The jacket is merely a space filled with non-conducting material, to prevent the absorption of heat by the air in the cold-air passage. It was common knowledge, and not invention, to add this to what Meinhard had.

The bills are dismissed, with costs.

THE ALLIE & EVIE.

PHILADELPHIA & R. R. Co. v. THE ALLIE & EVIE and others.

(District Court, S. D. New York. August 2, 1885.)

1. TUG AND TOW—SUDDEN SQUALLS—CUTTING ADRIFT—DROPPING ASTERN.

The tug A. & E., at South Amboy, New Jersey, took in tow two coal-barges, along-side, to go some 18 miles across the lower bay of New York harbor, and thence about six miles up the shallow Shrewsbury river to Red Bank, on an established line for towage. When about two-thirds of the distance to the Shrewsbury river, a sudden and violent squall raised a high sea that caused the boats to pound so much that they were cut adrift, after the captain's refusal to remain aboard of them to steer if dropped astern on a hawser, for fear of being washed overboard. The evidence was that, without a helmsman aboard to steer, the barges could not have been saved in such a wind and sea even if dropped astern; that the A. & E. was built to run upon this service; that she was competent to handle such barges in any weather ordinarily to be expected on such trips; and that the usual course, and usual precautions, were observed. *Held*, that the tug was reasonably sufficient for the work undertaken, and not liable for the loss of the barges because she did not drop them astern when the squall was approaching.

2. SAME—WEATHER ON STARTING—BAROMETER—CAUTIONARY SIGNALS.

A low but rising barometer, and cautionary signals displayed, are not alone sufficient to make starting on such a trip negligence, in the absence of all other indications of bad weather.

3. SAME—REASONABLE SUFFICIENCY FOR THE TRIP—CUSTOM.

Tugs, not being insurers, are liable only for lack of reasonable prudence, judgment, and skill; and as regards the adequacy of the tug, the fitness of the weather on starting, as well as regards seaworthiness in general, the question is a practical one of reasonable sufficiency for the particular trip in the judgment of skillful and prudent navigators, and on this question the customs of the time and place are competent evidence.

4. SAME—REASONABLE SKILL IN USE OF CUSTOMARY METHODS.

Where a tow is sent to be towed upon an established line whose methods of towage are known, and these methods are not in themselves unjustifiable, the contract implied by law is for the use of all reasonable judgment and skill in the use of these methods; and if there is no fault in this respect, the tug is not liable.

In Admiralty.

Mitchell & Mitchell, for libelants.

Wilcox, Adams & Macklin, for claimants.

BROWN, J. This libel was filed to recover about \$4,800 for the loss of two coal-barges, with their cargoes, on the night of December 14, 1883, which were cut adrift during a squall in the lower bay while the boats were in tow of the tug Allie & Evie, on a trip from South Amboy to Red Bank, on the Shrewsbury river. The barges belonged to the libelants, and had taken on board cargoes of coal at Schuylkill Haven, Pennsylvania, consigned to Miles Ross, Red Bank, New Jersey, for which bills of lading were given "excepting the dangers of navigation." Arriving at South Amboy, the boats were taken in charge by the Pennsylvania Railroad Company, which had a towing line making regular trips to Red Bank, which is some five or six miles up the Shrewsbury river. This river is narrow and shallow, and can only

be navigated with such barges at or near high water, and only light-draught tugs can be used in such service. The distance from South Amboy to the mouth of the Shrewsbury is about 18 miles, and the course lies across the lower bay, where a high wind soon raises a sea that is dangerous to any but ocean-going vessels. The tug-boat Allie & Evie had been constructed for this line the spring previous, and had made some 13 trips before the present. She usually took two boats along, one on each side, and the weight of evidence is that she was competent to handle such a tow, except in a high sea. Around South Amboy she could manage four or five such boats, and since this loss in 1883 she has continued in the same service without accident.

Upon this trip the Allie & Evie left South Amboy, as customary, at high water, which, on that night, was at 8:30 p. m. The libelants' boats were lashed one upon each side, as usual. A larger steam-tug, the Harry, of the same line, having no employment, was directed to accompany and assist the Allie & Evie a part of the way. She did so for nearly two-thirds of the distance to the mouth of the Shrewsbury river, when she cast off and returned to South Amboy. One of the libelants' witnesses says that when the Harry left there was a drizzling rain, but that the sea was calm and smooth. Several other witnesses say that it was then clear above, with the stars shining, and that there were no indications of the approach of bad weather. About half an hour after, and a little before 11 p. m., black clouds gathered suddenly in the west, the wind increased rapidly to a gale from the north-west, the sea rose, and the two barges, whose bows projected far beyond the tug, soon began to pound the tug, and became so displaced through the breaking of some lines as also to strike each other's bows. It then became apparent that the barges must be cut loose. The persons aboard of them came on board the tug, and the barges were cut adrift and lost. Before casting them off, some conference was had between the pilot of the tug and the captain of one of the barges, the only person aboard of that boat, about dropping the boats astern upon a hawser; but the captain refused to remain on board the barge if dropped astern, for fear of being washed overboard. The other captain was, in the mean time, getting his family aboard the tug. On the trial both the captains testified that they would not have consented to stay aboard; they assisted in cutting their boats adrift, and they both, with other experts of the libelants, as well as the respondents' witnesses, agreed that it would have been of no use to drop the barges astern on a hawser without men aboard to steer them. The Schuylkill boats are not easily managed on a hawser, and they steer badly.

Unless the testimony of all the boatmen is discredited, the squall was a very violent one; the sea dangerous; and the tug in peril, even after the barges were cut adrift. The two captains did not expect to reach the shore alive. The pilot was alarmed for his safety. The waves washed over the pilot-house, the bulwarks of the tug were cut

away to ease her and let the water out, and when she got under the lee of Staten island she had three feet of water in her, reaching nearly to her fires.

It is not claimed that the respondents were insurers; but upon the rule laid down by the supreme court in the case of *The Margaret*, 94 U. S. 494, 496, that "the tug is the dominant mind and will in the adventure;" that "she is bound to bring to the performance of the duty she has assumed reasonable care and skill, and to exercise them in everything relating to the work until it is accomplished"—it is urged that the respondents are liable for this loss, (1) because the Allie & Evie was not a fit and proper tug for the work that she undertook; (2) because the barometer and cautionary signals displayed in New York indicated dangerous weather for some considerable time before she started out, and that the tug was not justified in starting; and (3) because the tug Harry returned sooner than she ought, and because, had she kept by, each tug, as it is claimed, might have saved one boat.

In regard to the last point, notwithstanding some reluctance to give full credit to the testimony that it was impossible to save either barge if dropped astern on a hawser unless there were a man aboard to steer her, the weight of evidence is so strong on both sides upon that point that I am not at liberty to disregard it. If that be so, even if the Harry was not justified in returning when she did, I do not perceive how remaining by could have made any difference in the result, as it is clear that neither of the captains was willing to remain aboard his barge to steer her. The early departure of the Harry, therefore, must be held to be immaterial as respects this loss, because there was no service that she could have rendered, except to take one boat astern on a hawser without any helmsman aboard, and that, according to the evidence, would have been ineffectual. But the weight of evidence is that there were no indications of bad weather when the Harry left the other tug some seven miles distant from the Shrewsbury river; and, considering that the use of two tugs was not customary, I cannot hold it negligence, or want of reasonable care, for her to return under such circumstances, without holding these trips, though made in the customary manner, to be wholly unjustifiable.

Even if the pilot of the Allie & Evie might have thought that the men could safely stay aboard, though he evidently did not think so, he had no lawful command or arbitrary power over the captains of the barges,—such as the captain of a vessel has over the seamen under him,—and he is not responsible for the conduct of the captains any further than they choose to comply with his requests or directions. *Sturgis v. Boyer*, 24 How. 110; *The Express*, 3 Cliff. 462; *The James P. Donaldson*, 19 Fed. Rep. 264. Here the pilot proposed to drop the barges astern, the captains refused to remain aboard, and that seems to have been taken as settling the question that the barges must be cut adrift; and upon the evidence I must find it rightly so determined.

It is argued that the barges should have been dropped astern on the first signs of the squall. This might possibly have been done with the men still on board. But their testimony on the trial was that in their judgment they would, in that case, have been certainly washed overboard and all lost. Upon that testimony of the libellants' witnesses I cannot find it to have been a fault in the tug that she did not pursue that course, even if there was time for it, after it became probable that there would be danger to the boats in keeping along-side; and it is not clear that there was time after the extent of the danger became apparent.

That the Allie & Evie was not competent to handle and save this tow in the sudden and violent squall that sprung up, is plain from the result. But upon the evidence above referred to it must be held that the Harry, and probably any other tug, would have been equally incompetent. The difficulty did not spring from lack of power in the tug, but from the unavoidable dangers of the route. No tug can tow barges along-side in a high sea. They must soon founder from pounding; and if the sea is too high to permit men to remain on the barges to steer, and if such boats, though on a hawser, could not be saved without being steered, as would appear from the evidence, then there is no alternative in such an emergency but to cut the boats adrift.

Navigation cannot escape dangers. If it could, there would be no place for insurers. There are very certain and very peculiar dangers that attend navigation on such a route as this,—a route that combines the navigation of a shallow river with a passage of from 12 to 15 miles across a broad bay liable to high and dangerous seas in sudden squalls, with boats that, if the testimony is to be credited, are unmanageable under such circumstances. All that can be done in such navigation is to take every reasonable precaution that prudence and good judgment can suggest,—precautions proportionate to the dangers involved,—and to start out only when there is no reasonable probability of bad weather. Upon this point the witnesses on both sides agree that when the tug started from South Amboy there were no recognizable signs of bad weather. The barometer was, indeed, low, though it was rising towards evening; cautionary signals had been displayed in New York since the morning; and these signals continued to be displayed for two days. These facts, however, were not known to those in charge of the line at South Amboy, although they might have been ascertained by telegraphic inquiry, and also through Mr. Chace, the general superintendent of this department of the respondent's business. But a low though rising barometer, and the display of cautionary signals, are not alone, in my judgment, so certain indications of bad weather that trips of a few hours' duration only must be condemned, where all the ordinary signs visible to experienced and practical seamen indicate safe weather for the trip. No experts were called to testify that the starting out was improper under the circumstances. If such short trips were condemned by law,

as lacking ordinary prudence, on account of the mere possibility of danger suggested by the barometer and cautionary signals, in the absence of any other unfavorable indications, much of the towing business of this harbor must often come to a standstill for a considerable period, except at the risk of the tugs as insurers. Clearly, that is not the practice; nor is it the fair import of the contract of the parties in taking such boats to tow. Practices, or so-called customs, that are at variance with the obligations that the rules of law impose, are indeed void, and afford no defense. *The Wm. Murtaugh*, 3 FED. REP. 404. But there is no rule of law, and I am not prepared to hold, that short towing trips must be condemned so long as the barometer is low, though rising, and cautionary signals are displayed, in the absence of all other indications of probable bad weather.

The requirements of law are substantially the same, both as to the adequacy of the tug for the work assigned her, and as to proper weather for starting out; and it is the same that is applied to seaworthiness in general, viz.: reasonable sufficiency for the particular trip or voyage, according to the judgment of persons versed in the business. The defense of unseaworthiness is not made out by showing that "a stouter ship might have survived the peril." *Amies v. Stevens*, 1 Strange, 128. The law does not require a vessel, to be seaworthy, to be capable of withstanding every peril; nor that a tug be capable of rescuing her tow in all weather; nor that she shall start only when there is no possibility of danger; nor that the master in an emergency shall infallibly do that which, after the event, others may think would have been best. *The Hornet*, 17 How. 100; *The Star of Hope*, 9 Wall. 230; *The W. E. Gladwish*, 17 Blatchf. 77, 83; *The Mohawk*, 7 Ben. 139. The tug must be reasonably adequate for the work undertaken; managed with reasonable judgment and nautical skill; and she must start only in weather that in the judgment of nautical men is reasonably safe for the trip. In whatever form the question comes up, whether as to seaworthiness, adequacy for the work, or the time of starting, it is a practical question of reasonable prudence and judgment. And as regards seaworthiness in general, or the adequacy of the tug for the work undertaken, there is no other final criterion than the judgment of practical men versed in the business and the customs and usages of the time and place, viewed as representing the judgment and knowledge of the time. To show this, the custom and practice of nautical men is admissible. See *The Titania*, 19 FED. REP. 101, 105-109, and cases there cited. The exercise of reasonable prudence and judgment, measured by this standard, does not exclude some remaining maritime risks. Against these risks it is the province of insurers to provide; otherwise, the shipper is his own insurer.

In the present case the consignee had telegraphed to the respondents: "Please send the Red Bank boats down to-night, if possible; the Shrewsbury may freeze up any day." In the judgment of the two

captains who were the libelants' witnesses, as well as in the judgment of all the other witnesses who testified on this point, there was nothing apparent in the weather that should deter them from starting. Had they not started, and had the Shrewsbury frozen up the next day, a claim of damages might have been interposed. All the usual precautions were taken. No similar accident on this line has occurred, either before or since. The same tug has been in use, and in the same way. No witnesses have expressed the judgment that the weather was unfit for starting. The evidence shows that the *Allie & Evie* was built for this express purpose; that she was adequate to handle the tow in any ordinary weather that was to be expected. I am not prepared to hold these trips unjustifiable in law on account of their peculiar dangers, and the evidence does not clearly establish any actual negligence or want of reasonable care; and even the loss that subsequently happened arose, as it seems probable, not from anything indicated by the barometer or the cautionary signals, but from a sudden squall from the north-west, quite probably wholly independent of the conditions indicated by the long-continued signals and barometric observations. The libelants, moreover, were as familiar with the sea perils of the route as the respondents were. As the line was an established one, and in use by the libelants, it cannot be doubted that they were acquainted with the means of transportation employed and the modes of navigation. Under these circumstances the contract of the parties implied by law was for the exercise of reasonable prudence, judgment, and skill in towing the barges according to the customary methods and usages of the line.

I think this loss was one properly to be ascribed to the perils of navigation, in a sudden squall, not reasonably to have been anticipated; and not to inadequacy of the tug, or to want of reasonable skill or judgment, either in not keeping out of danger, or in avoiding it when it overtook them. *The Geo. L. Garlick*, 20 FED. REP. 647; *The James P. Donaldson*, 19 FED. REP. 264; *The Charles Allen*, 23 FED. REP. 407. There must, therefore, be judgment for the respondents; but costs will not be awarded against the receiver.

THE LURAY.¹

VICKERY and another v. THE LURAY.

ROLLISON v. THE LURAY and THE GRACE.

(District Court, E. D. Virginia. March 16, 1885.)

1. COLLISION—STEAMERS—FOG—FAULT.

A steamer moving south, on the western side of the channel, at the rate of four and three-fourth miles an hour, with the tide, which rate is barely sufficient for steerage way, there being a dense fog at the time, is not moving so fast as to be in fault for a collision with an approaching steamer, which is moving at the rate of five and one-third miles an hour against the tide.

2. SAME—SPEED.

In a dense fog a speed of five and one-third miles an hour, against the tide, in a narrow channel, when the vessel is under full command of ~~steerage-way~~, is too rapid.

3. SAME—WHISTLE—PERSONAL INJURY TO CREW.

A steamer which runs through a dense fog with a whistle blowing so feebly and imperfectly that it gives no notice of her proximity to neighboring vessels, is at fault, and one of her crew, who has been injured in a collision with an approaching vessel not in fault, may recover of the steamer employing him damages for such injury.

In Admiralty. In a cause of collision.

White & Garnett, for the Grace and owners.

Whitehurst & Hughes, for J. W. Rollison.

Sharp & Hughes, for the Luray and owners.

HUGHES, J. On the morning of January 30, 1883, the steamers Luray and Grace came in collision about midway of the ship channel, a quarter of a mile N. $\frac{1}{2}$ E. from the Craney island light-house, in Elizabeth river. The Luray was on her usual trip from Hampton and Old Point Comfort to Norfolk. The Grace was bound out from Norfolk on a trip into the Rappahannock river. The collision occurred, according to the weight of evidence, at 9 o'clock, 48 minutes, A. M. The Luray struck the Grace on her port side, at an angle of about, or nearly, 30 deg., a little abaft of midship and forward of her boiler, and penetrated her hull to within three feet of her side on the starboard quarter. The keel of the Grace was not struck. The Grace sank at once in five and a half fathoms of water. All on board were saved, except one passenger, who was in the cabin below, whose body was recovered the next day. Her fireman, James W. Rollison, was severely injured, and one passenger sustained temporary injury. The headway of the Luray was arrested by the contact; and she gave all the assistance that was possible in saving the crew and passengers of the Grace.

The collision occurred in a very dense fog,—in what is called a fog-bank,—which the Luray had entered four-fifths of a mile below, at

¹ An appeal is pending from these decisions.

buoy 7. This dense fog had prevailed during the whole trip of the Grace from Norfolk to the place of collision. The distance of this place from Craney island light-house was 520 yards, and from buoy 7 was 1,670 yards by the chart.

The owners of the Grace file their libel against the Luray, claiming \$10,000 of damages, which they claim to have sustained from the accident, and produce evidence to show their actual outlay for repairs to have exceeded \$7,000. The contention of the libelants is that the Luray was running too fast on the occasion, in such a fog as then prevailed, and did not give proper signals, duly announcing her whereabouts, by steam whistles.

The Grace is a steamer of about 41 tons; and she had but little freight. She was built for a fishing steamer, and had large holds in her hull. She is of light structure, but was strong and staunch. Her breadth of beam was $16\frac{1}{2}$ feet, and her length 85 feet. The Luray is a very strong and staunch boat, 150 feet in length of keel, and had a tonnage of three to four hundred tons. The evidence taken by parties on either side in this cause is unusually voluminous; and on several points is absolutely contradictory and irreconcilable. I will not undertake to review it; though I have given it frequent perusals and much thought. I shall confine myself in what follows to what seem to be the most important questions in the case; chiefly to the inquiry whether the Luray was at fault in being in the place where the collision was, or in running too fast in the fog that she was in at the time of the collision; and whether she was also at fault in respect to fog signals, and other precautionary measures.

The evidence of respondents shows that the Luray left the wharf at Old Point Comfort sharply at 9 o'clock, and, the fog being light at the time, came at her usual speed of 12 miles an hour to Sewell's Point wharf; that she ran in at that wharf, and was seven minutes there putting off cargo; that she resumed her trip and came on for Norfolk, having lost 10 minutes in going to, stopping at, and again getting under way from Sewell's Point wharf; that she came as far as buoy 7 at the rate of 10 miles an hour, or somewhat more, the fog still not obstructing the vision; that she reached buoy 7 at 40 minutes after 9 o'clock, and there struck and entered the fog-bank; that she immediately slowed down her speed, which, in the course of the three succeeding minutes, was reduced to half-speed; that she continued still to check her speed for three minutes longer; that at the end of six minutes from buoy 7 she ported her helm a little, which nearly destroyed her steerage-way, going on a flood-tide only at the rate of "4 or 5 miles an hour, not more than that, over the ground;" that two or three minutes later, as her engineer was about to increase her speed, in order not to lose her steerage-way the Grace shot out of the fog across her bows so near to her that all witnesses agree it was impossible to avoid a collision.

The evidence further shows that the Grace was crossing the bows

of the Luray at an angle of about or nearly 80 deg., although the Grace's pilot and master testify that she was moving N. $\frac{1}{4}$ W., and although the navigators of the Luray testify that she was moving S. $\frac{1}{4}$ E. up to three minutes before the collision, when she ported her helm a little, throwing her slightly further to the west. Here is a point in regard to which the evidence is conflicting. The burden of proof is on the libelants, and the evidence leaves this matter in doubt, with the probabilities against the Grace. It is conceded that the angle of collision was about 80 deg. The Grace claims to have been heading directly from buoy 9 to buoy 7; but she was in fact 85 to 100 yards to the west of this course when the collision occurred. She must have passed near Craney Island light-house, (which, by the chart, is 115 yards westward of a straight course from buoy 9 to buoy 7;) for Capt. Kenney, her master, testified that he was steering from the light-house for a buoy a quarter of a mile north, which could only be red buoy 8, which is due north of the light-house, and which is, by the chart, 120 yards west of a straight course from buoy 9 to buoy 7, on the western edge of the channel. Her pilot must have been aware of this fact, and must have been crossing obliquely eastward to regain the course he was intending to pursue when the collision occurred. The Grace was under the disadvantage of a thick fog all the way down, was continually uncertain of her position, as was shown by her master's constant heaving of the lead, and could not avoid varying materially from her intended course a great part of the time. Moreover, her pilot was not a licensed Virginia pilot, and her master was not especially familiar and experienced in these waters. If the Grace had been on a direct course from buoy 9 to buoy 7, as she desired to be, the chart shows that at the time of the collision she would have been 100 yards to the east of where she actually was, and that a collision would not have been possible.

It was not a fault that the Luray was where she was, near the western edge of the ship channel, with helm a-port. Unless signaled to the contrary, vessels usually pass each other port to port, each one passing on her starboard side of the channel. This is where the Luray was running in coming up the channel, and it is not pretended that she got a signal to pass the other side. The middle of the ship channel at that place is shown by the evidence and the chart to be not more than 50 yards from the west bank; while on the east side there is more than half a mile of deep water, spreading out to the mouth of Tanner's creek. I conclude from all the evidence under this head that the Grace before the collision had been quite near the west bank of the channel, and that this not being the proper side for a vessel going north, she was crossing over to gain a direct course from buoy 9 to buoy 7, when she encountered the Luray; that at that moment she was heading much more directly across the channel than a course N. $\frac{1}{4}$ W.; and that, by being on her port side of the channel, in a fog, and in addition crossing the channel at an angle

of nearly 80 deg., she rendered a collision with any vessel meeting her more or less inevitable.

The unfortunate position and attitude of the Grace at the time of the collision would not relieve the Luray of fault, however, if, at the time, the Luray was running faster than is allowable in a fog. The speed of the Luray, therefore, while in this fog-bank, is the very gist of this case; and I shall enter into the inquiry on that point with all the minuteness of scrutiny which the case admits. The proof is that she left Old Point wharf sharply at 9 o'clock; that she ran at the rate of 12 miles an hour until reaching Sewell's point; that she lost 10 minutes in touching at the wharf there; and that she was at buoy 7 at 40 minutes after 9. The distance from Old Point to buoy 7 is shown by the chart to be 11,385 yards, or five and a half nautical miles. If the Luray had run at the rate of 12 miles an hour over the whole distance, then calculation shows that, allowing 10 minutes for the delay at Sewell's point, she would have reached buoy 7 at 9 o'clock, 37½ minutes; but the proof is that she did not reach there until 9:40, having lost 2½ minutes by running at less than full speed between Sewell's Point wharf and buoy 7. From that buoy to the place of collision is shown by the chart to be 1,670 yards, or rather more than four-fifths of a nautical mile. The collision occurred at 9 o'clock and 48 minutes. The Luray was therefore eight minutes in running the 1,670 yards. It is important to ascertain how those yards were run. On reaching buoy 7 the evidence is that she was running at the rate of ten miles an hour, and that she was then rung down to slower speed in consequence of her having entered the fog-bank. Her navigators testify that in three minutes she had been brought down to half speed, say six miles an hour; that she continued to be brought slower for three minutes longer; that then her helm was ported a little, which still further checked her steerage-way; and that in two minutes more, when the collision happened, she had scarcely enough steerage-way for navigation. I will endeavor to distribute her speed in these eight minutes. Counsel for respondents insist that this interval between buoy 7 and the collision was nine minutes. I assume that it was only eight minutes, which assumption is to that extent adverse to them.

If the Luray ran at the average rate of nine and one-half miles an hour during the first minute after passing buoy 7, at the average rate of eight miles during the second minute, and at the average rate of seven miles during the third minute, the result was as follows: She ran in the

First minute,	-	-	-	-	-	-	-	-	830 yards.
Second "	-	-	-	-	-	-	-	-	277 "
Third "	-	-	-	-	-	-	-	-	243 "
Total	-	-	-	-	-	-	-	-	850 yards.

—and at 9:43 she was within 1,670 less 850 yards, or 820 yards, of the place of collision, and within five minutes of the time of the ac-

cident. If she then ran all these five minutes at an equal speed, and was not slowing down still more, as the evidence shows that she was doing, she ran during this five minutes at the rate of 164 yards a minute, or rather less than four and three-fourths miles an hour, and struck the Grace when at that speed. And this mathematical showing verifies the statement of Capt. Schermerhorn that at the time of the collision the Luray was running at the rate of "4 or 5 miles an hour, not more," (see page 7 of the testimony bound in book form;) and of Mr. Ross, the engineer, who states (page 2 of his testimony) that she was running at the rate of three to five miles after she had slowed down; and of Capt. Skinner, a Virginia branch pilot, who was on board, and who estimated her speed to be four miles an hour.

It is to be observed that the tide was running flood, at the rate of about one mile and a half per hour; and that though the Luray was running, at the time of the collision, about at the rate of four and three-fourths miles over the ground, yet her steerage-way in the water was only three and one-fourth miles. This was scarcely steerage-way enough; and in point of fact, Mr. Ross, the engineer, testifies (page 3) that, after the rudder had been put across the stern, he was "afraid she did not have steerage-way, so, when he got three bells, he was in the act of opening her out a little." Corroborating this view is the fact that so large and powerful and weighty a boat as the Luray was stopped in her course by coming in contact with so small, light, and yielding a boat as the Grace, and stopped before she had cut across her hull by nearly three feet. If the Luray had had the headway with the current of 10, or even 8, miles an hour, her navigators say that she would have passed entirely over the Grace, with headway enough left still to go on.

I think the conclusion cannot be resisted, and is entirely warrantable, that the Luray was running when she struck the Grace at the lawful speed of about four and three-fourths miles over the ground, and that this, on the flood-tide then prevailing, afforded her only enough steerage-way for safe navigation. None of the decisions of the courts require a steamer running in a fog to slow down to a point at which her steerage-way would be lost or unduly diminished.

I do not propose, in dealing with the libel against the Luray, to go into the question whether the Grace was, in respect to her own crew and passengers, in fault on the occasion of this collision; but yet, it may be incumbent on me in the *Luray Case* to consider some of the points contended for by the officers and crew, and the counsel, of the Grace.

As to the Grace's whistle, the evidence is in hopeless conflict, and I shall not discuss it. I pass to the question of the speed at which the Grace ran in coming down the Elizabeth river to the place of collision. All her witnesses testify that she left her wharf at Norfolk at about 9 o'clock on the morning of January 30, 1883. Her engineer, Brightman, who looked at the clock in his room, fixed the time at just five

minutes after 9 o'clock. The distance to the place of collision is shown by the chart to be four nautical miles from Campbell's wharf. The officers, crew, and some of the passengers of the Grace say, generally, that her speed down river was about three miles an hour. Now, if this were so, it took the Grace one and one-fourth hours to run the four miles, and the collision did not happen until fifteen minutes after 10 o'clock. If this were so, then the Luray would have been running an hour and a quarter (less 10 minutes for touching at Sewell's point) in coming from Old Point. That is to say, she would have made the trip of six miles and three-tenths in an hour and five minutes. This is at the rate of six miles an hour averaged for the whole distance, making no allowance for slowing down after entering the fog-bank.

The theory, therefore, that the Grace ran only at the rate of three miles, would exonerate the Luray, by establishing that, after slowing down from her average speed of 6 miles an hour to "4 or 5 miles, not more," just before the collision, she was not in fault, having at that speed not more than enough steerage-way. But the engineer of the Grace testifies that a little while before the collision his clock showed 9 o'clock, 44 minutes. His clock showed Norfolk time. The Luray's showed 3 minutes slower than Norfolk time. So that the Grace left Norfolk at 2 minutes after 9 by the Luray's clock. We have seen that the collision occurred at 48 minutes after 9 by the Luray's time; which would be 45 minutes after the Grace left Norfolk. Thus the testimony of the officer of the Luray, who looked at her clock, and that of the officer of the Grace, who looked at his clock, concur unconsciously in fixing the time of the collision. This concurrence of the only witnesses whose testimony was definite and distinct is worth more than that of a dozen witnesses who guessed the speed of the Grace in passing through a thick fog, when all objects that could afford an idea of the speed with which they were passing were hidden from the vision.

If the Grace made the distance from Campbell's wharf to the place of collision—four nautical miles—in 45 minutes, according to Capt. Schermerhorn's time, and according to engineer Brightman's testimony, then she was running against the tide at the rate of five and one-third miles an hour with all that speed for steerage-way. If, therefore, either of the two vessels was in fault in running unduly fast in the fog, it was the Grace.

I will sign a decree dismissing the two libels as against the Luray, and allowing 21 days for appeals.

In the case of *James W. Rollison v. The Luray and The Grace*, the libel of James W. Rollison against both the steamers for damages, caused him by badly crushing a leg, and subjecting him to a long and painful illness at St. Vincent's hospital, a considerable loss of time, great pain and suffering, and the ultimate amputation of a leg, de-

pende substantially upon the same principles as those which determine the case of the owners of the Grace against the Luray.

The libellant, James W. Rollison, who was fireman on the Grace, certainly is entitled to recover against one or the other of the steamers; for the collision was the result of fault, and not of inevitable accident. I have stated why I think the Luray was not in fault.

I have also shown that the Grace was running at the rate, over the ground, of five and one-third miles an hour, against the tide, in full command of her steerage-way, and in a very dense fog. I am not prepared to say that five and one-third miles an hour is too fast, under all circumstances, for a steamer to run in a thick fog, but I do think that when she has full command of steerage-way, is in a fog-bank, and in a river channel somewhat narrow, that that speed is too fast. Indeed, the Grace was running over the water at the rate of six and two-thirds miles an hour, the tide setting against her at the rate of one and one-half miles an hour. This, under the circumstances, was too fast.

As to the whistle, the evidence is conclusive that the Grace was diligent in blowing it. I think it is also clear that before the Grace set out from her wharf, and before the engine and boiler were in full action, the whistle made a great noise, probably too much noise. But after she got under way and well out on her trip,—indeed, as she was getting out into the harbor,—her whistle was condemned as defective by steam-boat men, who heard it from a greater or less distance. The testimony of the officers of the Roper, the Fairchilds, the Honing, and the Virginia, boats which she passed at different stages on her trip down the river, seems to establish the fact that the whistle did not give a proper signal, or one that could be heard and understood by vessels meeting her in a fog. The more vigorously, therefore, that she blew her whistle, the more fully she demonstrated to vessels at some distance that it was defective. The object of giving the fog-signal is to make a moving vessel's position known to other vessels in motion in the same waters; it is not to advertise to her own crew and passengers, or to people in neighboring docks, that she is at hand; it is solely to show to vessels navigating the same waters with herself her presence and position. If her whistle is insufficient to give the notice to such vessels, as that of the Grace did not do to the Honing or the Virginia or the Luray, although blown vigorously, then it was fatally defective in respect to the prime object for which it is employed in navigation, and must be condemned. When Capt. Dawes, of the Virginia, hallooed to the Grace, on discovering that the strange noise she was making was intended for a fog-whistle, that "she had better sell it and buy a fog-horn," she ought to have done at once what the Honing did,—she ought to have got in to some wharf.

Rollison is entitled, in my opinion, to recover damages from the Grace, and I do not feel justified in assessing them at less than \$5,050. I will so decree, and allow 21 days for appeal.

THE CONOHO.

(District Court, E. D. Virginia. March 10, 1885.)

1. COLLISION—COASTING STEAMER—LIGHTS.

A coasting steamer not rigged for sails, which navigates narrow channels, is in fault in not carrying the central range of two white lights required by the rules, and in showing instead a single white masthead light. In narrow channels and rivers this range of lights is essential in order to indicate her course accurately to approaching vessels.

2. SAME—BURDEN OF PROOF.

When the question arises, the burden of proof is on the vessel whose lights are attacked to show by clear proof that her lights were properly placed and burning at and just before the collision.

3. SAME—FAULT.

An approaching vessel which sees only a white light on the other vessel, and regulates her movements on the assumption that such vessel is at anchor, is not in fault in case of collision, but the other vessel is solely liable.

In Admiralty. Libel for collision.

Sharp & Hughes, for libelant.

Starke & Martin and *White & Garnett*, for respondent.

HUGHES, J. The collision which is the subject of this libel happened at half past 11 o'clock, on the night of August 30, 1884, in the southern part of Currituck sound. The government of the United States has excavated a canal 80 feet wide, and 9 or 10 feet deep, through the sound and in North Landing river; the former navigation and natural depth of water having been only from six to six and a half feet. On each side of the artificial canal the water of the sound spreads out with its original depth. The government has placed gas beacons along this canal to mark each change in its course, the general course being about S. by E. This collision happened at about three-quarters of a mile north of beacon light No. 7, at a point two miles north of Long Point light. The water of the sound east of the canal or cut at the place of the collision, is six to six and a half feet deep. The collision occurred between the steamer Fairchilds, going south, and the steamer Conoho, going north; the Fairchilds drawing five and a half, the Conoho seven, feet. The Fairchilds was sunk and her cargo damaged; and this libel is brought by the owner of the Fairchilds and by her master, for the damages sustained by vessel and cargo.

The evidence of the libelants presents the following case: The Fairchilds had met and passed the tug Belle Virginia, in tow of a raft, about three miles north of beacon 7, and some distance north of beacon 6. She had up all her regulation lights; namely, her green and red side lights, her aft white light high up above decks, and her lower forward white light. She passed the tug port to port. The Fairchilds held her course in the cut until after passing beacon 6, and saw a white light ahead of her, nearly in range with beacon 7. She took this to be the light of a vessel at anchor. The night was

dark; there was a strong wind from the west; a squall had prevailed, but was subsiding. Concluding that the light ahead was an anchor light, the master of the Fairchilds resolved to pass to the eastward around the stern of the vessel supposed to be at anchor, there being danger of fouling his propeller in passing over the anchor and chain of a vessel at anchor, and the water east of the cut being about six and one-half feet deep. He first slowed down and starboarded his helm. While in the act of running this course, making for the east of the cut, he discovered that the vessel which he had supposed to be at anchor was moving towards him, and was within a hundred yards of him. He immediately blew four whistles and backed his engine, and had barely checked the headway of the Fairchilds when she was run into by the other vessel, abreast of the forward hatchway, and so damaged that she sank in a few minutes, on the east side of the cut, in six and one-half feet of water. The other vessel proved to be the steamer Conoho. Capt. McHorney, master of the Fairchilds, and all the crew of this steamer, testify that they saw no other light on the Conoho except a white light, high up and forward of midships. The proof of the crew of the Conoho is that this light was 42 feet above the deck. Capt. Spidden, master of the tug Belle Virginia, testifies that after the Fairchilds had passed him he saw the white light of the Conoho, and took it to be that of a vessel at anchor; that he saw no other light; and that if her side lights had been burning he could and would have seen them. The bridge-tender at Coinjock, five miles south of the place of collision, and a man who lived at the bridge, testified that when the Conoho passed them she had up only one white light. They were examined apart, and though subjected to a rigid cross-examination, these two witnesses corroborated each other in their statements.

The seventh rule of navigation, prescribed by act of congress as to signal lights for steamers under way, requires that "coasting steamers and those navigating bays, lakes, or inland waters," etc., "other than the Mississippi and its tributaries, shall carry red and green side lights, as prescribed for ocean steamers, and a central range of two white lights, the after light being carried at an elevation of at least fifteen feet above the light at the head of the vessel, the head-light to show through 20 points of the compass," etc., "and the after light to show all around the horizon." Rule second provides that the lights prescribed, "and no others, shall be carried in all weathers between sunset and sunrise." The board of supervising inspectors, in the rules and regulations prescribed for lakes, bays, sounds, rivers, and the seaboard, as authorized by acts of congress of 1871, 1875, 1881, and 1882, require as follows, (see rules and regulations, approved March 5, 1884, p. 47:) "If at anchor, all vessels, without distinction, must exhibit a bright white light at least twenty feet above the surface of the water."

The strict observance of these rules is necessary to the safety of

navigation. By their observance the navigation of steamers at night is rendered as safe as it is by day. The rule for inland waters and narrow channels differs in one respect from that for open waters. It not only requires the two colored side lights, but it requires the two white range lights, to be up and burning. The red and white side lights only show in what *general direction* the steamer is going; they do not show with accuracy *the course* held by the steamer moving in that general direction. In narrow waters it is necessary to safety that this *course* shall be known; and the high light aft, and the lower light forward, fixed on a range with the center of the vessel, as required by rule 7, shows this *course*.

These two sorts of lights are probably more important in narrow channels than the red and white lights. They are both essential. It is for this reason that every steamer navigating narrow waters at night is required to have these lights up. If a steamer has them not it is in fault; it is grossly in fault. It takes the risk and responsibility of whatever may happen when they are not up. The burden of proof is upon the steamer to show that they were up. The proof must be positive. It must not be a matter of inference. These lights must be shown to have been up at the time of the collision, and long enough during the moments just previously to have permitted the approaching vessel to make the maneuvers proper for avoiding a collision. There can be no safe navigation of our inland waters by steamers at night unless the master of each steamer *knows* that these lights are up at every moment while he is in motion. What I said in the case of *The Oliver*, 22 Fed. Rep. 848, I repeat with emphasis and enlargement: the law as to lights is imperative. It must be obeyed. It must be effectively obeyed. Obedience to the requirements of the law must be certain and *unremitted*. The master, or officer in charge, must *know* that the lights are continually up. Conjecture will not do. If he does not look to it himself he must have a lookout on deck, not only to keep the lights constantly burning, but to be able to say positively, in the event of a collision, that they were up before and at the time of it. The courts must not be driven to the necessity of fishing for the truth in the uncertain and conflicting testimony of the seamen of rival crews.

The case under consideration turns chiefly upon this question of the lights of the Conoho. It is not pretended that this steamer had a white light aft, showing all around the horizon, nor a head-light forward, at least 15 feet lower. Without these range lights, the Fairchilds would not know the Conoho's course. It is not proved, even by the Conoho's own witnesses, that she had a red light burning just before the collision. These witnesses leave that important matter to conjecture. All the Conoho's own witnesses agree that the red light was out immediately after the collision. None of them could prove that it was burning immediately before. The existence of this light was essential to authorize the Fairchilds to pass to port down the

west bank of the cut. Unless it was burning, the Fairchilds had no right thus to pass to port. The green light of the Conoho, being on the opposite side of that on which the Fairchilds would have passed if she had known the Conoho was moving, could not probably have been seen if lighted; and therefore, whether it was burning or not, is not an essential question in the case. Still, no witness of the Conoho testified that it was burning immediately before the collision. All that they could say, and all that the crew do say, is that it was burning just after the collision. I know not how to reconcile the testimony of all the witnesses of the libelants, who say that they did not see the green light of the Conoho, (some of them insisting positively that it was not burning,) with the testimony of all the crew of the Conoho, that it was burning just after the collision, except in one way.

The duty of attending to the lights, and putting them in place after sunset, belonged to one of the colored wheelmen, Tobe Jones. At the time of the collision this man was lying awake in his berth below, waiting to go upon his watch at 12 o'clock. As the Conoho crashed into the Fairchilds, Jones heard the master of the latter sing out angrily, "What are you doing with your lights out?" He says he ran up on deck, and the green light on the starboard deck was burning. He says he then looked on the port side, and that light was out. He adds that he took that light out of the box, and it was warm. Here was a man whose place depended on showing that those lights were up. It was natural for him to run up and light the green light as soon as possible. It was natural for him, finding that everybody else had discovered that the red light was out before he could light it, to insist that the lamp was the next thing to being lighted; that it was warm. The theory that this interested man ran up promptly and lit the green light reconciles all the essential testimony in this case; and it is much more rational to assume that this one interested witness told a falsehood, than that all the rest of the crew of the Conoho, or else all of the witnesses of the libelant, including so intelligent and disinterested a witness as Capt. Spedden, of the Belle Virginia, told a falsehood. It is unquestionable that the Conoho had up neither of the white range lights required by the rules of navigation; and that she was in fault as to both of them. The weight of evidence establishes, also, that her side lights were not burning just before the collision. The burden of proof is upon her to show that they were burning, and she does not show it affirmatively by any conclusive or reliable testimony. She herself proves that her lookout came from off the deck into the pilot house soon after passing Long Point light, which was two miles (or nearly half an hour) from the place of collision. Just before that accident she did not have a lookout on deck, either to keep his eyes on the lights or for any purpose. She was, in these respects, at fault, not only in her duty, but in her proofs.

Though the Conoho was thus in fault, however, the Fairchilds would not have a right to recover, if, after she had discovered the real position of the Conoho, she committed a fault that produced the collision. She certainly did not commit a fault in not trying to leave the Conoho to port, and passing down the west side of the out. She could not safely do this. She had no right to do this so long as the Conoho showed no red light. Seeing no red light, and being in motion, she was under the necessity of acting in accordance with the signal light or lights shown by the Conoho. The master of the Fairchilds insists, with apparent truth, that the Conoho showed no lights to indicate that she was in motion; and, on the contrary, showed a light which could indicate nothing else but that she was at anchor. His own movements were responsive to that signal. They were proper for the occasion. The Fairchilds, acting upon the direction of the signal held out to her, the wind being from the west, was right in declining to leave the anchor light to port, lest she should foul her propeller in the anchor chain, and also did right in slowing her speed, and starboarding her helm, to pass to the eastward around the stern of the vessel supposed to be at anchor. And when all of a sudden she discovered that the vessel moving under anchor light was a steamer in motion, within 100 yards of her, she could do nothing else but blow four whistles, stop, and back her engine. She was not at fault in this. She obeyed rule 21 of navigation, which requires steamers when in danger of collision to "stop and reverse."

If, as the testimony of libelant indicates, the steamers were a hundred yards from each other when the Fairchilds, in moving eastward, showed her green light to the Conoho, then the Conoho committed a fault on seeing that green light. All her witnesses that spoke on the subject testify that, on seeing the green light and blowing one whistle, the Conoho hard-ported her helm. The Fairchilds was going at less than seven miles an hour, and the Conoho at five miles. They were nearing each other at the rate of 200 to 250 yards a minute, and the Conoho had half a minute in which to sheer off, leaving the Fairchilds to starboard. Instead of that she hard-ported her helm, and drove right into the Fairchilds at right angles. If, when she blew her one whistle she had instead blown two whistles, and hard-starboarded her helm, she might have cleared the Fairchilds, if the two vessels were then 100 yards apart.

But it is impossible to know with certainty whether this distance was 15 or 100 yards. The witnesses of the Conoho say that it was only 15 to 20 yards. It is uncertain, therefore, whether the Conoho did make the collision inevitable by hard-porting her helm and sounding one whistle, or not. No conclusion, therefore, can be formed on this subject.

The cause of the collision was the false signal held out by the Conoho, in having up to the inspection of the Fairchilds no range white lights, no red light, probably no green light, and in having up only

what the Fairchilds had a right to conclude was an anchor light. The regulation forbids the anchor light to be less than 20 feet above the water. It does not forbid its being 42 feet above deck.

In the interest of the navigation of our inland waters, I should not dare to exonerate the Concho from blame on the evidence in this case. I will refer to the master the question of damages; and on the coming of his report will assess these, and decree for the libellant.

There was no appeal from this decision. -

THE CLARA DAVIDSON v. THE VIRGINIA.

THE BALTIMORE STEAM-PACKET CO. v. THE CLARA DAVIDSON.

(District Court, E. D. Virginia. July 10, 1885.)

COLLISION—SAIL-VESSEL APPROACHED BY STEAMER—CHANGE OF COURSE—TACKLING.

If a sail-vessel is tacking against the wind, where there is sufficient sea-room to keep on, she is not at liberty to change her tack or course when approached by a steamer which is trying to keep out of her way. Nothing but urgent necessity will excuse a sail-vessel for luffing and changing her course when on a tack, and approached by a steamer.

In Admiralty. Cross-libels.

White & Garnett, for the Baltimore Steam-packet Company.

Sharp & Hughes, for the Schooner.

HUGHES, J. The collision complained of by the libellants in these cases occurred in Elizabeth river, off Lambert's point, a mile and three-quarters below Fort Norfolk, on the fifth of May last, shortly before 7 o'clock in the evening. The passenger steamer Virginia, a fast boat owned by the Baltimore Steam-packet Company, was on her regular trip down the river, bound for Baltimore. The schooner Clara Davidson was tacking up the river. She had been on a starboard tack from below to buoy 11, which is the black buoy just below Lambert's point. She had there luffed and got upon a port tack, heading W. by N. across the river, close-hauled, when her master saw the Virginia off Fort Norfolk moving down the river. When about two-thirds of the way across the river, the schooner hard starboarded and becketed her wheel, and changed her course, intending to bring up the channel, and at the same time, as her master testifies, to avoid grounding, and colliding with the schooner Rachel Seaman, which was lying at anchor on the western side of the channel. There were two other schooners at anchor on the western side of the channel, one of them near buoy 10, and another near buoy 12, which were a quarter of a mile apart. The wind was blowing a light breeze from about

south-west, and was a little baffling. The river off Lambert's point was 2,120 feet wide for 12 feet water, and 3,530 feet for 6 feet water. Taking the mean, I conclude that it was 3,100 feet for 8 feet water, or half a mile. The collision happened, therefore, not less than 1,000 feet from the western side of the 8-foot channel. The schooner was running light, and drew 5 feet water, exclusively of the center-board. From the time that the Davidson tacked at buoy 11 to the moment of collision was about five to six minutes. When the collision happened, the helmsman of the schooner had becketed his wheel and left it, and was assisting in shifting the boom from the port tack, until the collision happened. It is contended, on the part of the schooner that from this time to the moment of collision was a period of more than two minutes. If so, the helmsman of the schooner was all that while absent from his post; that is to say, was absent for more than two minutes before the collision.

The steamer Virginia had come down from off the Hospital light below Norfolk to buoy 12 at the rate of 13 miles an hour. On reaching this buoy, which was rather more than half a nautical mile (3,830 feet) from the place of collision, seeing the Clara Davidson and one or two other schooners in the channel below, she slowed down her speed to five or six miles an hour. The Clara Davidson and one of these other schooners were tacking at the time, in opposite directions, across the river. The Virginia accordingly determined, by slowing down, to pass under the stern of both vessels after they should leave space enough between them for that purpose. On nearing the Clara Davidson, after thus slowing down, the Virginia saw the Davidson change her course by making the maneuver in the channel of the river, which has been mentioned. The Virginia, being then close on the Davidson, immediately reversed her engine and backed her wheels; but at about the moment of succeeding in checking her headway, and before moving backwards, the schooner ran into her on her starboard bow or side.

Just above the place at which this collision occurred, the river makes a decided bend to eastward, so that a steamer moving north from above the bend appears to a vessel coming from below the bend to head across her bows. This fortuitous appearance of things must have caused the navigator of the Davidson to suppose that the Virginia was heading across her bows, and did create the like impression in some of the passengers and some of the crew of the steamer herself. I therefore do not think that the change of course which the Davidson ventured upon was a willful disregard of the rule of navigation requiring her to keep on, which should have governed her on the occasion. Be the reason of the change what it might, this change of course on the part of the schooner so demoralized the situation that the steamer at once reversed her engine and backed her wheels, as required in such an emergency, and came to a dead stand in her course. While the steamer was thus situated, the schooner, which was badly managed,

and had no one at the wheel, and was herself in an unmanageable condition, was driven upon the steamer in the manner that has been described.

The law governing this case is as follows: The rules of navigation provide (rule 20) that if two vessels, one of which is a sail-vessel and the other a steam-vessel, are proceeding in such directions as to involve risk of collision, the steam-vessel shall keep out of the way of the sail-vessel; and (rule 23) that the sail-vessel shall keep her course. In construing and obeying these rules (rule 24) due regard must be had to all dangers of navigation, and to any special circumstances which may exist in any particular case rendering a departure from them necessary to avoid immediate danger.

In *The John L. Hasbrouck*, 93 U. S. 405, at page 405, the court say that "sail-vessels descending a river are not required to hold their course at the hazard of being grounded or shipwrecked by natural obstructions * * * when a steamer is approaching," etc.

In *The Illinois*, 103 U. S. 298, the chief justice says, in a case similar to the one at bar: "It was clearly a fault for the schooner to change her course unless there was a necessity for it. Mere convenience was not enough. * * * It is not found that the ice was so close under the port bow of the schooner as to make it dangerous for her to keep on as she was going until the steamer got by. * * * So far as the findings show, the way was open for some distance ahead, and the steamer had the right to assume she might keep her place in mid-channel and go on with safety."

On the condition of leading facts that have been shown above, the preliminary questions in this case are whether the schooner violated rule 23 of navigation, which required her to keep on in her course, upon a port tack, on the approach of the steamer; and, if so, whether there were any necessities of navigation controlling her sufficient to excuse the violation. It seems to have been assumed in the preparation of the evidence in this case that the answer to these questions would probably not be in favor of the schooner; and counsel have, with great industry, ingenuity, and ability, presented the court with voluminous evidence and elaborate argument addressed to questions of fault other than, and independent of, the preliminary questions which I have mentioned. But I do not find myself at liberty to ignore the inquiry whether a statutory rule of navigation was violated by the schooner. Those rules are the law of laws in cases of collision. They admit of no option or choice. No navigator is at liberty to set up his discretion against them. If these rules were subject to the caprice or election of masters and pilots, they would be not only useless, but worse than useless. These rules are imperative. They yield to necessity, indeed, but only to actual and obvious necessity. It is not stating the principle too strongly to say that nothing but imperious necessity or some overpowering *vis major* will excuse a sail-vessel in changing her course when in the presence of a steamer in mo-

tion; that is, obeying the duty resting upon it of keeping out of her way.

If the statutory rules of navigation were only optionally binding, we should be launched upon an unbounded sea of inquiry in every collision case, without rudder or compass, and be at the mercy of all the fogs and mists that would be made to envelope the plainest case, not only from conflicting evidence as to the facts, but from the hopelessly conflicting speculations and hypotheses of witnesses and experts as to what ought to or might have been done before, during, and after the event. The statutory regulations that have been wisely and charitably devised for the governance of mariners, furnish an admirable chart by which the courts may disentangle themselves from conflicting testimony and speculation, and arrive at just conclusions in collision cases.

That the Clara Davidson changed her course while the Virginia was approaching to pass her, is admitted; and yet it has not been shown that she was under the *necessity* of doing so. There was no danger of *grounding* by keeping on in her port tack. She had a thousand feet of eight-foot water before her, and no proof is adduced by a single witness that she would have run the least risk of grounding. Her master had seen the Virginia when off Fort Norfolk, more than a mile and a half distant. He had seen her again at buoy 12, when she slowed down from 13 to 6 miles an hour. He had thus had full notice of her approach in the channel, which he was crossing at the slow speed of less than four miles an hour. He had no right to presume that the steamer intended to cross his bows, as an excuse for changing his own course. He had no right to make any presumption that could exonerate himself from the duty of keeping on in his course. As already said, there was no danger of his running aground. If there was danger of his running upon the schooner Rachel Seaman, anchored ahead of him on the west side of the channel, no great harm could have resulted from such an encounter. He was moving against wind and tide at the slow pace of less than four miles an hour, and the other vessel was at anchor. A fender or two—the slightest precautions—would have prevented any possible harm to each of the schooners. There was no certainty of his striking the Rachel Seaman, and the encounter need not have been harmful. The mere possibility of a harmless encounter fell short—far short—of constituting such a *necessity* or *vis major* as is contemplated by the statutory rule of navigation, which, in extreme emergencies, and only in extreme emergencies, will excuse sail-vessels, when in the presence of approaching steamers, from keeping on in their course.

It is contended on the part of the Clara Davidson that more than two minutes elapsed from the time she began the maneuver for changing her course until the collision. If this had been so, she would certainly have had time to pass clear of possible collision with the Virginia by keeping on in her port tack. The Virginia had a right to presume

that the schooner would not change her course. She did so presume, and neared the schooner in that legitimate presumption. When she found that the schooner had unaccountably changed her course, and rendered a collision imminent, she did what the law requires her to do,—she immediately reversed her engine and backed on her wheels. I do not see that she was in fault in any particular. The schooner was in fault, and I will decree accordingly.

WILLIAMS v. CONTINENTAL INS. CO. OF NEW YORK CITY.¹

(District Court, D. Minnesota. September, 1885.)

1. MARINE INSURANCE—VALUED POLICY.

A valued policy is one in which the value of the property insured is fixed and agreed upon by both parties to the contract, and in case of total loss it is not necessary that proof should be made of the market value at the time and place of shipment.

2. SAME—OPEN POLICY.

Unless a certain amount is stipulated and expressed in the contract of insurance as the value of the property upon which the risk is taken, then it is necessary that proof should be made of the market value in case of loss, and such a policy of insurance is denominated an open policy.

3. SAME—CUSTOM AND USAGE.

Evidence of custom and usage cannot be received to change the contract of insurance.

4. SAME—CASE STATED.

An open cargo policy was issued by the Continental Insurance Company of New York City to its agents at Duluth, Minnesota, and they issued to the shippers of certain wheat a certificate as follows: "This certifies that M. & M. are insured under and subject to the conditions of open policy No. 649, issued by the Continental Ins. Co. of New York city, at the Duluth agency, in the sum of \$8,000 on 17,000 bushels wheat, in board cargo of schooner Carlingford, at and from Duluth to Buffalo. \$8,000 at 2.25 per cent. is \$180, which is hereby acknowledged to have been received. Loss, if any, payable to M. & M., or order hereon, and return of this certificate." *Held*, that this was an open and not a valued policy.

In Admiralty.

C. K. Davis, for libellant.

W. D. Cornish, for respondent.

NELSON, J. A libel is filed to recover upon a contract of insurance, by which the defendant agreed to cover a quantity of wheat shipped from the port of Duluth to the city of Buffalo. An open cargo policy was issued by the company to its agents at Duluth, and the contract of insurance arises under this policy and the certificate by which this particular risk was taken. This certificate was exe-

¹Reported by Robertson Howard Esq., of the St. Paul bar.

cuted and delivered to the shippers, October 19, 1881, and is in the words and figures following:

"CONTINENTAL INS. CO. OF NEW YORK CITY.

"No. 12,104.

INLAND MARINE DEPARTMENT.

"This certifies that Munger & Markell are insured under and subject to the conditions of open policy No. 649, issued by the Continental Ins. Co. of New York city at the Duluth agency, in the sum of eight thousand dollars, on 17,000 bushels wheat, in board cargo of schooner Carlingford, at and from Duluth to Buffalo. \$8,000 at 2.25 per cent. is \$180, which premium is hereby acknowledged to have been received. Loss, if any, payable to Munger & Markell, or order hereon, and return of this certificate.

"This certificate is not valid unless signed by the authorized agent for this company at Duluth, Minn.

[Signed]

"GEO. SPENCER & Co., Ag'ts.

"*Duluth, Minn., October 19, 1881.*"

And indorsed across the face of which certificate was the following:

"Permission is given to load and carry a locomotive and tender on deck to Prince Arthur's Landing, if towed there, also to tow below said Landing."

A stipulation is filed under which the court is to determine whether the policy is an open or a valued policy. This is the sole question, and its solution settles the controversy. It is agreed that if it is decided that the policy is open and not valued, there can be no recovery. The contract of marine insurance is an agreement by the company, in consideration of a certain sum paid, called "premium," to indemnify the insured for loss which may occur by the perils of the sea mentioned in the policy. This is accomplished by paying the insured the value of the property at risk, with expenses of putting it on board, etc. In case of a total loss the insured loses as much as the property was worth when shipped. A valued policy is one in which the value of the property insured is fixed and agreed upon by both parties to the contract, and in case of total loss it is not necessary that proof should be made of the market value at the time and place of shipment. Unless a certain amount is stipulated and expressed in the contract of insurance as the value of the property upon which the risk is taken, it is necessary that proof should be made of the market value in case of loss. Such a policy of insurance is denominated an open policy. How can the value be determined, in this case, except by proof of the market price per bushel at Duluth? No value is fixed in the certificate; only the extent of insurance is limited to \$8,000, and the certificate of insurance states that it is made under and subject to the conditions of the open policy issued to the company's agents. These writings constitute the policy by which the contract of indemnity is effected, and as the value of the wheat is not agreed upon and expressed in the policy, it is an open and not a valued policy. The evidence of custom and usage offered cannot be received to change the contract.

A decree will be entered dismissing the libel.

ÆTNA NAT. BANK and others v. MANHATTAN LIFE INS. Co. and others.

(Circuit Court, S. D. New York. August 3, 1885.)

1. FRAUDULENT ASSIGNMENT OF LIFE INSURANCE POLICY—BILL BY CREDITORS OF DECEASED DEBTOR TO SET ASIDE.

A bill in equity may be maintained by creditors of a deceased debtor to set aside a fraudulent assignment of a life insurance policy originally payable to the debtor, his executors, administrators, and assigns, but fraudulently assigned by him to his wife while he was insolvent, and without valuable consideration, notwithstanding such creditors have not obtained judgments at law against the debtor in his life-time, or against his representatives after his decease; it appearing that the complainants had, prior to the death of the debtor, obtained a decree in equity against him and his wife in the circuit court of the United States for the Northern district of Florida, in which the amount of the complainants' debts was adjusted, and in which the said debtor was adjudged to be absolutely insolvent.

2. SAME—INJUNCTION PENDENTE LITE.

It appearing that the fund would be liable to be placed out of the jurisdiction of the court, and beyond the reach of creditors in case they should be ultimately found to be entitled, if the injunction should be refused, *held*, that an injunction *pendente lite* should be granted to restrain the insurance company from paying over the money under the policies until the rights of the parties should be determined.

In Equity.

William B. Hornblower, for plaintiffs.

John W. Weed, for defendants.

WHEELER, J. According to the bill in this case the policies in question on the life of the husband were originally made payable to the executors, administrators, or assigns of the husband, and the premiums were paid out of his property, which, in equity, belonged to his creditors. And the assignment to the wife shortly before the death of the husband was for a merely nominal consideration, pecuniarily, and was made for the purpose of placing the avails of the policy beyond the reach of his creditors. It is inferable, from the statements of the bill, that the assignment was made in Florida, and not in New York. Its effect may be governed by the laws there rather than by the laws of New York, where the insurance company is located. And by the laws of either the assignment may be so far inoperative, as against his creditors who bring this bill, as to entitle them to the amount due on the policy in preference to the wife as assignee. The fund would be quite liable to be placed out of the jurisdiction of this court, and beyond the reach of the creditors, in case they should be ultimately found to be entitled, if an injunction should be refused and the stay already granted vacated. It seems proper, therefore, that the fund be held where it is until the rights of the parties to it are determined.

It is objected that the creditors have not a sufficient judgment at law upon their claims to entitle them to maintain this proceeding. They have, however, a decree of the circuit court of the United States

for the district of Florida, to which these creditors and the claimant were parties, as well as the debtor, in which, upon similar issues, the amount of their debts, respectively, was adjusted for the same purposes. And, further, the debtor has died leaving the sum due on these policies as a part of his estate, if it belongs to his estate, within this jurisdiction, with no other creditors, so far as yet appears here. These grounds may be found sufficient to uphold the proceedings.

Motion for injunction granted.

ÆTNA NAT. BANK and others v. UNITED STATES LIFE INS. Co. and others.

(*Circuit Court, S. D. New York. August 3, 1885.*)

FRAUD ON CREDITORS—PREMIUMS PAID TO LIFE INSURANCE COMPANY—STATUTE OF NEW YORK.

A bill in equity may be maintained by creditors of a deceased debtor to reach premiums paid to a life insurance company in fraud of creditors of the insured out of funds of the insured, and in furtherance of a combination and conspiracy between the insured and his wife to hinder, delay, and defraud the creditors of the deceased, notwithstanding the said policies were made payable to the wife of the deceased, and notwithstanding the provisions of the statutes of New York exempting such policies from the claims of creditors of the husband, where the premiums do not exceed \$500. But the creditors have no claim upon the insurance in such case beyond the amount of the premiums and interest thereon.

In Equity.

William B. Hornblower, for plaintiffs.

John W. Weed, for defendants.

WHEELER, J. The policies in this case upon the life of the husband were originally made for the benefit of, and payable to, the wife. According to the bill the premiums were paid from the property of the husband in fraud of the rights of his creditors, who bring this bill. If this is all true, the amount due on the policy does not represent the property of the husband, nor any part of his estate, beyond the amount of the premiums. The insurance was upon her interest in his life, not the creditors' interest in his life, and the amount due represents her interest, and, beyond the amount of the premiums, is hers. An amount equal to the amount of the premiums may represent so much of his estate, and in equity belong to his creditors. They may ultimately, by these proceedings, reach that amount, but there appears to be no fair ground on which they can reach more.

Motion granted for an injunction to restrain payment of so much of policies as equals in amount the premiums paid thereon, with interest, and stay of proceedings vacated as to residue.

BRYANT and others v. CHARTER OAK LIFE INS. Co.

(Circuit Court, N. D. Illinois. July 9, 1885.)

MORTGAGE—CONVEYANCE WITH RESERVATION OF LIFE-ESTATE—PAYMENT OF INSURANCE MONEY—RENEWAL OF MORTGAGE—FORECLOSURE.

B. borrowed \$19,000 from I., and gave his bond for that amount, and secured it by mortgage on certain real estate in Chicago. The mortgage provided that B. should keep the property insured against fire and assign the policies as collateral security, which was done. The mortgage provided that in case of loss the mortgagee and his assigns might collect the policies and apply the money in payment of the loan. B. subsequently conveyed the property, in consideration of love and affection, to his children, reserving a life-estate therein to himself. I. sold and assigned the bond and mortgage to C., and the bond became due and remained unpaid until the buildings were destroyed by fire. C. collected \$8,875 on the policies and gave B. credit on his bond for that amount. Subsequently, at his request, B. was allowed to renew the mortgage for five years, and to receive and expend the amount collected on the policies, less the interest due on the bond, in restoring the burned buildings. *Held*, that the money paid to C. did not extinguish the mortgage *pro tanto*; that the agreement between B., as life tenant, and C. was valid; and that C. was entitled to foreclose the mortgage on default in payment thereof.

In Chancery.

Hugh L. Mason, for complainant.

Cyrus Bentley, for defendant.

GRESHAM, J. James M. Bryant borrowed \$19,000 from E. S. Isham, on the seventeenth day of May, 1866, and on the same day gave his bond for that amount, and, to secure its payment, executed a mortgage upon real estate in Chicago. It was made the duty of the mortgagor, by a provision in the mortgage, to keep the premises insured against fire, and assign the policies to the mortgagee as collateral security. Policies were obtained and assigned in pursuance of this covenant. The mortgage also provided that the mortgagee and his assigns might collect the policies in case of loss, and apply the money in payment of the mortgage debt. On the twenty-eighth of August following, Bryant, in consideration of love and affection, by a quitclaim deed conveyed the mortgaged premises to his children, reserving a life-estate to himself. This deed contained the following:

"And it is hereby understood and agreed that the said party of the first part reserves the right and the power to charge each, any, and all of said lots or parcels of land by mortgages or trust deeds, conveying the fee-simple title thereof, for moneys raised, or to be raised, loaned, or borrowed thereon, for the purposes of improving or adding to the house or houses now upon any one or more or all of said parcels of land or lots, or erecting upon any one or more or all of said lots, any new building or buildings, whenever, in his opinion, the same may be necessary or proper, by reason of injury or destruction of any house or houses now on said lots, or any of them, by fire or other casualty, or ordinary wear and tear from use, occupation, or time. Said improvements, if made, being for the benefit of those entitled, or to be hereafter entitled, to said lots, and it being right and proper to charge the whole estate in fee-simple with the moneys to be raised for such improvements. And it is further understood, provided, and agreed that no person or persons who

make a loan or loans upon such mortgages or trust deeds shall be required to look to the application of such moneys.

"It is distinctly understood that said party of the first part reserves to himself a life-interest in the property hereby conveyed."

On the twenty-fourth of January, 1867, Isham sold and assigned the bond and mortgage to the defendant. The bond became due on the seventeenth day of May, 1871, and remained wholly unpaid until the ninth day of October of the same year, when the insured buildings were destroyed by the great Chicago fire. On the twenty-first of November following, the defendant collected \$8,875 on the policies, and on its books gave the mortgagor credit for that amount, but made no indorsement of this credit on the bond or mortgage. On the second day of June, 1878, the mortgagor made application to the defendant for a renewal of the mortgage for five years, and asked that he be permitted to receive and expend the insurance money in restoring the destroyed buildings. The defendant agreed to this on the tenth of the same month, and on the faith of this agreement the mortgagor proceeded to rebuild. After the mortgagor had expended between eight and ten thousand dollars under the agreement, the defendant, on the thirtieth of September following, delivered to him the amount collected on the policies, less the interest which had accrued and remained unpaid on the bond. The exact amount the mortgagor thus received under the old mortgage, and without executing a new one, was \$7,880.09.

It is insisted by the complainants that the money paid to the defendant amounted to an extinguishment *pro tanto* of the mortgage; and that the mortgagor, as life-tenant, could not mortgage the fee. It is not denied that the insurance money was expended in good faith, in restoring the destroyed buildings. As life-tenant the mortgagor was entitled to possession of the premises, and the rents and profits, and no one could interfere with his possession, so long as he committed no waste. He was bound to keep down the interest, but he was not bound to pay off incumbrances. Although the evidence is not clear on that point, it may be assumed that the mortgagor had the buildings insured before he executed the deed to his children. No right was secured to them in the deed, or otherwise, to share in the benefit of the insurance. The mortgagee's covenant to keep the buildings insured for the benefit of the mortgagee was his personal obligation to the latter. While the policies were held by the mortgagee as collateral security to the mortgage debt, they were also intended to indemnify both the mortgagee and the mortgagor. It does not follow that, because the defendant, as the owner of the bond and mortgage, was authorized to collect the insurance money, and apply it as a payment on the debt, that the underwriters might not have paid the loss to the mortgagor, with the mortgagee's consent. If payment had been thus made, the children could not have complained. In using the insurance money to rebuild, and thus

restore the impaired security, no injury resulted to the estate. This money was placed to the mortgagor's credit on the defendant's books without being indorsed as a credit on the bond; it stood for the destroyed building, and, as such, was collateral security for the debt, just as the policies were before the destruction of the property. It was therefore competent for the defendant and the mortgagor to dispose of this money as they saw fit. The mortgagor did not choose to direct the defendant to apply it as a payment on the mortgage debt. *Gordon v. Ware Savings Bank*, 115 Mass. 588. The right asserted by the children as remainder-men is unfounded both in law and equity.

It follows from this view of the case that, without reference to the terms of the deed from the mortgagor to his children, the defendant, the Charter Oak Company, is entitled to a decree on its cross-bill for the amount of the bond and interest, less the credit already made on the interest, and a decree of foreclosure.

PEORIA SUGAR REFINING CO. v. PEOPLE'S FIRE INS. CO.

(Circuit Court, D. Connecticut. September 10, 1885.)

1. FIRE INSURANCE—INCREASE OF HAZARD, STIPULATION AS TO—RENEWAL.

A policy of fire insurance provided that insurance once made might be continued for such further time as might be agreed on, certain conditions being complied with, "and it shall be considered as continued under the original representations, in so far as it may not be varied by a new representation in writing, which it shall in all cases be incumbent on the party insured to make when the risk has been changed, either within itself or by surrounding or adjacent buildings; otherwise said policy and renewal shall be void and of no effect." During term of risk a building was erected within 41 feet of the property insured, but the fact was not reported to the insurance company. At expiration of risk a renewal by a new policy was asked for and given, covering the same amount at a slightly increased rate. Fire from the new building was communicated to the one insured, and that destroyed. *Held*, that the new building was an increase of the hazard of the risk, and that the failure to notify the company thereof avoided the policy.

2. SAME—PERMISSION "TO MAKE ADDITIONS, ALTERATIONS, AND REPAIRS."

Where a policy of insurance gave permission to the insured "to make additions, alterations, and repairs," *held*, that a new warehouse erected 40 feet away from the main building is neither an addition, an alteration, nor repairs, although connected with the main building by a bridge and an underground passage used for pipes.

At Law.

Alvin P. Hyde and *Franklin D. Locke*, for plaintiff.

Charles E. Perkins, for defendant.

SHIPMAN, J. This is an action at law which was tried by the court, the parties having, by written stipulation duly signed, waived a trial by jury. The facts which are found to have been proved, and to be

true, are as follows: In February, 1880, the plaintiff employed Frederick B. Hamlin, as its insurance broker, to procure insurance upon its property to a large amount. He was not able to obtain the entire amount that was desired, and employed William W. Buckley & Co., as his subagents or brokers, to obtain for the plaintiff a portion of said insurance. Said Buckley, as the plaintiff's agent, and not in behalf of the defendant, applied on March 3, 1880, to the defendant, an insurance company in Middletown, Connecticut, for insurance on the plaintiff's brick grape-sugar manufactory, and on the machinery contained therein. He also furnished to the defendant a memorandum, containing a simple diagram of the lower story of the plaintiff's factory, and written statements in regard to the characteristics and valuations of the property to be insured.

The only statement which is important in the present case is the following: "Building detached on all sides." The memorandum did not indicate how near any other buildings were to the insured property. It was entirely detached from, and not within 40 feet of, any other building. The defendant issued to plaintiff a policy of insurance for \$1,000 upon its factory; for \$1,000 upon its machinery contained therein,—for the term of one year from March 4, 1880. Said policy contained the following provisions:

"Insurance once made may be continued for such further term as may be agreed on, the premium therefor being paid, and a renewal receipt being given for the same; and it shall be considered as continued under the original representation in so far as it may not be varied by a new representation, in writing, which, in all cases, it shall be incumbent on the party insured to make when the risk has been changed, either within itself or by the surrounding or adjacent buildings; otherwise said policy and renewal shall be void and of no effect."

In May, 1880, the plaintiff built a warehouse, 144 feet long, and 40 5-12 feet distant from the main factory. The first story was of brick and the second story was of wood. All but the brick part was covered by an iron sheeting. The second story of the main building and the second story of the warehouse were connected by an iron skeleton bridge, which was used by the workmen as a passage-way. The bridge was originally of wood, but was changed to iron at the suggestion of some insurance men. There was also an underground passage, about four feet square, lined with wood, between the two buildings. This was not used as a passage-way for men nor to run feed, but as a place for pipes, and through it ran the large water-pipe which supplied the main building. The wooden lining was not scorched at the time of the fire, so that when the factory was rebuilt the same underground connection between the two buildings was again used. In the basement of the warehouse were two iron revolving cylindrical drums or dryers for drying feed. They were heated by iron steam-pipes to about 160 degrees Fahrenheit, and made six revolutions per minute.

The main factory and its contents were entirely destroyed by fire

on October 27, 1881. The fire originated in the warehouse in a room near the dryers, but how or from what cause it originated is unknown. A strong wind which was blowing at the time carried the fire to the main factory. On February 24, 1881, said Buckley applied in writing, for the plaintiff, to the defendant to "renew by new policy" said policy, which was to expire March 4, 1881, "divisions same as last year; rate increased to 1½ per cent." By "divisions" the respective amounts on building and machinery were meant.

In pursuance of this application for renewal, and without any examination, or other representations or survey, the defendant issued a new policy, whereby said pre-existing insurance for \$2,000 was renewed for one year, ending March 4, 1882. The risk had been increased by the erection of the new building. The action is brought upon the new policy. It contained the same provisions which have been quoted, and, except in rate, was a substantial repetition of the old policy. The defense is that after the date of the first policy, and before the renewal, the risk had been materially changed by the erection of the warehouse, of which no notice was given to the defendant; and that when the renewal was obtained, no information was given of the increased risk.

The position of the case is this: The memorandum made no representations as to the distance between the main factory and any other building. It simply said, "Building detached on all sides;" and no evidence was offered by the defendant to show that the connection by the underground, wooden-lined conduit increased the risk or made any material change of the representation; so that no attention need be given to any supposed increase of risk from the conduit. There was, as testified, an increase of risk by the erection of the new building within 41 feet from the main factory.

The question, then, arises, does the quoted provision in the policy require that, when a renewal is obtained upon a risk which had been increased during the preceding term, without the knowledge of the insurer, in a particular concerning which no representations were made in the original application, information of such increase of risk shall be given upon the request for a renewal? The language of the provision is: "Which, [new representation,] in all cases, it shall be incumbent on the party insured to make when the risk has been changed," etc. If this was the only provision in the policy in regard to notice of change of risk, there would be good ground for the opinion that a new representation was incumbent upon the insured only when an original representation had been made in regard to the particulars which had been changed, and that when silence had originally existed, the insured was not called upon to make new representations. But the policy also says:

"If, after insurance is effected, either by the original policy or by the renewal thereof, * * * if the risk be increased by any means whatever within the knowledge of the assured, * * * without immediate notice

to the company, and indorsement made on the policy, this insurance shall be void and of no effect."

The contract thus provided that when the risk was materially increased after insurance was effected, by any means known to the insured, notice must be given or the policy would become void. It can hardly be the fair construction of the policy that it could be avoided, during the continuance of the first term, by an increase of risk unknown to the insurer, and that when the insurance was renewed, without notice or knowledge of the increase, the renewal should be valid. The intent of the policy was to make it incumbent upon the insured, after the original insurance was effected, to inform the insurer of any material changes in the character of the risk by known means. He was compelled by the stringent provisions of his contract to affirmatively tell the insurer of a material increase in the risk which occurred after the insurance was effected, and, if no such information had been given, to tell the insurer of such increase when a renewal was asked for. The duty to give such information seems not to depend upon the fact that representations had been made prior to the original insurance which had become incorrect.

But the plaintiff says that the provisions of the policy in regard to continuing or renewed insurance are applicable only when the renewal is evidenced or shown by a renewal receipt. This construction, though plausible, does not seem to me to be fair. The policy says that insurance once made may be continued for an agreed time, a renewal receipt being given therefor; that is, the insurance may be continued after the expiration of the original term, and may be evidenced by a renewal receipt, and a new policy is not necessary. The policy then says: "it," i. e., the insurance continued for an agreed term, "shall be considered as continued under the original representation," etc. "It" refers to the renewed insurance, but is not limited to renewed insurance evidenced by a renewal receipt. Such a limitation would be unjust to the insurer, and is inconsistent with good faith on the part of the insured when he asks to have the insurance renewed by a new policy.

It must be observed that in this part of the case there are three facts of importance: (1) The careful provisions of the policy which made it incumbent upon the insured to give notice of any material change in the risk by known means; (2) the defendant was expressly requested to renew the insurance and to renew by a new policy; (3) the new policy was a substantial repetition of the terms of the original policy except in the rate, the change therein having been directed by the applicant. What would be the state of the law in a case in which either of these conditions did not exist, it is not necessary to consider. By the policy permission was given "to make additions, alterations, and repairs." A building 40 feet distant from the insured building, though connected with it by a bridge and an underground passage, cannot, with propriety, be called an "addition." It

is a new and separate building, while it is attached to the main factory in the way that has been stated.

Let judgment be entered for the defendant.

SWEET v. PERKINS.

(Circuit Court, E. D. Wisconsin. June, 1885.)

PRACTICE—BILL OF EXCEPTIONS, WHEN SETTLED—REV. ST. § 700—LAW RULE 80.

A bill of exceptions must be prepared and settled before the end of the term at which the cause was tried.

At Law.

F. L. Gilson, for the motion.

F. C. Winkler, contra.

DYER, J. This is a motion by the plaintiff for leave to settle and file a bill of exceptions preliminary to a removal of the case by writ of error to the supreme court. The action was tried before the court, without the intervention of a jury, June 28, 1883, and a finding and judgment in favor of the defendant were made and entered July 23 of the same year. No steps have been taken by the plaintiff from that time to the present application to make or settle a bill of exceptions, and this application is presented within a short time before the statutory period of two years prescribed for bringing a writ of error will expire. Until the present time the court has had no notice of any purpose on the part of the plaintiff or his counsel to prepare and have settled a bill of exceptions in the cause, and no consent of the defendant to now settle the exceptions has been obtained. The question, therefore, is whether, after this long delay, the application to present a bill of exceptions, and have it settled and signed, should be granted. The only excuse made for this delay is set forth in an affidavit, which is now submitted to the court, and in which it is stated that on the rendition of judgment the plaintiff instructed his attorney then in charge of the case to take the necessary steps to remove it to the supreme court; that the plaintiff is informed and believes that his attorney allowed the term at which the action was tried to pass without taking any steps to settle a bill of exceptions; that his attorney has since died; that he is advised by his present counsel that a bill of exceptions cannot be allowed except by special leave of the court; and that the plaintiff was and is ignorant of the rules and practice of the court in respect to settling a bill of exceptions, and believed that all things had been done in time to perfect a removal of the cause to the supreme court. This affidavit presents no valid excuse for failing to comply with the rule of court and the require-

ments of the practice with reference to the preparation and settlement of a bill of exceptions in the case. Section 700, Rev. St., provides that—

“When an issue of fact in any civil cause in a circuit court is tried and determined by the court without the intervention of a jury, according to section 649, the rulings of the court in the progress of the trial of the cause, if excepted to at the time and duly presented by a bill of exceptions, may be reviewed by the supreme court upon a writ of error, or upon appeal.”

Rule 80 of the common-law rules provides that—

“Where exceptions to the opinions of the court are taken by either party on a trial of a cause, or there is a demurrer to evidence interposed, or a special verdict found, the party may be required to prepare his bill of exceptions at the trial, or his demurrer or statement of the evidence, or to put in form the special verdict, or the court will at the request of the parties note the point; and the bill of exceptions, demurrer to evidence, or special verdict shall afterwards be *drawn up, amended, and settled before the end of the term.*”

Thus it will be observed bills of exceptions must be prepared and settled before the end of the term at which the cause was tried. This requirement is imperative, and, as we shall presently see, has been so held by the supreme court.

Attention was called on the argument to the case of *U. S. v. Breitling*, 20 How. 252, as sanctioning the exercise of a discretion in favor of allowing a bill of exceptions to be now settled. But the facts in that case, upon which the supreme court allowed a bill of exceptions to stand as a part of the record, were exceptional. The bill of exceptions was signed and sealed a day after the adjournment of the court; and attached to the bill were certain explanations made by the judge, in which he stated that the bill of exceptions was presented during the term, and before the court adjourned. The bill was handed back to counsel by the judge, with the request that he submit it to the opposing counsel. On the third day after this, the minutes of the court were signed, and there was an adjournment of the term. Nothing further was heard from the bill until after the lapse of several days, when it was again presented by the attorney for the party who had originally presented it to the court, with written objections of opposing counsel that it could not be signed after the adjournment of the term. These were the special circumstances of that case, and it was held that those circumstances justified the court in exercising its power to suspend its own rules, and to except the case from the operation of the rule, because the purposes of justice seemed specially to require it. In the opinion of the court, Mr. Chief Justice TANEY said:

“In the case before us the judge who tried the case has deemed it his duty to seal and certify the exception to this court, and, *under the circumstances stated in the exception and the note*, we think he was right in doing so, and that this exception is legally before this court as a part of the record of the proceedings of the court below.”

That case was commented upon by the supreme court in the case of *Muller v. Ehlers*, 91 U. S. 249. In the last-named case there was a trial by the court at the October term, 1872, and the case was taken under advisement. At the next term, and on the twenty-eighth of April, 1873, the court found for the plaintiff, whereupon the defendants moved for a new trial. That motion was continued until the next term, when, on the fifteenth of July, it was overruled and judgment entered on the finding. On the twenty-fifth of July, 1873, a writ of error was sued out and served, and a *supersedeas* bond was approved and filed. The citation was filed August 4, 1873. Down to that date, as appeared by the record, no bill of exceptions had been signed or allowed, nor time given, either by consent of parties, or by order of the court to prepare one, and in that condition of the case the court adjourned for the term. At the next term, and after the return-day of the writ of error, a bill of exceptions was signed and filed as of the twenty-eighth of April, 1873. Upon this state of facts the court ruled that the bill of exceptions which had been returned could not be considered as part of the record. Mr. Chief Justice WAITE, in delivering the opinion of the court, says:—

“It does not appear that the bill of exceptions was filed, signed, tendered for signature, or even prepared before the adjournment of the court for the term at which the judgment was rendered. No notice was given to the plaintiff of any intention on the part of the defendants to ask for the allowance of a bill of exceptions, either during the term or after. No application was made to the court for an extension of time for that purpose. No such extension of time was granted, and no consent given.”

This statement of facts meets precisely the facts as we have them in the case at bar. The opinion of the court proceeds as follows:

“Upon the adjournment for the term the parties were out of court, and the litigation there was at an end. The plaintiff was discharged from further attendance, and all proceedings thereafter, in his absence and without his consent, were *coram non judice*. The order of the court, therefore, made at the next term, directing that the bill of exceptions be filed in the cause as of the date of the trial, was a nullity. For this reason, upon the case as it is presented to us, the bill of exceptions, though returned here, cannot be considered as part of the record.”

The opinion then proceeds to comment upon *U. S. v. Breitling*, *supra*, and with reference to that case these observations are made:

“There the bill of exceptions was prepared during the term, and presented to the court for allowance four days before the adjournment. It was handed back to the attorney presenting it, three days before the adjournment, with the request that he submit it to the opposing counsel. Delay occurred, and the signature was not actually affixed until after the term. Under the special circumstances of that case the signature after the term was recognized as proper. The particular grounds for this ruling are not stated, but it was probably for the reason that, upon the facts stated, the consent to further time beyond the term for the settling of the exceptions might fairly be presumed. That case went to the extreme verge of the law upon this question of practice, and we are not inclined to extend its operation. * * * As early as *Walton v. U. S.* 9 Wheat. 651, the power to reduce exceptions

taken at the trial to form, and to have them signed and filed, was, under ordinary circumstances, confined to a time not longer than the term at which the judgment was rendered. This, we think, is the true rule, and one to which there should be no exceptions without an express order of the court during the term, or consent of the parties, save under very extraordinary circumstances. Here we find no order of the court, no consent of the parties, and no such circumstances as will justify a departure from the rule. A judge cannot act judicially upon the rights of parties after the parties in due course of proceeding have, both in law and in fact, been dismissed from the court."

The rule of practice thus quite peremptorily prescribed by the supreme court, and which, indeed, is but an enforcement of rule 80 before referred to, disposes of the application of the plaintiff in the case in hand to have a bill of exceptions settled and signed at this late day. To grant his application would establish a precedent in favor of negligence and inaction, and would be in clear violation of the existing rule of court, and the adjudication in *Muller v. Ehlers*.

Motion denied.

UNITED STATES *v.* BERRY and others.¹

(Circuit Court, W. D. Missouri, W. D. May Term, 1885.)

CONTEMPT—JURISDICTION—INTERFERENCE BY STRIKERS WITH RECEIVER—DIVISION OF DISTRICT.

A proceeding in contempt for interfering with a receiver appointed by a United States circuit court is criminal in character and cannot be heard, under the law, in a division of a district other than the one in which the acts amounting to a contempt were committed.

Proceedings for Contempt in the Matter of the Wabash Railroad. On motion for rehearing. See S. C. 24 Fed. Rep. 217.

Mr. Beebe, Dist. Atty. U. S., and *Mr. Randolph*, for the United States.

Mr. Warner and Hall & Rodgers, for defendants.

KREKEL, J. When these cases were before the court heretofore, (24 Fed. Rep. 217,) the question was, had the Moberly strikers interfered with the management of the road in the hands of the court? On hearing, they were found guilty, and sentence of imprisonment was passed on them for contempt. Upon a motion for rehearing, jurisdictional questions are raised, and these are now to be passed on. The following facts are deemed material in their solution:

The Wabash Railroad was, on the petition of creditors and others, taken possession of on the twenty-seventh day of May, 1884, by the circuit court of the United States for the Eastern district of Missouri, who proceeded to appoint receivers, who have since that time operated the road. In the order of court appointing the receivers, they are in-

¹ Reported by Robertson Howard, Esq., of the St. Paul bar.

structed to take possession, "and to manage, control, and operate said railroad, preserve and protect all said property, and collect, as far as possible, all accounts, choses in action, and credits due said company, acting in all things under the order of this court, or of such other courts as may entertain jurisdiction of parts of said property as ancillary to the jurisdiction of this court." By another part of said order authority is given complainants "to apply to any other United States circuit court of competent jurisdiction for such order or orders in aid of the primary jurisdiction vested in this court in said cause as may have ancillary jurisdiction herein." Copies of the order quoted from, and the bills upon which the proceedings were had, have been filed in the circuit court of the Eastern and Western divisions of the Western district of Missouri; and orders providing "that the order aforesaid of the circuit court of the United States for the Eastern district of Missouri be approved, and that it be taken and held to be the order of this court, except as to the requirements of a bond as therein mentioned, and the clerk enter the same upon the order-book," have been duly entered.

On the twenty-ninth day of May, 1885, orders suspending proceedings in the courts of the Western districts of Missouri were entered, containing, among other, the following: "With a view to the prevention of unnecessary labor, expense, and delay, and for the purpose of avoiding the unnecessary prosecution of numerous causes involving the same issues between the same parties, it is ordered that the original bills filed by the Wabash, St. Louis & Pacific Railway Company in said causes, and the cross-bills filed by the Central Trust Company of New York and James Cheney, aforesaid, be, and the same are hereby, suspended until the further order of court in the following-named courts, viz.: The circuit court of the United States for the Eastern and Western divisions of the Western district of Missouri." The Western district of Missouri, for judicial purposes, is divided by law into two divisions, the Eastern and Western. Moberly, where the strike occurred, is situate in the Eastern division. The proceedings against the strikers were commenced and proceeded with throughout in the Western division of the Western district of Missouri. The act of congress of 1879, establishing the division, in its second section provides that "all offenses hereafter committed in either of said divisions shall be cognizable and indictable within the division where committed." The act further designates Jefferson City as the place where the courts for the Eastern division, and Kansas City as the place where the courts for the Western division, are to be held. The courts of the two divisions are presided over by the same judges.

Three questions as to the jurisdiction of this court are thereupon raised:— (1) Can the circuit court of the Eastern district of Missouri give jurisdiction, ancillary or otherwise, to this court in a case which is pending in its own court? (2) If it can, and did so, has it not, by the order of suspension, deprived or suspended the jurisdiction?

(3) Is the proceeding in contempt of such a character that it can be heard, under the law, in a division other than the one in which the offense was committed?

The first of these questions I have not examined, because the circuit court of the Eastern district of Missouri, on full consideration, having, no doubt, regard to the importance of the matter, made the order. It would not be becoming for a district judge, sitting in the circuit court, to overrule the decision of the circuit court of another district, made by both the circuit and district judges. Besides this, it would seem that, as a matter of comity, any of the courts of the United States within the jurisdiction of which part of the property in the hands of the court is situate should lend, if need be, its aid in the administration, and specially to the protection, of such property; for, in so doing, it would be but carrying out the object for which the law is invoked. The presumption of jurisdiction, if ever indulged in, may be in a case like this.

Regarding the second question, the suspension of the jurisdiction, it is sufficient to say that a careful examination of the petition for suspension, and the order made thereunder, leads to the conclusion that the jurisdiction of the court was not to be interfered with further than the foreclosure proceedings were concerned. This view is concurred in by Judge BREWER, the circuit court judge, who made the order.

It is the third question, the hearing of the case in a division of the district other than the one in which the offense has been committed, which is mainly relied on for the setting aside of the proceedings had. The answer to be given to the question must in a manner depend on the nature of the offense known as contempt of court. By the seventeenth section of the judiciary act of 1789, the courts of the United States are given power "to punish by fine or imprisonment, at the discretion of said court, all contempt of authority in any cause or hearing before the same." The act of congress of 1831 confines these powers to "misbehaviors of any person or persons in the presence of said courts, or so near thereto as to obstruct the administration of justice; the misbehavior of any of the officers of said courts in their official transactions; and the disobedience or resistance by any officer of said court, party, juror, witness, or any other person or persons to any lawful writ, process, order, rule, decree, or command of said court."

This is the law to-day. It will be observed that while the laws seek to limit the powers of the court, not a word is said as to the extent of the fine and imprisonment which the judge may impose. These unlimited discretionary powers are sometimes justified on the ground that a court must have the means to protect itself. What is done by them for that purpose might, however, well be subject to revision. In a contempt case, as the law now stands, the person affected is remediless, unless the court acted without authority. *New Orleans*

v. *Steam-ship Co.* 20 Wall. 387. Proceedings for contempt have at times incidentally been made use of to collect and pay over damages to the party injured, thus making them both civil and criminal. Of late the tendency has been to make them purely criminal. In *Re Ellerbe*, 4 McCrary, 449, S. C. 13 Fed. Rep. 530, Judge McCrary takes this ground, citing a number of authorities in support. This view, with which I coincide, is also calculated to remove any doubt as to whether a judge at chambers can punish for contempt; for trials of criminal offenses, above all others, should be in court. Assuming that proceedings for contempt are criminal in their nature, the question remains, can they be had in a division of the district other than the one in which the offense was committed? Property of the Wabash Railroad is situate in both divisions of the Western district of Missouri, and interferences in one division, affecting its operation, must of necessity affect it in the other. The application for protection of the property was made to the judge at chambers in the Western division. Under the warrants issued the United States marshal arrested the defendants in the Eastern division, and brought them before the court in the Western division, in which the hearing was had and sentence passed. To the strikers themselves it may be of little, if any, importance whether they were tried in the Eastern or Western division of the district, yet, as a question of law, it is of importance.

A few suggestions as to the legislative history as to the divisions of the country generally, and for judicial purposes specially, may not be out of place. As pertaining to the system of government under which we live, the underlying idea is, the bringing near the citizen the government of which he is a part and in which he exercises control and power. The subdivision for judicial purposes no doubt partook of that idea. The constitution of the United States originally provided for the trial of crimes (except impeachment) by jury, and that "such trial shall be held in the state where the said crimes shall have been committed." The sixth amendment of that instrument enacts that "in all criminal prosecutions the accused shall enjoy the right of a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law." The constitutional provision last quoted not only requires trials to be had in the district as distinguished from the state, but also provides for the ascertainment of such districts. It is obvious that additional stress is laid upon districts by the change. From the judiciary act of 1789 down to the act of 1879, dividing the Western district of Missouri, it has been the aim of congress to designate the districts in which courts are to be held, and their jurisdiction, as a rule, has been confined to such districts. No such care has, however, been observed regarding the division of districts over which the same judges preside. Thus, for instance, the law provides that the justice allotted to a circuit shall attend at least one term of the circuit court in each district during

every period of two years. No notice is here taken of divisions of districts, but they are treated as a whole. Numbers of similar instances might be cited.

The desire to protect property in the hands of United States courts, under circumstances like those under consideration, has induced me to look into the means the present laws afford for that purpose. Aside from hearing cases during regular terms, the law provides for the holding of special terms, at the discretion of the courts, for the trial of criminal cases.

Adjourned terms may be held. The law also provides that while the supreme court of the United States is in session, it may direct special sessions for the trial of criminal cases, to be held at any convenient place within the district, nearer to the place where the offenses are said to be committed than the place appointed by law for the stated session, and gives the same discretionary power to the circuit and district judge when the supreme court is not in session. Construing the provision of the law here cited as providing for the holding of special sessions near the place of the commission of the offenses only, it still affords a remedy. Add to this the general power of all judges, state and federal, to place offenders under recognizance to keep the peace and bind them over to appear, and the powers of the court to deal with offenders violating its orders would seem to be adequate, though it must be confessed somewhat roundabout in districts where the courts are not always in session. A regard for individual rights, and the presumption that the law will be obeyed, may have intentionally left the remedies as we find them.

A somewhat careful examination of the law of contempt, as made by legislation and the judges, discloses that no effective limitation to the discretionary powers of the courts has been prescribed. It is necessary, perhaps, to leave to judges such powers in the punishment of crimes, but limits to them should be, and are nearly always, prescribed. It ought to be so in cases of contempt. These suggestions are made, not because the cases before me present any particular difficulty, but because of the onerous duties imposed on judges in vesting them with unlimited discretionary powers. That the strikers in these cases violated the orders of court by interfering with its management of the road, there can be no doubt. Their escape from merited punishment is due to the law.

The conclusions reached are that the proceedings in contempt are criminal in their nature; that they must be had in court, and, under the law dividing the Western district of Missouri, in the division in which the offense was committed. The order will be that all of the defendants be discharged, principals and sureties on recognizances be released, and that the sentences heretofore passed be held for nought.

AMES and others v. CARLTON SPRING-BED Co. and others.

(Circuit Court, N. D. Illinois. July 27, 1885.)

1. PATENTS FOR INVENTIONS—NOVELTY—KNEPPLER SPRING-BED BOTTOMS.
Patent granted July 27, 1869, to Alois Kneppler, for an improvement in spring-bed bottoms, *held* void for want of novelty.
2. SAME—BOYINGTON SPRING-BED BOTTOM.
Patent granted May 24, 1881, to Levi C. Boyington, for an improved spring-bed bottom, *held* void for want of novelty.

In Equity.

Charles H. Roberts and Manahan & Ward, for complainants.

G. L. Chapin, for defendant.

BLODGETT, J. This is a bill filed to obtain an injunction and accounting for the alleged infringement by defendants of—*First*, a patent granted July 27, 1869, to Alois Kneppler, for an "improvement in spring-bed bottoms;" *second*, of a patent granted May 24, 1881, to Levi C. Boyington, for an "improved spring-bed bottom." Both these devices are applicable to what are known as woven-wire bed-bottoms, in which the bottom is constructed by extending a fabric made of coiled spiral springs from end-rail to end-rail of the frame. The Kneppler device seems to have been one of the early efforts to utilize the woven-wire fabric for bed-bottom purposes, and instead of suspending the fabric from end-rail to end-rail, leaving the sides free, the sides were more or less supported by a side rod or wire, which seems to have been supposed to be necessary in order to give the requisite degree of strength and form to the bed-bottom. Later inventors demonstrated that the best, if not the only, practicable mode of utilizing the woven-wire fabric for a bed-bottom was by suspension from end to end, with no side fastenings. In the use of this fabric, suspended from end to end, such a degree of tension was necessary as would give the requisite amount of firmness to the bed, so that it would not sag or sink too much by the weight of the occupant, and, to some extent, the degree of tension thus required was found objectionable.

Kneppler placed underneath the coiled-wire fabric, vertical spiral springs, partly relieving the fabric from the burden of the occupant's weight, and dispensing, to some extent, with the necessity of so rigid an endwise tension upon the coiled-wire fabric. The Boyington device is the same in principle and mode of application as the Kneppler, with the exception that the coiled-wire fabric swings free from end-rail to end-rail; but he placed underneath the middle portion of the woven-wire fabric, between the side-rails, a series of vertical spiral springs, resting upon slats connected with the side-rails, so that the woven-wire fabric need not be stretched to the degree of tension required when no intermediate support is interposed; the claim of his patent being, "in combination with the end and side rails of a bed-

bottom, and spiral springs supported on slats connected therewith, a stretched woven-wire mattress connected permanently and directly with the end-rails, said stretched mattress having no other support than the end-rails and spiral springs, all substantially as and for the purpose specified."

The defenses interposed are, (1) want of novelty; (2) that the defendants do not infringe. It is admitted that the Kneppler device, as constructed and shown, was inoperative and useless, inasmuch, as has been before said, the side fastenings made the woven-wire fabric bag down in the middle, and assume what is termed by the witnesses a hammock shape. All that Boyington did was, in the light of the experience of other improvers of the woven-wire mattress bed, to remove the side fastening from the Kneppler bed, and place Kneppler's vertical spiral springs under the middle part of the wire fabric as an auxiliary support, instead of relying wholly upon the tension of the fabric; and the only question, so far as the Boyington device is concerned, is, was there any invention in doing this, or was it a mere mechanical improvement? As has been already stated, other inventors before Boyington had made, successfully, woven-wire mattress beds by swinging the fabric from end-rail to end-rail; but, so far as disclosed by the proof in this case, none of them had placed an auxiliary support, either in the form of spiral or other springs, under the woven-wire fabric. Boyington took the Kneppler construction, removed the side fastenings and side-rods, and received his patent for so doing. It seems to me this was nothing but such a mere mechanical alteration of Kneppler's device as any person familiar with the use of the woven-wire fabric for bed-bottom purposes could have done at the date of Boyington's patent, because it had become well established at that time that the woven-wire fabric must be suspended from end-rail to end-rail, and that side fastenings were not only objectionable, but absolutely prevented the effective operation of the woven-wire fabric for the purposes of the bed-bottom. It is therefore my opinion that Boyington's change in the Kneppler mode of construction was only mechanical, and did not involve the use of the inventive or creative faculty.

As to the Kneppler patent, as already stated, it was wholly inoperative and useless in the form shown, and this leads me to consider for a moment whether the interposition of these vertical spiral springs underneath the coiled-wire fabric can be said to amount to invention. The proof shows that bed-bottoms had been constructed, prior to the date of the Kneppler patent, of coiled-wire springs set vertically upon slats, or otherwise fastened, so as to bear the weight of the mattress and the occupant of the bed. In some cases these springs were interlaced, or fastened together, and in others they stood independently of each other; the mattress forming, as it were, a connecting web between them. In that case the coiled-wire springs were the only support of the mattress and the occupant of the bed. To interpose ver-

tical spiral springs underneath the coiled-wire fabric, after they have been used with an ordinary mattress, for the purpose of acting as an auxiliary support to the coiled-wire fabric, or to relieve the necessity of the severe strain or tension upon the coiled-wire fabric, seems to me not to have required inventive skill. The coiled-wire fabric and the spiral springs perform no new function, and a bed-bottom composed of coiled-wire fabric and spiral springs combined, as shown either in the Kneppler or Boyington devices, is but an aggregation of old parts, where no new function is performed by either of these elements by bringing them together, but each continues to perform the same function it did when used in accordance with the old art.

The proof also shows a patent for a bed-bottom, granted to P. P. Simmons, April 21, 1868, antedating the Kneppler by over a year, in which a fabric composed of transverse wooden slats and longitudinal wires was stretched from end-rail to end-rail, and supplemented by vertical spiral springs placed underneath the same. It is true that the fabric shown in the Simmons patent differs from that shown in the Kneppler and Boyington patent; but, after the introduction of the woven-wire fabric for bed-bottom purposes, there was no possible room for invention in substituting the woven-wire fabric for the wooden slat and wire fabric in Simmons' device; and when that was done you had exactly, in construction and mode of operation, the Boyington bed, and all there was of merit in the Kneppler bed.

I am therefore of the opinion that this patent is void, and that the bill in this case should be dismissed for want of equity.

ALDEN EVAPORATING FRUIT CO. v. BOWEN and another.

(Circuit Court, N. D. New York. August 25, 1885.)

PATENTS FOR INVENTIONS—REISSUE No. 5,648—ANTICIPATION.

The first claim of reissue No. 5,648, granted to Charles Alden, November 11, 1873, for an improvement in processes and apparatus for preserving animal and vegetable substances, the original patent, No. 121,569, having been granted to him December 5, 1871, *held void*.

In Equity.

W. J. A. Fuller, for plaintiff.

Cogswell, Bentley & Cogswell, for defendants.

BLATCHFORD, Justice. The controversy in this suit is reduced to the question of the infringement of claim 1 of reissued letters patent No. 5,648, granted to Charles Alden, November 11, 1873, for an "improvement in processes and apparatus for preserving animal and vegetable substances," the original patent, No. 121,569, having been granted to him December 5, 1871. Claim 1 reads thus:

"The within-described process of maturing and preserving animal and vegetable substances, in part through evaporation, and in part through chemical binding of their organic moisture, by exposing the same to a current of heated and humid air, increasing in humidity and decreasing in heat as the evaporation proceeds, said current of air moving in the same direction with the articles to be treated, substantially as herein set forth."

All there is of this process is whatever may result from the current of heated and humid air, increasing in humidity and decreasing in heat as the evaporation proceeds, the current of air moving in the same direction with the articles to be heated, and acting on the substances divided into extended surfaces and exposed on screens, which are moved away from the source of heat while still exposed to heat. The substance on the screen nearest the source of heat is exposed to it for a proper time, and the screen is then passed onward, and a fresh screen is introduced into the place thus vacated. The specification says:

"The current of air, in passing through these screens covered with fresh material, now carries with it an increased burden of moisture, derived from said material as it strikes upon the screens that have gone on before. With every forward movement of the carrying apparatus fresh screens are introduced, and the moisture of the current of air is increased thereby."

It also says that the process—

"Is generally carried on in an apparatus which consists essentially of an elongated chamber or shaft, square or oblong, or of any other form, in cross-section, and set vertically, as shown in the drawing, or in any other position found advantageous for particular purposes."

The specification states the rationale of the process thus:

"By introducing the green articles in the bottom part of the tower, and moving them in the same direction in which the air moves, the scorching or burning of such articles is effectually avoided, since an article in its moist state, when exposed to a high heat, gives up its moisture; and, as the heat is absorbed or rendered latent by such moisture, the article is prevented from being overheated, and, as it moves from the high to the low temperature, it becomes gradually deprived of all its free moisture, as previously stated."

The evidence shows that the process set forth and claimed existed before Alden's invention, in the apparatus used by the Shakers from 1860, as testified to by Anstatt; and in the dry-houses testified to by Ledyard, Rogers, and Ryder, where the fruit was first placed on the lowest tray nearest the fire, and that tray was moved upward in the dry-house as the operation progressed. The apparatus described by Alden may carry out the process more perfectly, but the process, as set forth in the claim, is the same. All that Alden had a right to claim was an apparatus or arrangement of mechanism. This he did in claim 2. But that claim is not infringed.

The bill is dismissed, with costs.

TUTTLE and others v. LOOMIS and others.

(Circuit Court, N. D. New York. January 2, 1885.)

PATENTS FOR INVENTIONS—REISSUE—LACHES.

No amendment can be imported into a reissue to effect a broadening of a claim in the original patent, after a lapse of eight years, in the absence of very special circumstances. *Mahn v. Harwood*, 5 Sup. Ct. Rep. 174, followed.

In Equity.

Duell & Hey and *M. D. Leggett*, for complainants.

N. H. Stewart and *John R. Bennett*, for defendants.

WALLACE, J. All the questions involved here have been decided in favor of the complainants in suits upon these patents; first by Judges DRUMMOND and GRESHAM, in the circuit court of the district of Indiana, and again by Justice MATTHEWS and Judge DYER, in the circuit court for the Western district of Michigan. Not only were these complainants the complainants of record in those suits, but the defendants in those suits were closely identified with the present defendants, although not in such sense privies as to effect an estoppel. In view of these decisions I ought not to consider the questions now presented as open. Upon the question of the validity of the reissue, however, my impressions are so strongly against the complainants that I am unwilling to direct a decree in their favor until the rehearing upon that question now pending in the Western district of Michigan has been had, and a decision reached by the court. When the former decisions were made, the law upon the subject of reissues was generally recognized as conferring broader powers upon the commissioner of patents, and as authorizing a wider latitude in modifying the claims of original patents than has since been declared to be the rule by the decisions of the supreme court.

Carver's original patent described spring harrow-teeth of such form that when attached to the under side of the harrow-bar the teeth would curve back over the bar and extend to the ground below the under side of the harrow-frame, with their points inclining forward. The claim covered such teeth. It is obvious that all the functions of such teeth could be obtained without adhering to the precise form and mode of attachment specified by Carver; and, assuming that he was the pioneer in the invention of spring harrow-teeth, he was entitled to a broader claim than he made. Whether he described in his original patent just the invention he supposed he had made, or whether his invention was really a broader one than he himself supposed it to be, when it became apparent that the real invention was unduly restricted and narrowed by the description, he was entitled to a reissue if the error arose from inadvertence, accident, or mistake. After the lapse of eight years, however, no amendment could be imported into the reissue to effect a broadening of the claim of the original, in the

absence of very special circumstances. *Mahn v. Harwood*, 5 Sup. Ct. Rep. 174. The specification here was very plain and free from complexity, and no special circumstances exist to take the case out of the general rule. It seems to have been the purpose of the first reissue to eliminate some of the details of form and arrangement which were imported as a part of the description into the claim of the original patent. The description is amended by the statement that—

"The size and shape of the teeth may be varied considerably without departing from the principle of my invention, which contemplates, broadly, a harrow provided with teeth fastened at one end of the frame, but so formed between the point of attachment to the frame and the point of contact with the ground that it will spring or yield so as to pass over lumps or obstacles without injury to the tooth itself, and without disturbing the operation of the other teeth of the harrow."

The claims are modified so as to cover the invention thus described. But in the second reissue all reference to such details in essentials is omitted, in order to prepare the way for broad claims which will embrace any harrow having two or more series of spring-teeth, and any harrow-tooth which "embodies the principle" of Carver's tooth. The drawings are referred to as embodying the principle of the invention, and the parts shown by the drawings are described. The specification is amended by the statement that the inventor was the first to have produced a harrow wherein the harrow-frame is supported on two or more series of spring-teeth which are adapted to yield to an unlimited extent when in use. When the several claims of the reissue are read with the specification as amended, there does not seem to be one which restricts the scope of the patent to a spring-tooth fastened to the under side of the bar, and curving back over the bar. All the claims of this reissue, except the third and fourth, are on their face much broader than the claim of the original, or for a different invention than is disclosed in the original. The third claim, read with the specification, is not limited to a spring-tooth curving back over the bar of the frame, or fastened to the lower side of the bar, nor is the fourth. It seems to me that these claims are broader than the claim of the original, by proper construction, although they are not in express terms.

In view of the lapse of time between the original and the reissue in suit, the inventor abandoned to the public all that he described and did not claim in his original patent. I have not considered the question whether this expansion of the claims was made in order to embrace in the monopoly of the patentee the harrows or harrow-teeth made subsequently to the original patent by others. For these reasons I am unwilling to decree for the complainants, unless, upon the review pending in the circuit court for the Western district of Michigan, that court should adhere to its original judgment. It is but just to the complainants to state that their counsel have not been fully heard. And one reason why I deemed it proper to curtail their argu-

ment was because the decision of the question involved more properly belongs to the circuit court of the Western district of Michigan, and the action of that court should not be forestalled by a decision here on full consideration.

LEACH v. CHANDLER and another.

(Circuit Court, D. Indiana. July 30, 1885.)

PATENTS FOR INVENTIONS—INFRINGEMENT—TABLES FOR TILE-MACHINES.

The fourth, fifth, and seventh claims of patent No. 279,259, granted to William F. Leach, on June 12, 1883, for improvement in tables for tile-machines, construed, and held not infringed by machines made under patent No. 243,867, issued July 5, 1881, to Elihu Dodds.

In Equity.

David A. Leach, for complainant.

West & Bond and *Stanton & Scott*, for defendants.

WOODS, J. The complainant, as owner of letters patent No. 279,259, granted him on June 12, 1883, for improvement in tables for tile-machines, sues the respondents for infringement of claims 4, 5, and 7 of his patent, and for a cancellation of letters patent No. 243,867, issued July 5, 1881, to Elihu Dodds, who assigned to the defendants; the alleged infringing machines having been made by defendants under and in conformity to the Dodds patent. The bill charges, among other things, that the complainant was in truth the first inventor, and that, in a proceeding of interference, to which the respondents appeared, it was so decided in turn by the examiner, by the examiner in chief, and by the commissioner of patents. The fourth, fifth, and seventh claims of complainant's patent are of the tenor following:

"(4) In a tile-table, suspended, flexible carriers, H, substantially as herein shown and described, whereby tiles of different forms and sizes will be firmly supported and safely carried, as set forth.

"(5) In a tile-table, the combination, with the bases, E, and the flexible carriers, H, of the suspending springs, G, substantially as herein shown and described, whereby the flexible carriers can adjust themselves more freely to the supported tiles as set forth."

"(7) In a tile-table, the endless chain of flat bases, E, substantially as herein shown and described."

The claim in the Dodds patent reads as follows:

"The combination in a tile machine of the carrier bars and a flexible bridging strap arranged to receive the tile as it comes from the forming dies."

The specifications of complainant's patent contain the following among other statements:

The object of this invention is to provide suitable means for receiving tiles as they come from the tile-mill, and delivering them uninjured to the off-

bearers; and also to provide suitable means for cutting the tiles accurately into proper lengths without stopping the machines. The invention consists in a tile-table, constructed with a frame provided with a series of rollers, around which passes an endless chain of receivers, having downwardly projecting flanges and connected at their forward ends, leaving their rear ends free. With the receivers are connected spring-supported flexible carriers, to adjust themselves to the form of the tile. To each receiver or base, E, are attached one or more springs, G, as the size of the said receiver may require. To the upper ends of the springs, G, are attached the side edges of the carriers, H, which are made of thin sheet-brass, or other suitable material that has sufficient flexibility to allow it to adjust itself to the slope of the tile to be carried, so that tiles of different shapes and sizes can be firmly supported and safely carried by the same carriers. If desired, the carriers, H, can be supported by rigid standards, but I prefer to use the springs, G, as they allow the flexible carriers to come in contact with more of the surface of the tiles, and thus carry them more safely. The carriers, H, can be made of such a length as the length of the tile may require.

It is not found necessary to determine whether the complainant or Dodds was first inventor, because, in view of the prior art, the invention of each, if properly called invention, must, in the judgment of the court, be construed strictly, and when so construed, there is no infringement. The flexible standard, as it seems to the court, constitutes an indispensable part of the complainant's combination. There is, to be sure, a suggestion in the specification that a rigid standard may be used instead; but if that be done, unless it be constructed with a hinge, as shown in the *red model* put in evidence, the chief value of the improvement will be sacrificed, because upon absolutely rigid standards the carriers, made of tin or brass or other material, would have little or no capability of conforming to the shape of tiles of different sizes. Constructed after the *red model*, or with flexible supports, the complainant's invention would seem to be ingenious, novel, and useful, but with rigid standards it would, in view of the Penfield patent, No. 98,519, and the Brown patent, No. 112,538, (to go no further,) involve no patentable advance over the prior art. It is claimed, with some emphasis, that the invention of the plaintiff consists in, or, at least, embodies the idea of, a series of carriers; but this, if conceded, does not help the case. A no less complete series is shown in the Penfield patent, and, without the flexible standard, it is impossible, as it seems to the court, to find support for any of the plaintiff's claims.

In respect to the seventh claim, it was conceded, upon the argument, that the action cannot be sustained.

Bill dismissed for want of merits.

RAILWAY REGISTER MANUF'G CO. v. NORTH HUDSON CO. R. CO. and others.

(Circuit Court, D. New Jersey. August 24, 1885.)

1. PATENTS FOR INVENTIONS—AMENDING AND ENLARGING CLAIMS BEFORE ISSUE.

An inventor may amend or enlarge his claims from time to time before the issue of his patent, in order to embrace everything which was specified at the start.

2. SAME—PATENT NO. 233,915, FOR FARE-REGISTER.

On examination of the original specifications of patent No. 233,915, dated November 2, 1880, for a fare-register, *held*, that the invention for which the patent was issued was sufficiently described therein, and that the attorneys of the inventor in the patent-office had authority to insert amended claims without having them verified by the oath and signature of the patentee.

3. SAME—ANTICIPATION—COMBINATION.

A combination is patentable only when the several elements of which it is composed produce by their joint action a new and useful result, or an old result in a cheaper or otherwise more advantageous manner.

4. SAME—PATENT NO. 233,915, FOR FARE-REGISTER.

Patent No. 233,915, for a fare-register, granted November 2, 1880, is not void for want of novelty.

In Equity.

Dickerson & Dickerson, for complainant.

Frost & Coe, for defendants.

NIXON, J. This suit is brought to recover damages for the infringement of letters patent No. 233,915, dated November 2, 1880, for fare-registers, issued to John B. Benton, assignor to the Railway Register Manufacturing Company of Buffalo, New York.

The defenses set up in the answer are want of novelty, prior use for more than two years, and non-infringement. I have no doubt that the mechanism used by the defendants infringe the complainant's patent. The complainant's expert (Quimby) properly describes the invention in Benton's patent when he says that it is to set back to the starting point the index hand or pointer of a trip-registering mechanism, which hand or pointer, during the registration of fares by a permanent register, partakes of the motion of a shaft rotated by the permanent register mechanism. The defendants use substantially the same mechanism which is found in the Fowler and Lewis patent, No. 231,161, and embodied in exhibit marked "North Hudson Co. Indicator." The mechanism varies in some details, but the variety arises from the use of mechanical equivalents, and the mode of operation of the two mechanisms is substantially the same. The principal questions left for me to consider are (1) whether, upon the original application made by Benton on the twenty-ninth of December, 1877, the patent-office was authorized to issue the patent on which the suit is brought; and (2) whether the claims of the patent, as finally issued, have been anticipated by other inventors and patentees.

1. Turning to the specifications of Benton's original application I find that he states the object of his invention to be threefold, to-wit, to produce a combination of mechanism which shall be capable (1) of registering fares, numbers, or amounts; (2) of separating the registrations belonging to each trip, or other definite period, by means of a trip index being returned to zero; and (3) of indicating how many times such trip index or register has been returned to zero. In order to effect these results he proposes the following combination: *First*, a single trip register for recording the actuations of the mechanism during a single trip, and capable of being set back to zero at the end of that trip. *Second*, a general register or permanent index, which records the same actuations that the single trip index does, and which cannot be set back. *Third*, a register for indicating how many times the single trip register has been set back to zero, and operated in and by the act of setting the single trip register to zero. After further and minutely describing in the specifications the means by which he expects to secure these results in a single combined mechanism, he concludes with six claims. In view of the subsequent proceedings in the patent-office it is only necessary to consider the fifth claim, which is as follows:

"(5) In a fare-register, the combination of a key, K, with a pawl, B, a ratchet-wheel, R, and a stop arrangement by which the indication of said register may at any time be changed to some other particular indication,—as, for instance, zero,—substantially as and for the purposes described."

The complainant insists that the three claims of the patent sued on are merely the restatement in a better and more formal manner of what is fairly indicated in this fifth claim of the original application, taken in connection with the specifications describing the mechanism by which the claim was made operative. The patentee precedes the three claims with the following disclaimer:

"I disclaim herein, in favor of my application filed July 9, 1880, all the patentable subject-matter of my present invention, save that covered by the following three clauses of claims; it being the intention to cover and include in this case only the three combinations of mechanism recited in said claims, while all the other patentable features, parts, or combinations of my invention are intended to be covered by the claims of my said application of July 9, 1880, which is filed as a division and continuation of this present application."

The claims are all combination claims, and are stated in the patent as follows:

"(1) The combination, substantially as hereinbefore set forth, of a registering wheel or index hand, actuated in one direction in the process of counting, and capable of being moved in the other direction, to reset or carry it to zero; a resetting wheel or teeth connected with said registering wheel or index hand; a movable plate or pawl-carrier, inclosed within the register casing, acting upon the said resetting wheel or teeth, and a removable reciprocating push-key to actuate said plate or carrier.

"(2) The combination, substantially as hereinbefore set forth, of a turning shaft; a toothed wheel to actuate said shaft; a trip index hand or registering

wheel connected with said shaft by a friction clutch or coupling, which compels the said index hand or registering wheel to move with said shaft in the process of counting, while allowing said index hand to be moved upon said shaft to reset it or bring it to zero; resetting teeth or projections connected with said index hand; a movable plate acting upon said projections of the index hand; a pusher or key, movable endwise, to actuate said movable plate in one direction, and a spring to move said plate in the opposite direction, or to return the plate to the position from which it was moved by said pusher.

"(3) The combination, substantially as hereinbefore set forth, of a trip register; a general register; a prime mover or handle for actuating said registers simultaneously, or nearly so; and a resetting mechanism for the trip register, consisting of a toothed wheel or projections connected with the trip register, a backward and forward movable plate acting upon said projections, a reciprocating key or pusher to actuate said plate in one direction, and a spring to move the plate in the opposite direction to that imparted by said key, whereby the said trip register is permitted to be moved with the general register, clear of the resetting plate, in the process of counting, while capable of being reset by said plate, by the simple reciprocation of the key or pusher, without disturbing the record of said general register."

The question is not, as the counsel of the defendants seem to imagine, whether everything which appears in these three claims was incorporated in the fifth claim of the original application; but whether the specifications of that application fairly indicate all that was put into these claims. I do not understand that an inventor, applying for a patent, and before it is issued, may not amend or enlarge his claims from time to time, in order to embrace everything which was specified at the start. I have examined with care the original specifications of Benton, and am of the opinion that he has substantially shown and described the invention, to cover which the patent of the complainant was issued. If this be the case, his attorneys in the patent-office had the authority to insert the amended claims, without having them verified by the oath and signature of the patentee.

2. It is further insisted by the counsel of the defendants that the claims contain nothing new, and that the invention has been anticipated. This is probably true, so far as the elements of the combinations are concerned. By searching the patent-offices of the United States and Great Britain, many patents may be and have been found which contain some one of these elements. They are all old. But have they ever before been put in combination? If not, and a new and useful result has followed such combination, the patent must be sustained. In the recent case of *Stephenson v. Railroad Co.* 5 Sup. Ct. Rep. 781, the supreme court, speaking by Mr. Justice Woods, say:

"A combination is patentable only when the several elements of which it is composed produce, by their joint action, a new and useful result, or an old result in a cheaper or otherwise more advantageous way."

No matter, then, how old the several elements are, have they been placed in such relation to each other that their joint action produces a new and useful result?

The date of the Benton invention is February 19, 1877, as the uncontradicted testimony of the case shows. Laying aside all patents

which do not antedate that time, none are left that cover the combinations of the complainant's mechanism.

Let a decree be entered for the complainant for an injunction and an account.

CELLULOID MANUF'G Co. v. CROFUT and others.

(Circuit Court, D. New Jersey. August 26, 1885.)

1. PATENTS FOR INVENTIONS—ANTICIPATION—PATENT No. 65,267.

Patent No. 65,267, dated May 28, 1867, and granted to William Hugh Pierson, for an improved plastic material made from vegetable fibers, was not anticipated by the English letters patent, granted to Alexander Parkes, upon a specification enrolled in the British office, on April 17, 1856.

2. SAME—ABANDONMENT—POVERTY—SICKNESS—INSANITY.

Continued poverty, sickness, and mental alienation are sufficient excuses for delay in procuring a patent. Abandonment to public held not shown.

In Equity.

Dickerson & Dickerson, for complainant.

John P. Adams, for defendants.

NIXON, J. This action is brought against the defendants to recover damages for the infringement of letters patent No. 65,267, dated May 28, 1867, and granted to William Hugh Pierson for an "Improved Plastic Compound," made from vegetable fibers. The patent relates to what is called by the patentee the "Plastic Art," and especially to the production of celluloid. He takes some form of fibrous material known as "cellulose," as, for instance, the ordinary cotton fiber, and converts it into nitro-cellulose, by treating it with nitric, or a mixture of nitric and sulphuric acids. By the action of these acids the cellulose is turned into a material usually called pyroxyline. This pyroxyline is then submitted to the action of solvents, which may be a mixture of alcohol and ether, or wood spirits, sufficient in quantity to put it into a half-dissolved or pulpy, but not into a liquid, state. The action of the solvents makes a plastic mass which is capable of being moulded into desired forms. To produce different effects, different foreign substances are added; and to render the result suitable for manufacture, it is laid upon a proper surface and submitted to continued pressure, by which it is compacted into a solid mass, now known as celluloid.

The complainant insists that the defendants have infringed the first and second claims of the patent, which are as follows: (1) The formation of articles of manufacture resembling stone, wood, whale-bone, shell, horn, and other rigid or elastic articles out of celluloid, or semi-soluble pyroxyline, prepared substantially in the manner and for the purposes herein set forth. (2) The combination of plastic, as above described, with vegetable or any other foreign matter, substantially in the manner and for the purpose set forth.

Numerous defenses are set up in the answer, but two only were urged at the hearing: (1) That Pierson was not the original and first inventor; the patent having been anticipated by the English letters patent granted to Alexander Parkes upon a specification enrolled in the British office on April 17, 1856. (2) Abandonment of the invention to the public.

1. The invention claimed by Pierson is undoubtedly fully set forth by Parkes in the second part of his specifications relating to the use of solutions of gun-cotton, or other similar compounds. But this is a foreign patent, and the complainant meets the alleged anticipation by evidence tending to show that the actual invention of Pierson was made by him some years previous to the sealing of the Parkes patent. Has he been successful in the attempt? The testimony is explicit and mainly uncontradicted that as early as the year 1850 the patentee, Pierson, began to direct his thoughts and devote much of his time to the production of solid bodies from pyroxyline and solvents, and combinations therewith of other materials. He was then a young physician, practicing his profession in Cincinnati. He made such experiments as his limited means allowed from 1850 to the month of July, 1855, when he was compelled by his pecuniary necessities to leave Cincinnati and take refuge for support in his father's house at Orange, in the state of New Jersey. He endeavored to enlist the interest and sympathy of the father in his invention, but he seems to have been of a practical turn of mind, and instead of encouraging, tried to check the son from indulging in such profitless hallucinations. The patentee was a witness in the case, and his modest story of his perplexities and struggles with poverty is quite pathetic.

"My practice as a physician," he says, "was very small in amount, and was among the poor, and I think I could not have collected as such as 50 cents a day. I did not collect enough to meet my mere living expenses. I had to receive aid from my father to meet those expenses. When Mr. Price, with whom I boarded, left Cincinnati, I was in his debt in about the sum of \$150. My recollection is that I had agreed to pay him at the rate of about ten dollars per week for my board. This sum of \$150, so due, my father afterwards paid for me, and I was unable for years thereafter to collect sufficient money from my earnings to liquidate that account. After Mr. Price left Cincinnati in the year 1853, I was reduced to very great straits at times, and lived the best way I could, from hand to mouth, in my own room, a large part of the time on bread and water. During all this period, however, I constantly devoted all the money that I could in any way spare, and really more than I could properly spare, from my actual necessities, to the purchase of materials for carrying on my experiments and completing my invention. I was necessarily greatly hampered in my work from lack of means, but I persistently employed all the means in my power, and constantly devoted all the time and attention I could spare from limited practice, to the perfection of what I at that time and ever since have believed would prove to be an invention of the greatest value to mankind and possibly to myself. * * * I was finally compelled to leave Cincinnati, and returned to my father's house in Orange, in the state of New Jersey, where, at least, I was assured of having enough to eat. I went right to work, continuing my experiments to improve and per-

fect the invention. I conducted them at first in a corn-crib on my father's premises, and afterwards in Willow Hall, which my father had just built. I moved into Willow Hall in September, 1855. After I arrived in Orange, and prior to my moving to Willow Hall, I had made other solid pieces of the material which I called plastic, and had also coated cloths. After moving into Willow Hall, I worked to perfect my invention; to adapt it to different uses, and to get it into a state in which I could obtain the assistance necessary to patent and introduce it to the public. A large part of the experiments were directed to reducing the cost of manufacture. I also desired, by actual experiment, to prove its adaptability to certain uses in the art; in short, to ascertain, as far as practicable with my limited means, the whole capacity of the invention. Although my invention, as an invention, was fully defined and completely demonstrated to my own mind, while in Cincinnati, at least as early as the year 1852, yet there were many things remaining to be done to make it commercially valuable and to make it useful for many different purposes for which I had designed and considered it adapted. It was necessary to carry on a series of experiments for very many of these independent uses, in order to obtain the proper consistency, the proper color, and other qualities suiting the material to such uses. While in Orange, I made a great many solid pieces of my plastic material, varying in size, shape, and color. * * * These results I gradually perfected after my return to Orange, and while there devoted myself constantly, excepting so far as my time was employed in a practice somewhat extensive among the poor, but very unremunerative, to perfect this invention. The cost of gun-cotton itself, as furnished in the market at that time, was too great to make the thing commercially practicable, and I spent a great deal of time in learning to make this necessary basic article more cheaply, so as to make the compound I wanted more practicable. This double work of my invention and practice was altogether beyond my strength, and my health gradually declined in consequence. A great deal of time was occupied in preparing specimens for the patent-office. I prepared more than 100 separate specimens for this purpose alone. These specimens were completed somewhere in the year 1860, but their preparation had occupied me much of my time for several years before. I filed a *caveat* referring to this invention in April, 1860, and made an application for letters patent in November, 1860. I made this application just as soon as I was pecuniarily able after I had commercially perfected my invention. The money for making the application I was compelled to borrow, having been in very straitened circumstances during the period when I was living in Orange, after my return from Cincinnati. During this period, and until I made application for letters patent, I find by examining my accounts that I collected on an average less than one dollar a day from my practice, and, of course, I was able to spare but little from this very limited income. During all that period I had but very little money, and such as I had was constantly devoted towards the perfecting and carrying out of my invention; and that was my main object and aim, during all that period, as it had been from the time when I first conceived the invention. Such practice of medicine as I did, I was compelled to do in order to obtain the necessary means of living, and for carrying on my experiments. After making this application for letters patent, my application was, as I believed, unjustly refused by the patent-office; and after having devoted so many years of my life to this one idea, the disappointment was too great for me to bear, enfeebled as I was by overwork; and, as I am informed by my friends, my mind became unbalanced in connection with a severe fit of sickness, which occurred at this time, and this condition continued for about seven months. I was sent to an asylum early in February, 1861, and remained there until some time in September, 1861. This sickness came upon me almost immediately after the rejection of my application by the patent-office."

He further states that after his release from the lunatic asylum he was compelled to desist from all mental labor; being advised by his physician that it would be very dangerous. He was also advised by him that the best chance of recovering his health would be to enter the navy and go to sea; that he obtained the position of assistant surgeon of the navy in August, 1862; that all the pay he received, beyond his living, was from time to time appropriated in the payment of the debts which he had contracted in prosecuting his invention; that as soon as his health permitted, he went home on leave of absence, and entered into a written contract with his former patent attorney, Mr. Greenough, to renew the application for the patent, agreeing to give him for his services one-half interest in any patent afterwards obtained; that Greenough having again failed in his efforts, a contract of a similar nature was made with Mr. Williams, through whose exertions the patent was finally granted.

No question has been raised by the defendants in reference to the truth of the patentee's testimony, and it clearly reveals the fact that his invention was practically complete some years before the date of sealing the English patent of Parkes.

2. I am further of the opinion that the defendants have not succeeded in showing any acts or conduct on the part of the patentee which would justify the court in holding that the invention was abandoned. Continued poverty, sickness, and mental alienation are always regarded as sufficient excuses for delay, and not a fact or circumstance has been brought into the case showing any intention of abandonment.

A decree must be entered for the complainant, with costs.

WILLIMANTIC LINEN Co. and others v. CLARK THREAD Co. and others.

(Circuit Court, D. New Jersey. August 19, 1885.)

1. PATENTS FOR INVENTIONS — REOPENING DECREE TO ADMIT NEW DEFENSE—NEWLY-DISCOVERED EVIDENCE—LACHES.

Courts will not open a decree and admit new defenses and newly-discovered evidence, unless it appear that the defendants could not, with reasonable diligence, have discovered the facts which are sought to be introduced, when the pleadings were drawn and the testimony taken.

2. SAME—DECREE INTERLOCUTORY—APPLICATION TO REOPEN, HOW MADE—EVIDENCE.

When the decree is interlocutory and not final, the court has power to open the same and allow a new defense on motion, and without the formality of a bill of review; but when the application is in fact and substance for a rehearing on the ground of newly-discovered evidence, it must be supported by the same sort of proof as is required in order to give a party relief upon a bill of review, or a supplemental bill in the nature of review, after a final decree.

In Equity.

B. F. Thurston and W. C. Witter, for complainants.

Livingston Gifford and Edmund Wetmore, for defendants.

NIXON, J. This is an application to open the interlocutory decree entered in the case, to give the defendants an opportunity of setting up an alleged new defense to the suit. The ground on which the application is made, as revealed in the moving papers, is that the defendants have been misled in preparing their defense by a false allegation in the bill of complaint. The suit was commenced February 13, 1872, by filing the bill, in which the erroneous allegation is made that the inventor, Conant, filed his application in the patent-office for his patent before the date of the sealing of the English letters patent to one William Weild, to-wit, July 22, 1858. It is not claimed that the complainants made a willful misstatement. It is admitted that they were led into the error by the officers of the patent-office, who had indorsed the application as if filed January 5, 1858, when, in fact, it was not filed until January 5, 1859. The late George Gifford, Esq., appeared for the defendants, and put in their answer May 6, 1872, in which he denied infringement, and also that Conant made his invention before the sealing of the English Weild patent. The replication was filed June 1, 1872.

The testimony, running through several years, seems to have been largely directed to the question of infringement. None was taken on the issue of the priority of the respective inventions of Conant and Weild. The proofs were published, and the case went to final hearing, and an interlocutory decree was entered in favor of the complainants, May 3, 1879. Proceedings began before the master for an account, and were substantially closed before the death of Mr. Gifford, which occurred in the summer of 1883. The present counsel of the defendants, Mr. Livingston Gifford and Mr. Wetmore, have succeeded Mr. George Gifford, and it is alleged in the moving affidavits that their attention was first called to the error in the bill of complaint, in regard to the date of the Conant application, in the month of December, 1884, and that the time which has since elapsed has been necessarily devoted to obtaining proof of the said error.

The decree being interlocutory, and not final, the court has power to open the same and allow a new defense on motion, and without the formality of a bill of review. But the application is, in fact and substance, for a rehearing, on the ground of newly-discovered evidence, and it must be supported by the same sort of proof as the court requires in order to give a party relief upon a bill of review, or a supplemental bill in the nature of a bill of review, after a final decree.

More than 12 years have elapsed since the bill of complaint was filed and the acknowledged error in date committed. I have examined the affidavits and the briefs of counsel submitted in the case with great care, and have been met at the threshold with the objection that the motion ought not to succeed, owing to the laches of the defendants in making their application. It a well-settled and a safe

and salutary principle of law that courts will not open a decree and admit new defenses and newly-discovered evidence, unless it appear that the defendants could not with reasonable diligence have discovered the facts which are sought to be introduced when the pleadings were drawn and the testimony taken.

Some embarrassment is caused by the death of Mr. Gifford, who was for a period of more than 12 years previous to his decease the counsel of the defendants. He was a gentleman of such exceptionally high character that all men knowing him would be inclined to accept as true his simple statement respecting any transaction as he understood the truth to be. He cannot, however, be interrogated; but it is quite clear from the evidence that both he and Mr. Clark, who represents the defendant corporation in these proceedings, had the means of ascertaining, and with ordinary diligence could have ascertained, as early as the spring of 1873, the true date of Mr. Conant's application for the patent.

Without expressing any opinion upon the other questions involved in the motion, and which have been so elaborately and ably argued by the respective counsel, it is quite clear that upon the ground of laches alone the application to open the case ought to be refused; and it is accordingly so ordered.

LORD and others, Ex'rs v. WHITEHEAD & ATHERTON MACHINE CO. and others.

SAME v. WHITEHEAD and others.

(Circuit Court, D. Massachusetts. August 26, 1885.)

PATENTS FOR INVENTIONS—EQUITY JURISDICTION—INFRINGEMENT—EXPIRATION OF PATENT—DISCOVERY—ACCOUNT—REMEDY AT LAW.

A bill in equity brought for the infringement of a patent which has expired previous to the bringing of the suit will be dismissed for want of jurisdiction, notwithstanding it avers that defendants manufacture and use the infringing machines secretly, and that complainant is ignorant of the number of machines so used, and unable to estimate the amount of damages, and prays for an account of profits, the damages to complainant from said infringement, other than the profits, being sued for in a pending action at law.

In Equity.

B. F. Thurston, D. H. Rice, and A. Eastman, for complainants.

F. P. Fish, F. T. Greenhalge, and A. M. Moore, for defendants.

COLT, J. These bills in equity are brought for the infringement of letters patent granted to Edward Lord, January 9, 1866, and which expired previous to the bringing of the suits. The defendants have demurred to the bills on the ground that they disclose no cause of action cognizable in a court of equity, and that the complainants have

a plain, adequate, and complete remedy at law. The demurrer is based upon the principle laid down in *Root v. Railway Co.* 105 U. S. 189. In that case suit was brought for the infringement of a patent that had expired prior to the filing of the bill. The bill stated that the complainant was ignorant, and could not set forth how many of the patented articles the defendant had used, but that he believed the number was large, and that the defendant had realized great gains and profits therefrom. The prayer of the bill was for an account. The defendant demurred to the bill, and the demurrer was sustained on the ground that a bill in equity for a naked account of profits and damages against an infringer cannot be sustained; that such relief, ordinarily, is incidental to some other equity, the right to enforce which secures to the patentee his standing in court.

In the present bills the complainants, instead of the simple allegation that they are ignorant of the extent of the infringement and the amount of profits, and praying discovery, set out special allegations in the bill relating to the discovery sought; such as that the infringing machines were made by the defendants in different rooms of their factory, and put together either in the factory, or at the place of business of the purchasers in distant parts of the country; that some have been shipped to foreign countries; that sometimes the outer doors of defendants' factory have been locked, and sometimes the purchasers and users of such machines lock the doors of their factories while the machines are in use; that the defendant corporation succeeded to the business of Whitehead & Atherton, a copartnership, and the complainants are unable to determine the precise time when such transfer was made, and what machines were then in process of construction, and whether or not the machines made about the time of the transfer were made by the defendants or by Whitehead & Atherton; and that by reason of the course and manner of conduct by the defendants, and the use of said machines by the purchasers aforesaid, and of others matters connected with the business, the complainants are ignorant of, and not able to ascertain, the number or size of the machines made and sold by defendants in violation of complainants' rights, and are unable to estimate the amount of damages.

The complainants pray for an account of profits; "the damages to your orators from said infringement, other than said profits, being sued for in an action at law now pending in this honorable court."

In substance, we cannot but consider these bills as the ordinary bills brought for the infringement of a patent, and we cannot see how they can be sustained under the rule laid down in *Root v. Railway Co.*, *supra*.

It is contended that by reason of the discovery asked for, the complainants have a standing in a court of equity. At least since the law authorizing the examination of parties as witnesses, we understand the more general and better rule to be that equitable jurisdic-

tion will not attach for discovery simply, except in aid of a suit at law; but the party must invoke some other distinct equitable ground. And where the broader rule may be said to prevail, based upon the proposition that the court having acquired jurisdiction for the purpose of discovery, it will proceed and determine the whole matter in controversy, the plaintiff must allege that the facts concerning which he seeks a disclosure are material to his cause of action; that he has no means of proving these facts by the testimony of witnesses, or by any other kind of evidence used in courts of law; that the only mode of establishing them is by compelling the defendant to make disclosure; and that therefore a discovery by suit in equity is indispensable; and, further, if the defendant by his answer fully denies all the allegations with respect to which a discovery is demanded, the suit must fail. 1 Pom. Eq. Jur. §§ 223-230.

These are not bills of discovery brought in aid of suits at law, and the allegations therein contained are not sufficient to support them, even under the broader rule of equitable jurisdiction adopted by some courts.

But equitable jurisdiction is invoked on the ground of account. The account sought, however, must be incidental to some other equitable relief. *Root v. Railway Co.*, *supra*. Stress is here laid by the complainants on the words of the court in *Root v. Railway Co.*, that "such an equity may arise out of, and inhere in, the nature of the account itself, springing from special and peculiar circumstances, which disable the patentee from a recovery at law altogether, or render his remedy in a legal tribunal difficult, inadequate, and incomplete."

These are actions of tort for which the plaintiffs are entitled to damages. In such cases the mere intricacy of the account does not furnish a ground for equitable interference. In *Hipp v. Babin*, 19 How. 271, Mr. Justice CAMPBELL, says: "No instances exist where a person who had been successful at law has been allowed to file a bill for an account of rents and profits during the tortious possession held against him, or in which the complexity of the account has afforded a motive for the interposition of a court of chancery to decide the title and to adjust the account." In citing this in *Root v. Railway Co.*, the court say: "These principles were announced in a case for the recovery of the possession of real estate held adversely, but they are of general application, and embrace as well the case of torts to personality and infringements of patent and copy rights." See, also, *Parrott v. Palmer*, 3 Mylne & K. 632, 642; *Higginbotham v. Hawkins*, L. R. 7 Ch. App. 676; *Smith v. London & S. W. Ry. Co.* Kay, 408.

The demurrers are sustained, and the bills dismissed.

FAY and others v. ALLEN.

(Circuit Court, N. D. New York. August 26, 1885.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT.

Doane and Bugbee patent of March 9, 1880, for spoke-throating machine, *held*, infringed, as to the first three claims, by the spoke-throater manufactured by defendant under patents granted him August 10, 1880, and October 11, 1881, respectively; and Locke patent of April 17, 1877, *held*, not infringed by same.

2. SAME—ANTICIPATION—EVIDENCE.

Where defendant testified to having conceived, constructed, and publicly used the invention prior to the patentees, and was corroborated by numerous witnesses, but it appeared that each machine he had made before patentees completed theirs and placed it on sale had been taken to pieces after being tested, and before being put on sale, or used otherwise than for the purpose of testing, and that he only commenced the construction of the first machine placed on sale by him after the patentees had completed their machine, satisfactorily tested it, and placed it in their ware-room: *held*, that anticipation was not established, and decree for complainant ordered.

3. SAME—COSTS—BILL DISMISSED AS TO ONE PATENT AND DECREE AS TO ANOTHER.

Costs not awarded either party; the bill being dismissed as to one patent, and decree granted as to the other.

This was a suit for infringement of two patents on spoke-throating machines: the first granted Joseph R. Locke, April 17, 1877, No. 189,635, and afterwards assigned to complainant; the second granted complainant, as assignee of William H. Doane and George W. Bugbee, March 9, 1880, No. 225,355. The first three claims of the latter patent were charged to be infringed. The answer denied the validity and infringement of both, setting up as anticipations various earlier patents; also alleging prior public use of the Doane and Bugbee invention by Locke, the patentee of the above-named Locke patent, and by the defendant and others. The prior use by Locke relied upon consisted in a modification of the machine shown in the Locke patent, which was introduced by Locke shortly after the Locke patent was granted. This modification appeared to have only been tried at one test of the machine, which was then set aside and never used again, but was produced in evidence. The witnesses stated that the purpose of the modification was to reduce friction, and that it was not satisfactory. With respect to this use, it was contended by defendants that it was a use of the Doane and Bugbee invention with sufficient publicity to constitute anticipation. On the part of complainant it was contended that it was not such a use as suggested to Locke or any of the witnesses the operation of the Doane and Bugbee patent.

With respect to the defendant's use, defendant testified to having conceived the invention of the Doane and Bugbee patent in April, 1878, and made a rough sketch upon a board about that time to illustrate it, exhibiting this sketch to a person with whom he was talking; to have commenced, immediately after, the construction of a ma-

chine, and to have completed it, and publicly operated it, in September, 1878. A large number of witnesses testified in corroboration of defendant, some of them fixing their dates by book entries, and those who saw the machine operate stating that it operated successfully. On cross-examination it appeared that the machine built in September was only operated experimentally in the shop where it was built, and immediately after, by order of defendant, taken to pieces, the patterns burned and the castings melted; that a drawing of a new machine exhibiting, or claiming to exhibit, the features in controversy was made by defendant in October, 1878, and the construction of the new machine completed so as to operate in March or April, 1879; that this machine was also torn to pieces by defendant in April or May, 1879, without having been put on sale or into practical use, and the construction of a new machine commenced thereafter, the new machine being completed about July, 1879, and sold the following December. No rebutting witnesses concerning this use were called on the part of complainant.

Doane and Bugbee did not claim to have commenced the construction of their machine before December, 1878. Their working drawings were made in January, 1879, and the machine satisfactorily tested on or before February 24, 1879, and then placed in the store-room, with other machinery, for sale. This particular machine was sold in September, 1879; other machines, differing in size, having been constructed and sold meantime. It was contended in behalf of defendant that the machine made in September, 1878, was only unsatisfactory in features other than those in controversy, and that the defendant anticipated this invention, both in conception and actual construction and public use. In behalf of complainant it was contended that whatever defendant did prior to the summer of 1879 was unsuccessful experiment; that this was sufficiently shown by the fact that defendant himself had torn his successive machines to pieces after having tested them; that, to defeat a patent by a prior use, it was necessary it should be a use of such character as to exhibit the invention as complete and practically operative, while the uses of defendant exhibited the contrary; that the failure of these machines tended to show that they did not possess the features attributed to them by the witnesses, whose memories were refreshed by association with defendant, by a model introduced in testimony made after the litigation commenced, and by familiarity with defendant's subsequent machines; and that the fact that defendant, when his application for patent (which originally claimed the subject-matter in controversy) was rejected on the Doane and Bugbee patent, did not claim priority or seek an interference, tended strongly to show that he did not at that time consider himself to have made the invention substantially earlier than the date of their application.

Parkinson & Parkinson, for plaintiff.

Duell & Hey, for defendant.

BLATCHFORD, Justice. The claim of the Locke patent is a claim to a combination of mechanism, and is as follows:

"The combination of the sliding frame, B, provided with the curved guides, *b'*, the pivoted frame, D, the spring, H', the shafts, E, and the cutter-heads and cutters, F, G, with each other, and with the uprights, C, and the main frame, A, substantially as herein shown and described."

In view of the state of the art, and of the claims made by Locke in his application and rejected, this claim to a combination must be construed strictly, and every element in it must be found in the defendant's structure to constitute infringement. The spring, H', and the sliding frame, B, provided with the curved guides, B', are not found in the defendant's machine; nor is any one of them, or any substantial equivalent for it, found there.

As to the Doane and Bugbee patent, it is admitted that the first three claims of it are infringed, if they are valid. The attempt of Locke to make a structure embodying these three claims was a mere experiment, and was abandoned, and not resumed. It did not contemplate the use of the spoke as a guiding element. The machine of Doane and Bugbee was completed, and practically and successfully worked, prior to February, 24, 1879. The two machines on which Allen worked before July, 1879, were neither of them put to any practical work, and each of them was destroyed as useless. He did not commence till April, 1879, the construction of the successful machine which he completed. The fact that when Allen applied for his patent, his claims were rejected as anticipated in the Doane and Bizbee patent, and he did not apply for an interference, is of weight to show that he did not then claim priority to Doane and Bugbee, because he accepted a patent without the rejected claims.

There must be a decree dismissing the bill as to the Locke patent, and awarding an injunction and an account of profits and damages as to the first three claims of the Doane and Bugbee patent, without costs to either party to and including the hearing. The question of subsequent costs is reserved.

HAYES v. BICKELHOUP, Jr., and another.

(Circuit Court, S. D. New York. June 16, 1885.)

PATENTS FOR INVENTIONS—ESTOPPEL—PRINCIPAL AND AGENT.

A servant or agent sued separately for infringing a patent is not bound by a former decision against his principal upon the question of the validity of the patent.

In Equity.

Livingston Gifford, for plaintiff.

Sanford H. Steele, for defendants.

WHEELER, J. This cause has been heard on a motion for a preliminary injunction. The defendants appear to have been servants or agents of George Bickelhaupt, Sr., in doing what was adjudged to be an infringement of the same claim of the same patent,—claim 2 of reissue 8,688,—in controversy here. 21 Fed. Rep. 567; 23 Fed. Rep. 183. It is urged that the adjudication there binds them here, and that they are not entitled to be heard here as to the validity or scope of the claim, nor as to whether what is the same as was there held to be an infringement is so. It is true, probably, that the decision there reached bound them as the servants or agents of that defendant as to what was then adjudged, and that they might have been proceeded with for contempt for any continuation in doing what was then enjoined, without having become or been made parties to the suit any further than they were. They might have been made, or on their own motion have become, parties to the suit, so that whatever was adjudged in it would have bound them. But they were not made actual parties to the suit, and were not called upon to litigate the questions involved in it, and did not voluntarily become parties to it, so as to be bound by such adjudication as might be had in it as parties to suits are bound. They were bound only through their relation to their employer or principal, and the decree and injunction would only affect them through him, and could only be applied to them through him. This is a new suit against them acting in their own right for what is claimed to be a new infringement. They appear to be entitled to make any defense that any one charged with infringement would be.

This claim was held to be valid upon the authority of *Hayes v. Bockel*, 11 Fed. Rep. 87. It was intended to follow *Hayes v. Seton*, 12 Fed. Rep. 120, and *Hayes v. Dayton*, 20 Fed. Rep. 690, as far as they went in determining the question of infringement. What was before the courts, respectively, in those cases was not shown, but has, to some extent, been shown now. It appears now that by mistake or otherwise the letters upon that part of plaintiff's Exhibit No. 5 referred to in *Hayes v. Bockel*, showing the patented invention, were misplaced so as to make the invention appear to be different from what it really was, and more different from Dench's patent, with which it was compared, than it really was. It also appears that what was held not to be an infringement in *Hayes v. Seton* and *Hayes v. Dayton* was very similar to what is now claimed to be an infringement. And it is suggested that some of these questions are likely to be reheard before the judge who rendered those decisions. These considerations throw sufficient doubt about the propriety of an injunction in this case to appear to warrant continuing this motion to final hearing.

Motion continued to hearing.

PARKER, Trustee, v. McKee and another.

(Circuit Court, S. D. New York. June 17, 1885.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT—INJUNCTION.

Parker v. Stow, 23 Fed. Rep. followed, and preliminary injunction granted.

2. SAME—INFRINGEMENT BY PARTNER.

Where a member of a firm alleged to be infringing a patent was formerly a part owner of the patent, he will be estopped from denying its validity, unless it is shown that the conveyance of his title to the plaintiff was wholly without consideration.

In Equity.

W. C. Strawbridge, for plaintiff.

Walter D. Edmonds, for defendants.

WHEELER, J. This motion for a preliminary injunction cannot be denied without overruling, in effect, *Parker v. Stow*, 23 Fed. Rep. 252, and *Parker v. Montpelier Carriage Co.* Id. 836, which followed that decision. There are alleged anticipating devices put into this case which were not in either of those cases, but none of them is any nearer like the patented invention than some that were in those cases and considered, nor any nearer like it than long and well known chaise and carriage tops are. A point is made that the first reissue narrowed the patent by making the locking device a necessary part of it, and that the second reissue, although it only restored the original, broadened the second reissue to cover this infringement, and that what was surrendered of the original to obtain the first reissue could not lawfully be so reclaimed in the second. A comparison of the claims of the original with those of the first reissue shows that there was nothing covered by the former which was not included in the latter. Therefore nothing appears to have been abandoned by surrendering the original and taking that reissue, and it is not necessary to consider in this view what the effect would have been if there had been such an abandonment.

There is a strong reason for maintaining the validity of the patent in this case that did not exist in either of those cases, and that is that one of the defendants, who are a firm doing the business that infringes, was once an owner in the patent, and his title has passed to the plaintiff as a title to a valid patent. It is admitted that such a conveyance upon a valuable consideration would estop him from denying the validity of the patent, but it is urged that this conveyance was without consideration, and that therefore it does not work any estoppel. It does not appear, however, so far as has been noticed, that the conveyance of his interest was entirely without consideration, and the presumption would seem to be that it was upon consideration, and that the estoppel should follow. But the plaintiff appears to be entitled to an injunction independently of this ground. Motion granted.

THE ADELE THACKERA, Etc.

(District Court, S. D. New York. August 6, 1885.)

1. JETTISON—GOODS VALUELESS IN THEIR SITUATION.

To recover contribution for jettison the sacrifice must be voluntary; if the goods have, through a sea peril, become practically irrecoverable and valueless, subsequently cutting them loose will not sustain a claim for contribution.

2. SAME—LUMBER WASHED OVERBOARD—LASHINGS CUT.

Where lumber on deck was partly washed overboard in a gale, but more or less of it remained attached to the vessel by its lashings, which were afterwards cut loose, *held*, upon the evidence, that before the lashings were cut the lumber was practically lost by a sea peril; that it was of no pecuniary value in its then condition, and afforded no just claim for contribution as for jettison.

3. CHARTER-PARTY—SUBSEQUENT CHANGE OF MASTER, WHEN VALID.

Under a charter-party executed by the master, who is described therein as "party of the first part," which contains no *express* statement or covenant that he shall sail as master for the contemplated voyage, there is no *implied* warranty to that effect, when the evidence does not show that the master's personal services were one of the inducements to the contract. *Held*, therefore, that in such a case the subsequent appointment of a new and competent master for the voyage, without notice to the charterer, did not affect the obligations of the contract.

In Admiralty.

E. D. McCarthy, for libelants.

Jas. K. Hill, Wing & Shoudy, for claimants.

BROWN, J. This libel was filed to recover some \$1,800, the share of the schooner and freight towards contribution for an alleged jettison of lumber during a voyage of the Adele Thackera, in November, 1883, from Brunswick, Georgia, to New York. Upon the trial an amendment of the libel was allowed so as to include an independent claim for the loss of the lumber, on the ground that the master named in the charter had put the vessel on this voyage in charge of the mate. The schooner took a part of the lumber on deck, as customary, and sailed from Brunswick on November 9th. On the 13th the entry in her log shows that she encountered heavy weather. The entry reads as follows: "At 4 A. M. tremendous high cross-sea; vessel shipped much water. At 5 A. M. deck-load started, and went off down to the rail; got fouled up in running gear; had to cut gear and deck-load lashings to let it get clear. * * * The wind afterwards moderated, but again became a gale on the 14th." The log of that date contains the following: "At 5 A. M. blowing a gale from W. S. W. What lumber was left on deck got adrift, and with hard work kept it from breaking our pumps, while sea after sea washed it overboard. Some we had to cut to get clear of rigging. * * * 15th. At 6 P. M. everything movable gone from deck." The vessel arrived at New York on the 23d. The protest sworn to the same day runs in nearly the same words: "November 13th, 4 A. M. Tremendous high cross-sea running; vessel laboring hard and straining badly. 5 A. M. shipped an immense sea, which started the deck-load adrift; got fouled up in

our running gear; was obliged to cut our deck-load lashings, and let it go clear; lost load down to rails."

Upon the trial the acting master, Connell, and the first mate, both testified that there were but a few sticks that were fouled with the running gear, and which, from swinging back and forth, had to be cut, and that all the rest was washed overboard and lost. Counsel for the libellant urge that this testimony is so clearly contrary to the statements of the log and protest that it should not be credited.

Without considering the question whether the jettison of the deck-load, though shipped in accordance with the custom, gives rise to a claim for contribution, (see *Macl. Law Shipp.* 668; 1 *Pars. Shipp. & Adm.* 353, 354; *Cram v. Aiken*, 13 Me. 229; *Hazleton v. Manhattan Ins. Co.* 12 Fed. Rep. 159,) to constitute such a claim, the jettison must have been a voluntary sacrifice. 1 *Pars. Shipp. & Adm.* 346-351. If the lumber, in the condition which it had come to occupy through a peril of the seas, at the moment when the cutting of the lashings took place, was practically irrecoverable and of no value, then the cutting of the lashings, which was the only voluntary act, did not properly cause the loss of the lumber. Practically it was lost already. The cutting of the lashings did not cause the loss of anything having then any value, and hence would not be a ground of claim. *Stev. Av.* 15; *Nickerson v. Tyson*, 8 Mass. 467; *Johnson v. Chapman*, 19 C. B. (N. S.) 563; *Shepherd v. Kottgen*, 2 C. P. Div. 585, (C. A.)

The language of the log and of the protest give no support to the belief, in the face of the testimony, that anything, except a few sticks not already washed overboard, was cut away. It is not credible, indeed, that one-third of the deck-load, which was above the rail, could actually hang overboard and remain along-side for any considerable time by such lashings. I conclude, therefore, that the apparent discrepancy between the log and the testimony arises from the very brief and ambiguous form of the entries. The mate testified that he cut away but one lashing, and that that was what he meant was cut loose; not that the deck-load was cut loose. But even if the whole deck-load were hanging overboard after it had "gone off," as the log says, "down to the rail," I must deem it, in that position, practically irrecoverable and valueless, and not a ground of claim as for a voluntary jettison upon the subsequent cutting of the lashings. The question is fully discussed in *Shepherd v. Kottgen, supra*.

Upon the second ground of claim I am also satisfied that the libellant is not entitled to recover. The charter-party is dated September 27th. It purports to be made between J. P. Kinney, master, of the first part, and the libellants, of the second part. It agrees to freight and charter the vessel, then in New York, for a voyage from Brunswick to New York. There is no covenant that Kinney shall be the master for the voyage, nor any statement as to who shall sail as master; but only that the vessel shall be "tight, staunch, strong, and in every

way fitted for the voyage." Kinney was not previously known to the charterer, and it is clear that the personal services of Kinney as master were not an inducement to the contract. The description of "Kinney, master," as the "party of the first part," is not a warranty that he shall sail as master on the voyage referred to, but only that he was master at that time and competent to make the contract. The case is therefore the same in effect as if the owners had been the persons named as parties of the first part, with no mention of the master's name; and, in that case, it is clear that a change of master by the owners after the charter was signed would not have been a breach of any express or implied warranty. By the French Code de Commerce, § 273, it is required that the master's name shall be stated in the charter. Nevertheless, even under such a requirement of law, it is held by the French courts that unless the personal services of the master named were an inducement to the contract, a change of master before sailing does not entitle the charterer to rescind the contract. 1 Valroger, Comm. du Code de Com. § 286; 2 Valroger, Comm. du Code de Com. § 679.

Much stronger is the case for the owners where there is no law requiring any statement of the master's name, and where the usual form of charter-parties does not embrace any such statement. See Macl. Law Shipp. 360. The former mate of the vessel was, in this case, duly appointed captain for this voyage. He signed the bill of lading for the lumber as master, and he is described as "master" in it. He was master for this voyage, and the evidence is that he was fully competent.

I cannot sustain the libel on either ground, and there must be judgment for the defendant, with costs.

BROWN v. HICKS.

(Circuit Court, D. Massachusetts. August 26, 1885.)

1. MASTER—WHALING VOYAGE—AGREEMENT—RECALLING VESSEL—DAMAGES.

B. entered into an agreement with the agent of the bark Andrew Hicks, "to proceed from the port of New Bedford to Mahe, Seychelles islands, by steamer, and on his arrival there to take charge as master of the bark Andrew Hicks, and perform a whaling voyage in said bark not exceeding three years in duration, and return with said bark to the port of New Bedford," and the agent agreed to pay him "the one-fifteenth lay or share of the net proceeds of the cargo obtained by said bark during the term of his service as master thereof." The voyage not proving successful, the agent recalled the bark before the expiration of three years. *Held*, that the contract should be construed to mean that the voyage was to last three years unless its purpose was accomplished within a shorter period, and that B. was entitled to recover damages for a breach of the agreement under the circumstances of this case.

2. SAME—PROFITS IN LIEU OF WAGES—PARTNERSHIP.

Where the master of a ship contracts to receive a certain proportion of the profits of the voyage in lieu of wages, this does not constitute him a partner with the owner.

Admiralty Appeal. See 8 Fed. Rep. 155.

W. C. Parker, for appellant, Roswell Brown.

W. H. Cobb, for appellee, Andrew Hicks.

COLT, J. This is a libel *in personam* brought by the master of the bark Andrew Hicks against the owner for an alleged breach of contract. The libelant shipped as master under the following agreement between himself and the respondent:

"This agreement, made this day by and between Andrew Hicks, agent of bark Andrew Hicks, of Westport, state of Massachusetts, and Roswell Brown, of Fairhaven, state aforesaid, master mariner, witnesseth: that the said Roswell Brown hereby agrees to proceed from the port of New Bedford to Mahe, Seychelles islands, by steamer, and on his arrival there to take charge, as master, of the bark Andrew Hicks, and perform a whaling voyage in said bark not exceeding three years in duration, and return with said bark to the port of New Bedford. For and in consideration of said services as master the said Andrew Hicks, agent, hereby agrees to pay the said Brown the one-fifteenth lay or share of the net proceeds of the cargo obtained by said bark during the term of his service as master thereof."

On August 31, 1877, the libelant left New Bedford for Mahe, and on December 15th he took charge of the vessel. January 10, 1878, he went to sea and returned to Mahe, February 3d, when the second mate was discharged. February 14th, he went to sea again, cruising off Mahe banks, and returned a few days afterwards to Mahe to get deserters. On February 23d, when ready for sea again, Samson, the first mate, refused to go, and was discharged. The vessel put to sea on March 4th, and cruised until July 29th, when she arrived at Helena. On July 30th she started for New Bedford, arriving October 19th. On February 24, 1878, the libelant wrote to the agent as follows:

"I have decided to make St. Helena my next port. Shall be there by the last of July, when I shall expect to hear from you. I should say, if I might be allowed to suggest, that you send me both a mate and a second mate, although I can get along very well with Murray for second mate; the difficulty will be to get some one to fill his place. * * * I feel that it is absolutely necessary for the benefit of the voyage that a mate should be sent out. It is possible I may get a very good man at St. Helena to take Murray's place, although I think it would be the better plan to send a man, providing you have a chance to send them direct to St. Helena by a sailing vessel. * * * I might almost say, two months and a half I have had nothing but vexations and trials. Just as I thought I had everything fixed for the next six months, Samson gives up. By this circumstance everything is reversed at once."

On receipt of this letter the respondent, after making inquiries with a view to getting men to go out and join the vessel, and not finding any one he deemed suitable, consulted with his co-owners, and all agreed it was best to order the vessel home. He accordingly, on April 25, wrote to the master that he wished the vessel to proceed

directly home, as he thought it best for all concerned. This letter was received July 29, and on the same day the libelant wrote the respondent:

"I very reluctantly comply with your request; your views may be right to a certain extent, as I am situated now, for we have seen sperm whales three times since we left Mahe banks, but taken no oil. I believe if we had been properly manned we should have made a good show, although the chances were not the best. * * * But as you think it best for all concerned that the ship shall return to New Bedford direct. I will bring her there as fast as wind and weather will permit."

Under these circumstances can the libelant recover damages?

The contract was to perform a whaling voyage not exceeding three years in duration. A contract to perform a whaling voyage is a contract to cruise for whales and obtain a cargo of oil, if it can be done within the period prescribed. It does not mean a voyage to the whaling grounds and return. According to the size of the vessel, it may take three or five years to obtain a cargo. It is necessary that there should be some limit as to time, otherwise the ship might be kept away from home indefinitely. We think the fair interpretation of the contract is that the voyage was to last three years, unless its purpose was accomplished within a shorter period. The owner may have a right to recall the vessel and terminate the voyage at any time within the three years, or before the purpose of the voyage is accomplished; but, if he does this, he must show proper cause, or he should be held liable upon his contract with the master. *Parsons v. Terry*, 1 Low. 60.

The relation of the libelant to the owner was not that of partnership, but of servant and master. Where the master of a ship contracts to receive a certain proportion of the profits in lieu of wages, this does not constitute him a partner with the owner. "There is no pretense, therefore, for saying that the captain was a partner because his wages were to be regulated and paid by reference to a calculation on the profits of the adventure," says Lord ELLENBOROUGH in *Mair v. Glennie*, 4 Maule & S. 240. See, also, 2 Pars. Shipp. & Adm. 57; Story, Partn. § 42; *Baxter v. Rodman*, 3 Pick. 435; *Parsons v. Terry*, 1 Low. 60.

A termination of the voyage by the owner, under the circumstances presented in this case, would not, in our opinion, prevent the master from claiming damages for breach of contract. It was the duty of the owner to provide the ship with an outfit suitable for the successful prosecution of the voyage, and while he might conclude it was best to terminate the voyage, because he believed it would prove unsuccessful, yet this would not relieve him from his contract unless the master was to blame. We fail to discover any fault on the part of the master, nor does the respondent seek to charge him with blame, but takes the position that it was best for all parties in interest that the voyage should end.

We think the libelant is entitled to damages, and that the measure

of damages is the sum which his lay would probably have amounted to, calculated upon the basis of the average catch of vessels on the ground from the time the libelant received directions to proceed home to the expiration of the three years, deducting the time it would take for the return voyage to New Bedford. *Parsons v. Terry*, 1 Low. 60.

The decree of the district court is reversed.

THE LORENZO D. BAKER.

(District Court, D. Mass. c'ussetts. August 12, 1885.)

COLLISION—STEAM-SHIP—SCHOONER—FOG—SPEED—CAPE COD.

On examination of the evidence in this case, *held*, that the steam-ship was not going at an immoderate speed at the time of the collision with the schooner, and that the libel should be dismissed, but without costs.

In Admiralty.

J. C. Dodge & Sons, for libelant.

C. T. Russell, Jr., and *Geo. A. King*, for claimant.

NELSON, J. This collision between the schooner *Dresden* and the steam-ship *Lorenzo D. Baker* happened in a thick fog, some 15 miles off the coast of Cape Cod, between Highland and Nauset lights, on the morning of the eleventh of September, 1884. At and for some time before the collision the fog was so dense that a vessel could not be seen more than a hundred yards off. The *Dresden* was on a voyage from Shulee, Nova Scotia, to New York, with a cargo of piles. She was close-hauled on the wind, on the starboard tack, with the wind moderate from S. E. by S., her course being about due east. The steam-ship *Lorenzo D. Baker* was on a voyage from Port Antonio, Jamaica, to Boston, with a cargo of fruit. She sailed from Port Antonio on September 3d. On the evening of September 10th she encountered thick fog. Up to that time her speed during the voyage, under both steam and sail, had been some eight or nine knots. As she entered the fog her sails were taken in, and she was slowed to one bell, and she continued to run at that reduced rate during the night, but stopping every half hour to sound. Her last sounding before the collision was taken about 20 minutes after 6 o'clock of the morning of the 11th. Before she had again fully recovered her ordinary half-speed, the *Dresden* was seen over her port bow, moving directly across her bow. Her engines were instantly reversed at full speed, and her wheel put hard to port. This saved the *Dresden* from being run down, but did not prevent a collision. She struck the steamer at about right angles, end on, on the port side, near the fore-rigging. The *Dresden* was badly damaged. The *Baker* suffered no injury. No fog-horn was heard on the steamer from the *Dresden*. The only fault attributed to the steamer was that she was not going at a moderate speed.

Upon the foregoing facts, which are admitted or clearly proved, I am unable to come to the conclusion that the Baker's rate of speed was immoderate. She could not have been going more than four or five miles an hour; hardly faster than a fast walk on land. Undoubtedly, to those on the schooner, she seemed to be coming on with great velocity. But their view of her was but for a moment before the crash, and, in the excitement caused by the impending calamity, they were in no condition to form an accurate and reliable judgment. The steamer was not bound to lie to, or come to an anchor. Her duty was to keep a good lookout, and to move slowly, both of which she did. *The Johns Hopkins*, 13 Fed. Rep. 185.

In considering the case, I have rejected the evidence of the chief engineer and assistant engineer of the Baker. They were called by the libelants, and testified that the steamer's engines were out of order and could not be reversed promptly, and were not moving backward at the time of the collision. They have since left the employment of the claimants. Their hostility to the claimants was apparent, and sufficient, in my judgment, to throw discredit on their statements. I have no doubt, from the other evidence in the case, that the order to reverse was given, and was promptly and successfully obeyed.

Having decided that the steamer was without blame, it is unnecessary to consider the faults alleged by the steamer against the Dresden,—that she changed her course, and failed to sound a sufficient fog-horn. Under the circumstances, I do not think the claimants ought to recover costs.

Libel dismissed, without costs.

WILSON v. ROYAL EXCHANGE SHIPPING CO.¹

(District Court, E. D. New York. December 31, 1884.)

CARRIERS OF GOODS BY WATER—BILL OF LADING—REFUSAL TO RECEIVE GOODS—DUTY OF SHIP.

Where the person to whom goods named in a bill of lading are to be delivered refuses to receive them, the only duty attaching to the ship is to keep the goods for their owner.

In Admiralty. Exceptions to answer.

The facts in this case were these: The libelants were the owners of a steamer on which, at the port of Cephalonia, cargo was shipped to J. D. Nordlinger, at New York, via London, and through bills of lading were issued from Cephalonia to New York. At London the libelants' agents took the cargo and transhipped it on the steamer Egyptian Monarch, belonging to the respondent, and prepaid the

¹ Reported by R. D. & Wyllys Benedict, of the New York bar.

transatlantic freight, under a second bill of lading by which the respondent was to deliver the cargo at New York to the libelants' agents there; the plan apparently being that Nordlinger would thereupon receive the goods from libelants' agents on his through bills, and pay the freight from Cephalonia to London. On arrival in New York the cargo was delivered to Nordlinger, and the respondent did not collect any freight from him. The libel was filed to recover from the respondent the amount of freight uncollected from Nordlinger. The defense as set up in the answer was that stated below in the opinion, and that the libelants must first exhaust their remedy against Nordlinger. The libelants excepted to the answer as insufficient and impertinent and irrelevant, etc.

Foster & Thomson, for libelants.

Butler, Stillman & Hubbard, for claimants.

BENEDICT, J. The answer, to which exception is taken, avers that the libelants were notified of the readiness of the steamer to deliver the goods mentioned in the bill of lading sued on, and thereupon informed the owners of the steamer that they, the libelants, were not in a position to take the goods, and that Jacob D. Nordlinger was the owner of the goods. This was, in legal effect, a refusal on the part of the libelants to receive the goods. Upon such refusal the only duty attaching to the ship was to keep the goods for the owner. This duty they discharged when they delivered the goods to Nordlinger.

The exceptions to the answer must be overruled and the libel dismissed, unless libelants notice the cause for trial, and pay the costs of this hearing within 20 days.

MAYOR, ETC., OF NEW YORK v. NEW JERSEY STEAM-BOAT TRANSP. CO.
and others.

(Circuit Court, S. D. New York. August 20, 1885.)

1. REMOVAL OF CAUSE—NECESSARY PARTIES—RECORD—INJUNCTION—FERRY FRANCHISE.

In determining the right of removal of an action in equity on the ground of residence in different states, the residence of the *necessary* parties only will be considered.

2. SAME—MOTION TO REMAND.

Upon a motion to remand such an action before answer, where the averments of the complaint are so ambiguous as to make it doubtful whether certain defendants residing in the same state with the plaintiff are *necessary* parties, and especially where there are indications of a design to obstruct removal by the introduction of additional parties, the averments of the complaint should be rigidly scrutinized, and the whole record, including the plaintiff's affidavits, which form a part thereof, be looked at; and if it therefrom appears probable that such defendants are not *necessary* parties, the cause should be retained without prejudice to subsequent remanding, should they afterwards appear to be *necessary* parties.

3. CASE STATED—PRIOR INJUNCTION.

The defendant company was organized in New Jersey to run steam-boats between Staten island and New York, touching at several intermediate points in New Jersey; and thereunder was operating its business and running the steamer D. R. M. The plaintiff claimed that this was a *ferry*, and was run illegally without plaintiff's license, and brought suit for a perpetual injunction against the company, and made parties defendant also the master and engineer of the steamer, and the secretary of the company, and one S., who resided in New York, and had been enjoined in the state court in a previous suit, but, as was alleged, had procured this company to be organized as a scheme for his own benefit, and was operating the ferry purporting to be operated by the company. The plaintiff's affidavits showed that S. sedulously avoided all ostensible and legal connection with the company. *Held*, that no fact was stated whereby it appeared that the defendant company was not the sole party responsible to third persons for its transportation business; that an injunction against the company would bind all its officers, agents, and employees, and stockholders; and as it did not appear that S. personally owned or controlled directly any part of the line, *held*, that the company alone was a *necessary* party, and that the cause should not at present be remanded. Whether the organization of the new company by S. was in contempt of the prior injunction, *quære*.

In Equity.

J. J. Townsend and W. W. Macfarland, for the motion.

C. C. Beaman, opposed.

BROWN, J. The bill of complaint in this case was filed in the superior court of the city of New York to obtain an injunction perpetually restraining the defendants from running the steam-boat D. R. Martin, or any other vessel, as a ferry, from pier 18, New York, to Staten Island, without first taking out a license from the complainant. After the service of the complaint, and of several affidavits upon which a motion was noticed to obtain an injunction *pendente lite*, the transportation company removed the cause to this court. The petition of removal sets forth that of the five individual defendants three are citizens of New Jersey, and that the transportation company is also a citizen of New Jersey; that the complainant is a citizen of New

York; and that the other defendants, Starin and Carroll, though citizens of New York, are strangers to the controversy. The complaint also states that the defendant company is a corporation legally organized under the statutes of New Jersey. The petition further alleges that the defendant company is engaged in navigating the steamer D. B. Martin between numerous points in New Jersey and Staten island, and New York city; and that three of the defendants, Storey, Clark, and Belknap, are the agents and employes of the company, and have no other interest therein; and that there is in said suit a controversy which is wholly between the complainant, a citizen of New York, and the said transportation company, a citizen of New Jersey. Upon these grounds a removal was had to this court, and the complainant now moves to remand, upon the ground that upon the petition and the record the removal was unauthorized.

1. I am unable to sustain the removal upon the ground alleged that there is more than one controversy in the cause, because the complaint demands an "account of the sums of money received by the defendants, or *any* or *either* of them, from operating said ferry, and that they pay the same to the complainant." The cause of action, viz., to restrain the running of the ferry, is one and indivisible, though many persons may be engaged in the enterprise. The complaint, in general terms, charges that it is run by the defendants. The account demanded from each is a mere incident to the principal relief, and does constitute a several controversy, as in the cases of *Boyd v. Gill*, 21 Blatchf. 543, S. C. 19 Fed. Rep. 145, and *Langdon v. Fogg*, 21 Blatchf. 392, S. C. 18 Fed. Rep. 5, where the cause of action itself was joint and several. On this point, also, the decision of the circuit judge in the case of *Mayor v. Independent Steam-boat Co.* 21 Fed. Rep. 593, is strictly in point, and must be held to be controlling.

2. On other grounds, however, I think it would be improper to remand the cause at this time. Where the cause is removed on the ground of diverse citizenship, the court regards the citizenship of the *necessary* parties only. Thus, in the leading case of *Hyde v. Ruble*, 104 U. S. 409, the supreme court say:

"To entitle to removal, etc., there must be a separate and distinct cause of action, in respect to which all the *necessary parties* on one side are citizens of different states from those on the other." See, also, *Barney v. Latham*, 103 U. S. 211.

And in suits for injunctions against corporations it has been repeatedly held that the residence of the president or directors, who have been made co-defendants in the same state with the plaintiff, does not bar the corporation's right of removal to which it would be otherwise entitled, since the corporation is the only necessary and substantial litigant. *Pond v. Sibley*, 7 Fed. Rep. 129; *Hatch v. Chicago, R. I. & P. R. Co.* 6 Blatchf. 114.

The practice in equity is so flexible as respects the joinder of par-

ties defendant that it is necessary to examine the record to determine, so far as possible, who are the substantial litigants; or, in the words of the supreme court in *Barney v. Latham, supra*, who are the "indispensable parties" to the controversy presented by the complaint, and to the substantial relief sought. The subject of the controversy is plainly the running of the so-called ferry by the use of the steam-boat D. R. Martin, which the complainant alleges is run as a ferry without the necessary license. The contention of the defendant company is that it is engaged in the business of interstate transportation, for which no license from the complainant is necessary. It is manifest that the only necessary parties defendant to such a controversy are the persons having the legal control and responsibility of the enterprise. A decree against them binds their servants, agents, and officers; and where a corporation is the principal, no amount of mere pecuniary interest in the corporation by an individual stockholder will make him a necessary or indispensable party. *Barney v. Latham, supra*. The complaint upon its face discloses that some of the individual defendants are not necessary parties. It states that the defendant Clark is master, and the defendant Belknap is engineer, of the steam-boat D. R. Martin, which is alleged to be unlawfully run as a ferry without the complainant's license. No other connection on their part with the alleged ferry is stated. These statements of the complaint itself show that those defendants are not principals. The record elsewhere shows that they are in the employ of the transportation company as mere servants and agents, and hence not substantial parties to the litigation. When, therefore, the complaint alleges, as it does in the fourth paragraph, "that the *defendants* are now running the steam-boat D. R. Martin" as a ferry-boat, etc., and "thereby intercept and unlawfully appropriate profits, rents, and ferriage fees belonging to the plaintiffs," it is plain that this allegation cannot be held to be an averment that the defendants are all joint principals in the business. Again, as respects the defendants Storey and Carroll, the only allegations of the complaint are that they are "engaged and interested in operating the ferry, * * * not only in their own interest, but in the interest and under the control of the defendant John H. Starin." Of Starin it is alleged that he "is, in fact, the owner of the D. R. Martin, * * * and the person through whose instrumentality and in whose interest the transportation company, defendant, was organized and incorporated," and that said company "is a scheme devised by him for his own personal business and benefit, and that he is really the person now actually operating the ferry herein referred to, purporting to be operated by the said New Jersey Steam-boat Transportation Company."

These are all the averments of the complaint touching the character of the parties defendant. From these averments it is manifest that the apparent and only ostensible principal is the defendant corporation. The complainant's affidavits, which form a part of the rec-

ord, make this fact still clearer. They show that the corporation was organized and incorporated for this very purpose; that it is carrying on this business in the ordinary way; that the corporation, and not Starin, is the owner of the D. R. Martin; and that Storey is its secretary and treasurer. It is clear, therefore, that the defendant Starin is the only defendant, besides the corporation, concerning whom, upon the record, there can be any doubt that he is an unnecessary party. But even as respects Starin, the fair inference from the whole record is that neither in law nor in equity does he stand in the attitude of a responsible operator of this ferry; and that the complaint does not mean to make any such averment. He may, and doubtless does, have a warm personal interest in the success of the enterprise; he may own, indirectly, a large part, or even the whole, of the stock of the corporation; he may thereby possibly influence and direct the election of its officers, and in that sense be said to be "actually operating the ferry;" but unless he is directly and legally responsible personally for the running of the alleged ferry in other ways than these, he is not a necessary party to this suit. Such relations as those described are all indirect, as regards the complainant. Every corporation must have its stockholders, its officers, and its managers. Whether these are few or many, and whether its business through them be controlled by one man or by many, is wholly immaterial. The corporation, so long as it is in the possession and management of its business affairs, is the only party directly responsible, and the only party necessary to a suit like this. If it appeared from the complaint, or from the whole record, that the business sought to be enjoined was carried on jointly by several defendants or companies, each of whom was the legal owner and in control of one of the different parts of the same general enterprise, and was the party directly responsible for that part of it, all such persons or companies might be necessary parties. Such was, perhaps, the case of *Mayor v. Independent Steam-boat Co.*, *supra*, as presented by the record, where two other corporations were proprietors of the steam-boats engaged in the enterprise complained of.

In this case no such joint enterprise is alleged. Carefully scrutinized, the averments of the complaint above quoted state nothing beyond such relations as an individual may lawfully hold to a corporation, without in any way affecting its own sole responsibility to other persons for its business affairs. It is immaterial by whose "instrumentality" a corporation is organized if it be done legally. The lawfulness of its business is not impugned, nor its own sole legal responsibility for its business shifted, by calling it a "scheme" devised for one man's individual profit. Profit is the legitimate purpose, and the usual purpose, of all business corporations; and the averment that Mr. Starin is "actually operating the ferry referred to, purporting to be operated by the transportation company," states no fact showing that Mr. Starin does anything in or about the ferry business outside

of legitimate influence over the corporate action through the officers or stockholders, for which the corporation alone is legally responsible. The complaint does not aver that the persons actually employed in running the ferry are the servants or agents of Mr. Starin, or that they are employed or paid by him, and not by the corporation. The contrary appears clearly from the complainant's affidavits.

I regard it as obligatory upon the court to scrutinize the complaint thus rigidly, and to make no intendments in the complainant's favor upon a question of this character, because there are indications in the record of an attempt to prevent a trial in the federal courts through the joinder of defendants in no way necessary to the determination of the real issue; and because if the cause were remanded, and it should turn out upon the trial that these general averments of the complaint in regard to Starin and others were not sustained in any different sense from that above referred to, the cause might still proceed to judgment against the corporation in the state court, though the individual defendants were clearly shown to be unnecessary parties; and the corporation would thus be deprived of the right to a trial in the federal courts, which the United States statute was designed to secure to it. On the other hand, should it turn out hereafter that Mr. Starin has any direct, legal, and responsible relation to the running of this ferry, as regards third parties, so as to be a necessary party to the litigation, or to the actual controversy presented by the pleadings, then this court can, whenever that fact appears, remand the cause; and by the statute it will then become its duty to remand it.

For another reason, also, Mr. Starin would appear to be an unnecessary, if not an improper, party here, because in the former suit against the Independent Steam-boat Company, to which he was a party, it appears from the complainant's affidavits that Mr. Starin, "by an order of court, was, on or about August 14, 1884, enjoined, at the complainant's suit, from operating any ferry between the points mentioned in the complaint in this action," and that such order "is still in full force and effect." Having already obtained an injunction against Mr. Starin, it would seem to be at least wholly unnecessary, if not inadmissible, for the complainant to institute another suit against him as a substantial litigant to obtain the same relief a second time. The proper remedy against him would be a proceeding to punish him for contempt of the order already obtained in the former suit. In such a proceeding it might possibly be that the organization of a foreign corporation through his sole "instrumentality" to run the ferry he had been enjoined from operating, might be held to be a contempt. But that would not make him a necessary party to the new suit to enjoin the new corporation that is the proprietor of the alleged ferry. The fact that Starin is not proceeded against for contempt, but made a co-defendant in a new suit against the new company, shows that he is not made a party here as the proprietor

of the ferry, or as the direct and responsible principal, and that he is not intended to be represented as such; but as a person behind the corporation, and therefore a proper party merely, as distinguished from a necessary party. Clearly the new suit was instituted because the new corporation is lawfully constituted, and because neither the corporation nor its business could be affected by any proceeding merely to punish Mr. Starin for contempt of the former order. Being lawfully organized and conducted, it is apparently the sole responsible party in this suit. Mr. Starin cannot be made a necessary party by any averments of mere interest in, or control over, the corporation in legal ways through the stockholders; but only by the averment of some acts charging him with the direct legal responsibility for some parts, or of the whole, of the ferry business. Where the averments of the complaint are so general as to be capable of different constructions, it is competent to examine other parts of the record to see what is the nature and probable character of the suit. The affidavits of the complainant show, on the part of Mr. Starin, very sedulous care to avoid any legal relations with the present enterprise. The averment of the complaint that Mr. Starin owns the D. R. Martin is disproved by the complainant's own affidavits, and, as I have said, there is not a single fact or a single act of Mr. Starin's averred which would connect him with the enterprise as a responsible party. The general averments of the complaint may all be true; the alleged influence of Mr. Starin, if any, may all be exerted through the lawful stockholders or officers of the corporation. The affidavits strongly indicate no other acts of his; and upon this view I must hold the transportation company, so far as at present appears, to be the only substantial and responsible litigant, and the only necessary party. This is what the petition for removal avers. As this company is a citizen of New Jersey, and the complainant a citizen of New York, it follows that, so far as appears at present, the controversy in the sense of the act of 1875 is wholly between citizens of different states, and the removal in that case may be had under either clause of section 2. *Mutual Life Ins. Co. v. Champlin*, 21 Fed. Rep. 85.

The motion to remand is therefore, for the present. ~~denied.~~

UNITED STATES v. McLAUGHLIN and others.

(Circuit Court, D. California. August 18, 1885.)

1. PRACTICE—ANSWER—EXCEPTION TO INSUFFICIENCY OF.

Exceptions to insufficiency of parts or portions of an answer to particular allegations of bills in equity are confined to matters of discovery where the complainant is compelled to rely on the defendant to prove his case.

2. SAME—CORPORATIONS, INFANTS, ETC.

Such exceptions do not lie to the answers of corporations, infants, the attorney general, or when oath to the answer is waived.

3. SAME—FOUNDATION FOR.

The foundation for an exception for insufficiency consists of a sufficient allegation in the bill, and a sufficient interrogatory based upon it.

4. SAME—BILLS OF DISCOVERY.

Bills of discovery are not sanctioned by prevalent practice, and where discovery is asked for in a bill for relief, exceptions to sufficiency of answer will not be considered.

5. SAME—IMPERTINENCE.

The court will only order that matters clearly impertinent be stricken out. Where there are here and there useless or impertinent words, the court will remedy it in the adjustment of costs.

In Equity.

S. G. Hilborn, U. S. Atty., and *Mich. Mullany*, for complainant.

A. L. Rhodes, for defendants.

SAWYER, C. J., (*orally*.) In the numerous exceptions filed by complainant to the answer in this case two grounds are specified,—insufficiency and impertinence.

Two classes of insufficiency are recognized in equity practice. The first is where the whole answer is alleged to be insufficient to constitute a defense. In such a case the complainant usually has the case set down for argument upon the bill and answer, and the question is disposed of in that method. In other cases, exceptions for insufficiency are taken as to some particular portion or portions of the answer, upon the ground that certain allegations of the bill have not been admitted, or fully and specifically denied, or that the denial is evasive. In such cases the object of the party excepting is to get in the answer a full, specific, and clear admission or denial of the allegations. Exceptions for insufficiency, in respect to such matters, are only applicable to matters of discovery where the complainant is compelled to rely on the defendant for evidence to prove his case. Such an exception will not lie to the answer of a corporation, because the answer of a corporation is not evidence; it is not put in under oath, but under the seal of the corporation. And for similar reasons an exception for insufficiency, as to the answer to any particular allegation of the bill, does not lie where the oath to the answer is waived. The same rule applies to the answer of the attorney general, and answers of infants. 2 Daniell, Ch. Pr. (Ed. 1841,) 879, and note.

Exceptions for insufficiency, of the class last referred to, can relate

only to the subject-matter of a bill of discovery, where a party seeks to obtain in the answer evidence from his opponent; and they are especially adapted to a system of practice where parties are incompetent witnesses in their own cases. With relation to such exceptions, Hoffman, in his "Master in Chancery," says:

"The foundation for an exception for insufficiency consists of a sufficient allegation in the bill, and a sufficient interrogatory based upon it."

And it has been held, under the old practice, that the general interrogatory at the end of the bill, requiring the defendant to answer as to all matters alleged in the bill as fully and particularly as though specifically interrogated thereupon, is a sufficient interrogatory upon which to base an exception. But there must always have been, as a foundation for such an exception, either that general demand in the answer, or a specific interrogatory directed to the particular allegation of the bill specified in the exception. In the case of *Methodist Episcopal Church v. Jacques*, 1 Johns. Ch. 75, it was held that the general interrogatory in the bill is sufficient to base an exception of this kind upon. "The mere objection to a further discovery is that the bill contains no special interrogatories. The bill contains the general interrogatory 'that the defendants may full answer make to all and singular the premises, fully and particularly, as though the same were repeated, and they specially interrogated, paragraph by paragraph, with sums, dates, and all attending circumstances and incidental transactions.' The question, then, is whether this be not sufficient to call for a full and frank disclaimer of the whole subject-matter of the bill. And I apprehend the rule on this subject to be that it is sufficient to make this general requisition on the defendant to answer the contents of the bill, and that the interrogating part of the bill, by a repetition of the several matters, is not necessary."

It has also been held that no exception would lie, except where an interrogatory, either special or general, like that just quoted, called for an answer to the allegations of the bill. The decision cited was rendered before the adoption of the equity rules of the supreme court. In our present practice, under the provisions of equity rules 41-43, which permit a complainant, if he desires, to file interrogatories and prescribe the form to be followed, I apprehend that a general interrogatory would be insufficient. But however that may be, the bill in this case is in no sense a bill of discovery, excepting so far as all bills in which an answer under oath has not been waived may in a certain sense be regarded as bills of discovery. It contains no general interrogatory, and no specific interrogatory pointing to the matter set forth in the exception, and manifestly was not intended as a bill of discovery, but as purely a bill for relief. Though an answer upon oath is not waived, yet no demand in the nature of those which distinguish a bill of discovery is made anywhere in the bill. It is manifestly intended simply as a bill for relief, the complainants not seeking evi-

dence, but intending to rely upon the testimony of witnesses to prove their case.

It is very doubtful whether a pure bill of discovery in an equity suit would lie at the present day. It may be that a discovery might be asked for in a bill for relief; but it is probable that no prudent counsel, understanding what must be the effect, would at this day file a pure bill of discovery, or call for a discovery in a bill for relief, and thus unnecessarily give the defendant an advantage which he would not otherwise have under our present practice, which enables a complainant to place the defendant upon the stand and examine him as a witness, and thereby obtain his testimony much more judiciously, —testimony of a character less prejudicial to his client's interests than it would be were the testimony to come in the form of a sworn answer, strained through the legal cullender of his counsel, and by him shaped and shaded in his office at his leisure. Very wisely, I think, the bill in the present case has been made a bill for relief, not a bill of discovery. See *Slessinger v. Buckingham*, 8 Sawy. 469; S. C. 17 Fed. Rep. 454.

In *Ex parte Boyd*, 105 U. S. 657, the supreme court intimates that at this day bills of discovery are not only useless, but obsolete, and very strongly intimates a conformation of the idea which this court has endeavored to impress upon the bar here; that is to say, that the spending of time upon exceptions to answers is useless, and such exceptions are usually very much to the disadvantage of the party resorting to them. A defendant is often pressed to a direct denial which constitutes proof of his case in his own favor, which must be overthrown by the testimony of two witnesses, or equivalent proof on the part of the complainant. As I have intimated, this bill contains no allegation looking to a discovery. It merely undertakes to allege the grounds of suit and to develop the issues, and manifestly was not intended to obtain evidence to prove the issues.

The first exception is in general language that an allegation of complainant's bill of complaint indicated "is not sufficiently or at all answered, denied, or admitted in or by said answer." There is in the bill no demand for an answer, general or specific, upon which that exception can rest. The bill is not framed for the purpose of procuring evidence, but is evidently for relief merely. I shall therefore overrule that exception, and leave the complainant to make his proof in relation to the facts referred to by calling the parties as witnesses, if he so desires, or by other documentary evidence, and to obtain evidence by proceeding in the ordinary course. One of the defendants is a corporation, to an answer of which, exceptions for insufficiency, as we have seen, do not lie.

The other exceptions, although some of them refer to matters in the answer which are alleged to be impertinent, or refer to particulars in which the answer is alleged to be ambiguous or insufficient, are all really exceptions for insufficiency. There is no such term as "am-

biguous" known in equity practice with relation to a pleading, except in so far as it may be embraced in the term "insufficient." An answer may be insufficient because it is ambiguous.

Another averment contained in these exceptions is that the answer is, with reference to certain portions of the bill, impertinent.

In the fourth exception a certain portion of the answer is alleged to be impertinent, indefinite, and ambiguous. The only point to that exception must be that the allegations referred to are impertinent. The rule as to impertinence is well stated by Justice STORY in *Story*, Eq. Pl. § 267, as follows:

"However, in cases of mere impertinence the court will not, because there are here and there a few unnecessary words, treat them as impertinent; for the rule is designed to prevent oppression, and is not to be so construed as to become itself oppressive. Nor will the court, in cases of alleged impertinence, order the matter alleged to be impertinent to be struck out, unless in cases where the impertinence is very fully and clearly made out; for if it is erroneously struck out, the error is irremediable; but if it is not struck out, the court may set the matter right in point of costs."

In a note, attention is called to the language of Mr. Vice-Chancellor BRUCE in the case of *Davis v. Cripps*, 2 Younge & C. (New Reports,) 443:

"The court, in cases of impertinence, ought, before expunging the matter alleged to be impertinent, to be especially clear that it is such as ought to be struck out of the record, for this reason: that the error on one side is irremediable, on the other, not. If the court strikes it out of the record, it is gone, and the party may then have no opportunity of placing it there again; whereas, if it is left on the record, and is prolix or oppressive, the court, at the hearing of the cause, has power to set the matter right in point of costs. That consideration has been alluded to by Lord ELDON in *Parker v. Fairlie*, [1 Turn. & R. 362,] and other cases. It ought to be clear to demonstration that the matter complained of is impertinent before that which, if wrong, is irremediable, is done." See, also, *Attorney General v. Rickards*, 6 Beav. 444, and *Tucker v. Cheshire R. Co.* 1 Fost. (N. H.) 38.

In my judgment, none of the matter pointed out by the exceptions filed in this case is so clearly impertinent as to justify the court in striking it out. To go into the question of striking it out might require me to pass upon the merits of the case; whereas, unless those portions of the answer referred to in the exceptions are clearly impertinent, they ought not to be stricken out until the final hearing, when the whole case is before the court, and they can be dealt with as justice and the rights of the parties may demand. Whatever may be the decision in this suit, the case will undoubtedly go to the supreme court of the United States on appeal; and if I should be of opinion that these portions of the answer are impertinent and strike them out, the supreme court might be of a different opinion, and yet, if stricken out, the supreme court would have no basis upon which to finally determine the question and render a proper decree; and it might be necessary to affirm an erroneous decision, because a part of the defendant's case is not in the record.

The portions of the answer which it is most earnestly insisted are impertinent relate to the different steps taken in definitely fixing the location of the railroad. I think the setting out of those steps in the answer is eminently proper. It is assumed that the supreme court, by its decision in the *Dunmeyer Case*, 5 Sup. Ct. Rep. 566, has established the law in this regard. Undoubtedly it has settled the law, so far as this court is concerned. But counsel have a right to ask the supreme court to modify or amend its decision in that case, or to consider its application to a new state of facts. They have a right to submit the question again to that tribunal; and if these portions of the answer be stricken out, there will be no basis upon which to bring these questions again before the court. Besides, in the case referred to, only the case there presented was decided, and the decision is authoritative only to the extent called for in that case. In that decision it is held that the line of the road becomes fixed when it is definitely fixed by the company, and a map of the location filed in the office of the secretary of the interior. The time of the filing of such map was sufficient for the purposes of that case. There might be found to be a difference in this case. That is to say, the filing of the map might be the evidence, and the only evidence, that the secretary of the interior would act upon in issuing a patent. He would require evidence as to the time when the line of the road was definitely fixed, in order to justify him in exercising his functions of issuing a patent. That was the question before the court in the *Dunmeyer Case*, and it is a very different question from the question whether or not some other person has the prior right. The statute in no provision requires that a map of a definite location shall be filed. It is only a map of the general location that the statute requires to be filed in the office of the secretary of the interior; and upon the filing of that map all lands lying within 15 miles on each side of the road are reserved from sale, which is a distance of 10 miles wider than the extent of the lands granted, giving an opportunity for the line of the road to swing at least five miles from the line, as shown in the map of general location, and still have 10 miles within which to fix the limits of the grant.

On filing the map of *general* location, under the statute, the lands are withdrawn from pre-emption, or from opportunities on the part of any one else to acquire rights in them, and that condition of things remains until the road is definitely located and built. When it becomes definitely located in fact,—and it is certainly, really, definitely located when the road is constructed and finished,—the railroad company has performed all its duties, and its right to the land has become perfected, I should suppose; at least, counsel may well so argue, and they are entitled to have the question determined by the supreme court, as well as by this court. Even if the secretary of the interior can properly refuse to act upon any other evidence than the filing of the map *definitely* fixing the location, yet this is but a rule adopted

for administering the affairs of his office, and the railroad company's title might still well be fixed and indefeasible before the filing of a map of the definite location; and that map might only furnish final and conclusive evidence upon which the patent should be issued. The right to the land may be perfect before the patent issues, or would be issued; the patent being but the final record, and indisputable evidence of the title. The allegations of the answer, then, as to the time when the location was made, as well as when the plats of the different portions of the location were filed, can by no means, in my judgment, be stricken out as impertinent. I think those are matters which should be left in the answer and open to proof, for consideration by this court, and by the supreme court on appeal. Even if I should deem such matter impertinent, the supreme court might take a different view, and the parties here have the right to have that question passed upon on appeal.

These observations especially refer to the exception which was most elaborately argued and most strongly insisted upon; and the other exceptions are of similar character. It may be that some few words which are excepted to are impertinent, but they are not so clearly so, or of such importance, as to justify me in sustaining the exceptions.

The exceptions are therefore overruled, with leave granted to complainant to file a replication within five days.

McWHIRTER and others v. HALSTED and others.

(Circuit Court, D. New Jersey. August 11, 1885.)

1. EQUITY PRACTICE—INTERPLEADER.

An interpleader is properly applied for where two or more persons severally claim the same thing under different title, or in separate interests, from another person, who, not claiming any title or interest therein himself, and not knowing to which of the claimants he ought of right to render the debt, is either molested by an action brought against him, or fears that he may suffer injury from the conflicting claims of the parties.

2. SAME—INJUNCTION TO STAY PROCEEDINGS IN STATE COURT.

Section 720, Rev. St., expressly prohibits a court of the United States from issuing the writ of injunction to stay proceedings in any court of a state, except where the injunction may be authorized by any law relating to proceedings in bankruptcy.

In Equity.

E. L. Price, for complainants.

McCarter, Williamson & McCarter, for defendants.

NIXON, J. The firm of Halsted, Haines & Co., carrying on business in the city of New York, and all the members of which are residents of the state of New York, became embarrassed in their

affairs, and on the twelfth of July, 1884, executed and delivered to one Lewis May a deed of assignment for the benefit of their creditors. The trust was accepted, and the said May duly qualified and entered upon the discharge of his duties as assignee. Among the list of assets of said firm appears a debt of \$4,917.53, due and owing from the firm of McWhirter & Wilson, residing and doing business in Newark, in the state of New Jersey. On the same day of the execution of the deed of assignment, to-wit, July 12, 1884, Deering, Milliken & Co., a firm carrying on business in the city of New York, and composed of the following-named persons: William S. Johnson, residing at Orange, in the state of New Jersey; Seth M. Milliken and Ewen B. Gibbs, both residing in the city of New York, and William H. Milliken and Joseph E. Blabon, residents of the state of Maine,—caused a writ of foreign attachment to be issued out of the supreme court of the state of New Jersey, claiming to be creditors to a large amount of the said firm of Halsted, Haines & Co., directed to the sheriff of the county of Essex, and returnable August 6, 1884. By virtue of said writ the said sheriff has attached the debt of \$4,917.53. On the third day of December, 1884, Lewis May, as assignee of Halsted, Haines & Co., commenced an action of trespass on the case, in this court, against the said McWhirter & Wilson to recover the said debt, which suit is still pending.

On the twenty-first of January, 1885, McWhirter & Wilson filed in this court their bill of interpleader, acknowledging their indebtedness to Halsted, Haines & Co., averring their readiness and willingness to pay the same to whomsoever should be determined to be the proper party, alleging that the said assignee claimed that he was entitled to the money by virtue of the deed of assignment from Halsted, Haines & Co., and the attaching creditors, Deering, Milliken & Co., claimed the amount of said debt by virtue of their writ of attachment. The bill contained other averments usual in bills of interpleader, and prayed that the defendants might be required to interplead here and settle their right to said sum of money; that they might have liberty to pay the money into the court; and that the said Lewis May, assignee, and the said Deering, Milliken & Co., might be respectively restrained and enjoined from further proceeding in their suits at law. A rule has been taken upon the bill for the defendants to show cause why provisional injunctions should not issue.

We have no difficulty about the question whether the admitted facts establish a case for a bill of interpleader. The best elementary writers say that an interpleader is properly applied where two or more persons severally claim the same thing under different title, or in separate interests, from another person, who, not claiming any title or interest therein himself, and not knowing to which of the claimants he ought of right to render the debt, is either molested by an action brought against him, or fears that he may suffer injury from the conflicting claims of the parties. Story, Eq. Jur. § 806. That seems to

be an accurate description of the condition of the complainants in the present case. They are not, indeed, in any imminent peril; but, acknowledging the debt, they have the right to be protected from all harassment and distracting liability, to the extent that the court has power to grant them relief. Nor is there any difficulty in granting an injunction against the plaintiff in the action at law in this court restraining him from further proceeding therein. He is under its control. But it is different in regard to an injunction against the parties to the attachment proceedings in the state court. They are there pursuing a remedy given by the law against the property of a non-resident debtor, and section 720, Rev. St., expressly prohibits a court of the United States from issuing the writ of injunction to stay proceedings in any court of a state except where the injunction may be authorized by any law relating to proceedings in bankruptcy.

However inconvenient it may prove to the complainants, I am constrained to decline to order an injunction against the plaintiffs in the attachment proceedings, in the face of the above statute.

Rust and another v. Eaton and others.

(Circuit Court, D. Minnesota. September, 1885.)

SPECIFIC PERFORMANCE—CONTRACT TO CONVEY LAND—AGENCY—MEETING OF MINDS—EVIDENCE.

On examination of the correspondence and other evidence in this case, *held*, that the alleged agency of the party through whom plaintiff negotiated for the purchase of the land in controversy is not established; that there was no ratification of the acts of the alleged agent by the owner; that the contract, the specific performance of which is sought, is not in terms the contract intended to be entered into by the owner, and that it cannot be enforced.

In Equity.

Rea, Kitchel & Shaw, for plaintiffs.

Cross, Hicks & Carleton, for defendants.

Gordon E. Cole, of counsel for defendants.

NELSON, J., (*orally*.) This case is removed from the state court of Hennepin county, and is a suit in equity brought by the complainants to enforce the specific performance of a contract for the conveyance of certain city lots in Minneapolis, in this district. The contract of sale was executed on behalf of the defendant Franklin Eaton by one Eads, claiming to be his duly authorized agent. The facts are these: In January, 1882, the defendant Franklin Eaton agreed to purchase the property in controversy of his father, David Eaton, of New Hampshire, who owned it, and, by an arrangement at the time, was to receive a quitclaim deed by paying a certain consideration. The deed of sale was executed and retained by David Eaton for delivery to Franklin Eaton when he should fulfill his contract.

David Eaton held the property under a quitclaim deed from Philander Hall, who was the grantee from the assignee in bankruptcy of one John G. Sherburne, of the state of New Hampshire. All the conveyances were recorded in the office of the register of deeds of Hennepin county, in the state of Minnesota, except the deed from David Eaton to Franklin Eaton. Franklin Eaton had been to Minnesota to look after the landed interests of his father, and held a power of attorney which authorized him to take charge of the property, and, under certain circumstances, to convey it. This power of attorney is signed the eighteenth of June, 1877, duly acknowledged the same day, and was recorded on the twenty-second day of June, 1877, in the office of the register of deeds, Hennepin county, Minnesota. On January 4, 1882, the following letter was received by the defendant Franklin Eaton from A. D. Eads, who was a stranger to him:

OFFICE OF A. D. EADS, REAL ESTATE AND LOAN BROKER,
MINNEAPOLIS, MINN., January 4, 1882.

Franklin Eaton, Wentworth, N. H.—DEAR SIR: Is the property owned by D. Eaton in this city for sale? If so, please give me price and terms. The lots are 11 and 12, block 33, and all of block 48. Please let me hear from you. Taxes are now due.

Yours, truly,

A. D. EADS.

On January 17, 1882, Franklin Eaton writes as follows, in reply to the last letter:

WENTWORTH, N. H., January 17, 1882.

A. D. Eads—DEAR SIR: Your letter inquiring if block 48, and lots 11 and 12, block 33, were for sale, is received. That depends upon the price the property will sell for. If it will sell for \$8,000 it is for sale. If it will not bring more than \$4,000 it is not for sale now. If the property will sell so we think it is better to sell than hold it longer, it will be sold at any time. If you have a purchaser you can inform me what it can be sold for, and I will consider the sum and answer you any time.

Respectfully yours,

FRANKLIN EATON.

P. S. Your card received for future reference. If you desire to correspond further as to the property, will consider any communication, and answer.

Eads writes as follows, January 24, 1882:

Franklin Eaton, Wentworth, N. H.—DEAR SIR: Yours of the seventeenth inst. is received, and I have endeavored to get an offer on your lots. I can make sale of lots 11 and 12, block 33, and all block 48, for \$5,000; one-third cash in hand, and the remainder secured by first mortgage on the property, payable on or before three years, with 8 per cent. interest, payable semi-annually. If these terms suit, you can authorize me to close the sale. The party will want an abstract of title. He wants to know by return mail, as I have offered him a nice block a little further out for considerable less money, and which he will take if you and he cannot trade. My fees on sale are 5 per cent. on the first \$1,000, and 2½ per cent. on the remainder. This is the regular commission.

Hoping to hear from you soon, I am

Yours, truly,

A. D. EADS.

P. S. Taxes are now due.

In answer to this letter Eaton writes thus:

WENTWORTH, N. H., February 1, 1882.

A. D. Eads, Esq.—DEAR SIR: Your letter of January 24th received, contents noticed, in which you offer for block 48, and lots 11 and 12 in block 33, \$5,000, less commission. I thank you for the offer, but, according to my knowledge of its value, prefer to hold the property a while longer before putting it into the market, if that is the present market price. I have been advised not to sell block 48 for less than \$7,200. I may go out there next spring; if so, will call on you if I conclude to sell, or put the property into market then. I would sell on any terms that would make safe the investment and sale sure, giving sufficient time for payment to suit any honest purchaser. I think now, if property sells well in the spring, I may offer it for sale, on becoming better posted as to its true value. This conclusion may enable you to make sale of your block further away from the center.

Yours, truly,

FRANKLIN EATON.

On February 14th, Eads not receiving a reply, writes:

Franklin Eaton, Esq., Wentworth, N. H.—DEAR SIR: I wrote you in January last that I had an offer of \$5,000 for lots 11 and 12, block 33, and all block 48, Sherburne & Beebe's addition; one-third cash, balance on or before three years, at 8 per cent. interest. Please let me hear from you. Give me your *lowest* price on above terms, and if I can't sell to the one I have offer from, will try further. Please answer by return mail.

Yours, truly,

A. D. EADS.

Eads writes again on the second day of March:

Franklin Eaton—DEAR SIR: I wrote you, submitting an offer on lots 11 and 12, block 33, and block 48, of Sherburne & Beebe's addition; but have no reply. Please price them, if they are for sale, and I will make sale of them, if not too high. Please let me hear from you, and oblige,

Yours, truly,

A. D. EADS.

Eaton, on the eleventh of March, answers this letter as follows:

WENTWORTH, N. H., March 11, 1882.

A. D. Eads—DEAR SIR: Your favors, with offer inclosed of \$5,000 for block 48, and lots 11 and 12, in block 33, received. I did not intend putting that property on the market for sale at the present time, nor until I visit Minneapolis or become better posted on its valuation and prospects; but a man came to see me from there and requested me to make him the first offer for block 48, which I promised to do, and have offered to sell him for \$6,000, net. Have heard nothing since, as it has not yet been time. Will not sell to any other one at any price until suitable time expires, say fifteenth or twentieth of this month. After that, will take that price for same if my offer is not accepted by the one to whom it is made, or I learn something to change my mind. I am not very anxious to put that property on the market just at present, but if I should conclude to do so, should expect to take whatever it would bring. If you think my offer unreasonable, attribute it to the fact that my means of information are limited. Accept my thanks for your offer, although at present I decline its acceptance.

Respectfully yours,

FRANKLIN EATON.

Your terms as to payment are not objectionable,—only the sum. Am not very urgent for the money all being paid down.

Eads then replies to this letter as follows:

MINNEAPOLIS, MINN., March 17, 1882.

Franklin Eaton, Esq., Wentworth, N. H.—DEAR SIR: Yours of the 11th is received, and I am sorry you did not write me at once and give *my* party the *first* chance, as he had made an offer. He has been waiting for an answer, and had made his calculations to take it, and has now agreed to do so at \$6,000 *net*, for block 48, provided the other party does not take it by the 20th, as stated in your letter. He has paid some money down, so if the other party does not take it by the twentieth inst. please notify me at once. The terms are as proposed in my former letter. You can have the matter closed through the Security Bank here.

Hoping to hear from you by return mail, I am

Yours, truly,

A. D. EADS.

On the twenty-fifth of March, Eaton wrote the following letter, which it is claimed conferred upon Eads the authority to act as Eaton's agent:

WENTWORTH, March 25, 1882.

A. D. Eads, Esq.—DEAR SIR: Your letter of March 17th is at hand. In reply will say you are entitled to the benefit of my offer of six thousand dollars net, (\$6,000,) for block 48, in Sherburne & Beebe's addition to Minneapolis, terms two thousand dollars cash, with first mortgage securing four thousand dollars on said block, to be paid at stated intervals, all to be paid within, or at the expiration of, three years from date of said deed, with interest at 8 per cent., payable semi-annually.

I do not understand I am to pay any expenses of collections of interest or principal, or fees of any kind, only to furnish the full title shown on the records, as it now stands, as will appear by abstract of title in fee belonging to David Eaton, and conveyed by said David Eaton to me, Franklin Eaton; the last conveyance not yet on record in Minneapolis, but will be at time of deed-ing, so as to be all straight and sound, conveying all the title derived from Sherburne, as will appear by record in Hennepin county, at Minneapolis, to which you can refer.

Eaton there states explicitly, in this letter to Eaton, what kind of conveyance he is willing to give, provided the offer of \$6,000 is accepted, and the money paid.

The payments can be made through your bank, and the National Bank of Newbury, Wells River, Vermont, and deeds and mortgage conveyed through the banks in that manner, if no better way appears. You are to get your fees for doing the business of the party you buy for, as I understand the arrangement.

Yours, truly,

FRANKLIN EATON.

P. S. I have a quitclaim deed of block 48 from David Eaton, my father, and I will quitclaim the same, with warranty from and under me, the same as he has done. All taxes are paid up to 1882. When such deed is executed by me, and both David Eaton's to me and mine are on record the title will be complete. Elwood S. Corser & Co. have an abstract, and were here and said that was all they desired, in case they could buy it.

Immediately upon the receipt of that letter Mr. Eads enters into this contract with Messrs. Rust & Gale for the sale of this property.

FRANKLIN EATON TO GEO. H. RUST, A. F. GALE.

MINNEAPOLIS, MINN., March 30, 1882.

Received of Geo. H. Rust and A. F. Gale one hundred dollars, as earnest money and in part payment for the purchase of all of block forty-eight, (48,) v. 24F, no. 15—53

in Sherburne & Beebe's addition to Minneapolis, according to the plat thereof on file or of record in the office of the register of deeds in and for said Hennepin county, which I have this day, as authorized agent of Franklin Eaton, grantee from David Eaton, under an unrecorded deed, sold to said Geo. H. Rust and A. F. Gale for the sum of six thousand dollars, (\$6,000,) on terms as follows, viz.: Two thousand dollars cash in hand, on delivery of deed, and four thousand dollars in three equal annual payments, in one, two, and three years from the date hereof, with interest at 8 per cent. per annum, payable semi-annually. And it is agreed that if the title to the premises is not perfect in all respects, and free from any and all cloud or defect, this agreement shall be void and the above \$100 refunded; but if the title to said premises is perfect as aforesaid, and not taken, the said \$100 to be forfeited. The deed to be a special warranty deed, in accordance with letter from said Franklin Eaton, dated March 25, 1882, addressed to A. D. Eads, hereto attached.

[Signed]

A. D. EADS,
Agent for Franklin Eaton.

In the presence of witnesses.

And, in the presence of witnesses, we find:

We hereby agree to buy the above property on above terms.

GEO. H. RUST.
A. F. GALE.

This was duly acknowledged and recorded in the office of the register of deeds, Hennepin county, April 3, 1882.

On the receipt of this letter, which it is claimed conferred the authority to enter into this contract, and after the contract had been executed by Eads, he writes to Franklin Eaton as follows:

APRIL 1, 1882.

Franklin Eaton, Esq., Wentworth, N. H.—DEAR SIR: I have closed sale on block 48, Sherburne & Beebe's add. The parties will have abstract examined, and after which I will write you.

Yours, truly,

A. D. EADS.

Eads does not send the contract or a copy of it, and he does not even state any party with whom he had entered into the sale. He does not say, "Your offer to take \$6,000 for this land on the terms proposed in your letter is accepted by me, and the sale can be closed on the terms proposed in your letter." But he writes to Eaton that he has sold the property, having previously entered into a contract of which he does not inform Eaton. He writes him April 12th that Mr. Rust, one of the purchasers, will write to him with regard to the title, and on April 20th Mr. Rust writes to Mr. Eaton as follows:

MINNEAPOLIS, April 15, 1882.

Franklin Eaton, Esq.—DEAR SIR: In company with Mr. A. F. Gale I have purchased through your agent, Mr. A. D. Eads, block 48, in Sherburne & Beebe's addition to Minneapolis. We have procured an abstract of title, and our attorneys have examined it for us. There are several minor points regarding the title that we think can be arranged here, but two points must be attended to by you, as follows: (1) You hold your title through a deed made by David Eaton; he from Philander Hall. Said Hall appears to be the purchaser from James G. Ticknor, assignee in bankruptcy of J. G. Sherburne.

There is no record here of the bankruptcy proceedings. We need certified copies of all the proceedings in bankruptcy affecting this property. The proceedings should show that all Sherburne's property was duly and properly assigned to said assignee from May 25, 1868, including this block 48, and that the sale was in all respects complete and regular, and the sale confirmed, and deed ordered by the court. (2) A notice has been filed in the recorder's office here by Frank B. and John W. Sherburne, claiming that this sale to Hall was made to him as trustee for them; that the money was paid by them; and that they claim the property thereby. Can you explain this, or get quitclaim from them? Please advise me at once, as we are ready to complete the transaction as soon as the title is clear.

Truly yours,

GEO. H. RUST.

Up to the fifteenth of April, the time when Mr. Rust wrote this last letter, Franklin Eaton was entirely ignorant of any written agreement having been executed by Eads, and he answers Rust on the nineteenth of April as follows:

WENTWORTH, April 19, 1882.

George H. Rust, Esq.—DEAR SIR: Your letter of the 15th received. In reply, say I am not aware of employing Mr. Eads as my agent. He wrote me as to my price of block 48, and I gave it him, net. As to the copies you asked for, I think I may be able to furnish them, but cannot for a few days. Will see, and write you in about a week again.

Yours, truly,

FRANKLIN EATON.

On the 25th Mr. Eaton again writes to Mr. Rust:

WENTWORTH, N. H., April 25, 1882.

Geo. H. Rust, Esq.—DEAR SIR: Your letter dated the fifteenth inst. received. You say you have procured abstract of title of block 48, Sherburne & Beebe's addition to Minneapolis, and had it examined by your attorneys for you. Your understanding as to title is correct. I derive my deed from David Eaton, and he derives his title from Philander Hall, and Philander Hall gets his title from James G. Ticknor, assignee in bankruptcy of J. G. Sherburne. All of said transactions appear on your county records to the time of David Eaton's quitclaim deed to me. The said quitclaim deed from David Eaton to me, and my quitclaim deed to whom I make it, are to be put on record at my expense. If I understand you correctly, you are the party written to me about by A. D. Eads, who desired to purchase the block through him, acting as your agent and not mine. I also further understand from you that there are several minor points regarding title that you think can be arranged there, but that two points must be attended to by me here. Am I to understand that the two points you name are to be cleared up here at my expense, and also the several minor points which you think can be cleared up there by you are to be done at my expense, in addition to putting on record the conveyances from David Eaton to me, and from me to whom I sell? Please answer immediately by telegraph "yes" or "no," if you mean all the points. If you mean the first two points only to be cleared by me, say "Yes; the first two points I named."

Yours, truly,

FRANKLIN EATON.

P. S. Any conveyance I make will be done through some bank here in Concord, Plymouth, N. Y., or Wells River, Vermont, by leaving quitclaim deeds, properly executed, conveying all Hall's interest to block 48 derived from assignee, to be delivered on receipt of deposit.

F. E.

Rust telegraphs Eaton, April 29th, thus:

MINNEAPOLIS, MINN., April 29, 1881.

Yes; the first two points I named, and taxes.

He means a release from J. G. Sherburne's sons of any claim they may have; and also that a transcript of all the bankruptcy proceedings should be put on file in the office of the register of deeds for Hennepin county.

After the receipt of that telegram, Eaton, on the fifth of May, writes to Mr. Rust as follows:

WENTWORTH, May 5, 1882.

Geo. H. Rust, Esq.—DEAR SIR: I understand you are ready to accept my offer made to Mr. Eads, except you ask me to furnish certain papers clearing or evidencing the regularity of bankrupt proceedings. As to the Sherburnes matter, I would not ask or take a quitclaim deed from them if they would give one. I learn from Hall that there is no truth in their statement, and John G. Sherburne has been to me to try and purchase my title, and said nothing about any interest his sons had in the property. I suppose he is a rascal, and would have nothing to do with him or his sons, and I have no fears concerning any of their rights in the property. J. G. S. went through bankruptcy and got his discharge, but I could not show these facts without taking time to look up records, and having copies, etc., which I could not do anything about until after next week. I will make investigation after that time and inform you, unless some other party should conclude to take the property and pay me the cash down before I get time to look up the matter. If you know just what papers you need, you had better inform me, as I am no lawyer, and might not get just what is wanted if I tried to get them.

Yours, in haste,

FRANKLIN EATON.

Further correspondence ensued, and Rust wrote to Eaton:

MINNEAPOLIS, May 11, 1882.

Franklin Eaton, Esq.—DEAR SIR: Replying to your favor of May 5th, you do not need to employ a lawyer, but send to the clerk of the U. S. district court at Concord and get certified copies of all the proceedings in bankruptcy of John G. Sherburne which in any way relate to this block 48, in Sherburne & Beebe's addition, showing the sale and approval thereof, etc.

Meantime, if you have not yet paid the taxes of 1881, you should do so at once, as a penalty attaches of 10 per cent. on the first day of June, and also send the deed from David Eaton to yourself to the register of deeds to be recorded.

Waiting your reply,

Truly yours,

GEO. H. RUST.

Rust again writes to Eaton on the seventh of June:

MINNEAPOLIS, MINN., June 7, 1882.

Franklin Eaton, Esq.—DEAR SIR: I have no reply to mine of May 11th. I am going east to-night on a summer vacation. If you have sent me any papers they will be forwarded to me. Meantime, as my father lives in Wolfboro, N. H., and my brother in St. Johnsbury, Vt., it will be right on my route to pass through Wentworth and see you. So I will call on you about June 18th to 25th,—cannot say just when,—and we will talk the matter over.

Yours, truly,

GEO. H. RUST.

Rust immediately goes east about the twentieth of June, and visits Mr. Eaton at his home in New Hampshire, and has a conversation with him in regard to the negotiations for the purchase of this prop-

erty in the presence of an attorney in the town of Wentworth. The substance of this conversation was that Rust produced a paper and showed it to Mr. Eaton, which he said was filed in the office of the register of deeds by J. G. Sherburne's sons, and was a cloud upon the title, and said that if Eaton would furnish him a clear title to the premises, putting on file a copy of the bankruptcy proceedings in the case of John G. Sherburne, together with the proceedings for the sale of the land, with the judge's order of confirmation of the sale, and would also obtain a release or conveyance from J. G. Sherburne's sons of their interest, he would take the property as they had talked. Mr. Eaton told him he had never agreed to furnish them such a title as that; that all he had agreed to do was to furnish the title as it came to him through the bankruptcy sale, and that he would not attempt to get a release of any claim, or pretended claim, from J. G. Sherburne's sons. Then he asks Rust explicitly if he should procure a confirmation of the bankrupt sale and put on record the title he had agreed to furnish, if he would take the property. Mr. Rust said he would not do anything of the kind; evidently intending that Eaton should procure a release from J. G. Sherburne's sons of this claim which was asserted by them to this property. Rust does not deny that conversation, and does not deny anything that was said by Eaton with regard to the substance of that conversation; in fact, he virtually admits it.

On the ninth day of November, nothing having been done, Mr. Eaton writes to Mr. Rust:

"Your refusal to accept such quitclaim deed from me as would convey all the interest conveyed by the assignee to Hall, and from Hall to David Eaton, without any further trouble or expense to me than the recording of such necessary papers not already recorded, if any, relieves me from any obligation which would otherwise rest on me; and I wish it distinctly understood that I am not bound to comply with your request to furnish the extra proofs or agreement between us; and also that I do not hold you to any offer that has been made by you or any of your agents."

Nothing further was done until the next spring, about the second of April, 1883, when there was a formal rescission by Eaton of this contract, and the property was sold in April, 1883, to a purchaser by the name of Jones. In the fall of that year, in November, the complainants filed their bill for specific performance of this contract. These are the facts as they appear from the testimony which has been taken in the suit.

I have come to the following conclusions in this case: (1) There was no appointment of agency by Eaton; and Eads, when he made the contract with Rust as set out in the evidence, acted on his own responsibility. He did not inform Eaton of the terms of the sale even, but left him in entire ignorance thereof. Eads was the agent of Rust, who was ready to buy, and when Franklin Eaton gave him the benefit of the offer, which he referred to in his letter to Eads, he

expressly stated, "You are to get your fees for doing the business out of the party you buy for." No agency was created by this letter. (2) Eaton did not, in any of his subsequent steps looking to the sale of the land, ratify this action of Eads as expressed in the contract with Rust. The offer was to quitclaim for \$6,000, not a perfect title, but the title shown on the records, except that the last conveyance from David to Franklin Eaton was not then recorded, but "which will be at the time of deeding, conveying all the title derived from Sherburne, as will appear of record. When a deed is executed by David Eaton to me, and both David Eaton's to me and mine are on record, the title will be complete." That is, the title will be as it appears after the recording of the two last-named deeds.

Eads, when he made this contract, went further than Eaton stated he was willing to go, by inserting in the contract terms not contemplated by Eaton in his letter to Eads. Eads, in his contract, inserted this proviso:

"That if the title to the premises is not perfect in all respects, and free from any and all cloud or defect, this agreement shall be void, and the hundred dollars earnest money shall be refunded. But if the title to said premises is perfect as aforesaid, and not taken, the one hundred dollars to be forfeited."

Eaton could not ratify that contract without knowing the terms inserted by Eads in this proviso. There is no evidence that he knew anything about it, and Eads did not inform him. Eaton was willing to sell the property upon the terms offered to the purchaser, but the negotiations between him and Rust, when brought together, do not prove a ratification of the contract as made by Eads. Nor does it show that there was any sale, or agreement to sell. The minds of the parties never met. There was always something that was required to be done before the contract was to be considered completed.

There are other reasons assigned for refusing this specific performance, but in the view taken by the court it is not necessary to consider them.

A decree will be entered dismissing the bill, with costs. Ordered accordingly.

UNITED STATES MORTGAGE CO. v. SPERRY and others.

(Circuit Court, N. D. Illinois. September 12, 1885.)

1. GUARDIAN AND WARD—JURISDICTION OF COUNTY COURTS IN ILLINOIS—MORTGAGING WARD'S LAND TO ERECT IMPROVEMENTS THEREON.

A county court in Illinois has jurisdiction to pass an order authorizing a guardian to borrow money, secured by mortgage on the ward's land, for the purpose of erecting improvements thereon.

2. USURY—CORPORATION ORGANIZED UNDER LAW OF ONE STATE CHARGING INTEREST IN ANOTHER STATE IN EXCESS OF LEGAL RATE IN STATE WHERE CHARTERED.

A corporation organized and authorized to loan money by a special act in

New York, wherein it is provided that no "loan or advance shall be made at a rate of interest exceeding the legal rate," is not prevented from charging interest on a loan made in another state at a rate in excess of that provided by statute in New York, but not in excess of the rate allowed by law in the state where the loan is made.

In Equity.

Dexter, Herrick & Allen, for complainant.

J. V. Le Moyne and Lyman Trumbull, for defendant Henry W. Kingsbury.

GRESHAM, J. On the fifth day of July, 1872, Anson Sperry, as guardian of the estate of Henry W. Kingsbury, minor, filed his petition in the county court of Cook county, Illinois, setting forth that the real estate of his ward in that county was subject to mortgages amounting to \$78,500, some of which were due, and the holders were demanding payment, while others would soon mature, and the holders were willing to accept payment; that upon all of the mortgages there was overdue interest, payment of which was demanded; that a portion of the real estate consisted of lot 6, and part of lot 5, in block 35, in the original town of Chicago; that the buildings formerly on the premises were destroyed in the fire of October, 1871; that they constituted a very large part of the productive estate of the infant, were centrally located in the city, and before their destruction produced large rents; that persons interested in the estate, and its care and management, deemed it important the buildings should be restored and the property made productive; that no money had come into the guardian's hands with which to pay the mortgages or the accumulated interest, and that the present rentals were insufficient; that unless some provision was made, the mortgages would be foreclosed, and the premises sold; that it was believed the cost of constructing suitable buildings would be about \$100,000; that for the purpose of funding the indebtedness, paying off the mortgages, and constructing new buildings, it would be necessary to borrow about \$200,000; that Jane Kingsbury, the infant's grandmother, had been decreed to be entitled to one-third of the net rents as dower, and Eva Lawrence, his mother, to two-ninths of the net rents as dower in two-thirds of the premises, and his ward the residue. The petition concluded with a prayer that the guardian be empowered to make a loan not exceeding \$200,000, and that the property, which was particularly described, might be mortgaged to secure the loan. An order was entered allowing the prayer of the petition, and providing that when any loan should be negotiated, the guardian should report the same, and the securities proposed to be executed, to the court for its approval.

On the sixth of August an order was entered, reciting that the guardian had submitted to the inspection of the court a mortgage and bond to the United States Mortgage Company, to secure a loan of \$175,000 in gold; that it appeared to the court the mortgage was made in accordance with the previous order, and that the mortgage and the

guardian's action be approved. This mortgage was duly executed and recorded.

On the seventh day of March, 1873, the guardian filed a second petition, setting forth the making of the former mortgage, and that if the remainder of the gold received on the loan should be sold at the same premium as the last, he would receive, after defraying expenses, the sum of \$194,646.38; that he had paid off mortgages (describing them) making a total of \$68,643.81, leaving a balance of \$126,002.58, which amount it was estimated would all, or very nearly all, be required in the construction of the building then being erected on the front of the lot, leaving unoccupied a tract of ground in the rear about 80 feet by 100 feet; that this ground was improved and occupied at the time of the fire by a public hall or theater; that upon careful consideration and consultation with persons most competent to advise in the premises, it was deemed for the interest of the estate to re-erect upon the lot a public hall, the cost and furnishing of which it was estimated would be about \$70,000; that it was believed, from the present want of such a hall in that portion of the city, and the great demand therefor, such an investment would be highly judicious; that two of the original mortgages which were described remained unpaid, amounting to \$15,000; that the avails of the former loan would be nearly all required in the payment of the mortgages and the construction of the proposed building; that the guardian had no money with which to pay off these incumbrances and to erect a building on the rear of the lot, unless it was borrowed by mortgage; that the entire estate consisted of real property, nearly all in the city of Chicago, and the only income to meet the various charges and incumbrances upon it, and its expenses and taxation, was to be derived from the rental; that no revenue could be derived from the rear portion of the lot, unless it was improved; that the premises before the fire had been largely productive, and it was believed, if judiciously improved, would be again equally productive. This petition concluded with a prayer that the guardian be empowered to make an additional loan in gold, not exceeding \$75,000, and that the property, which was particularly described, might be mortgaged to secure the payment of the loan. An order was entered three days later allowing the prayer of this petition, with a provision that when the loan should be negotiated the guardian report the same, and the securities proposed to be executed, and all his transactions connected therewith, to the court.

On the fourth of April of the same year the guardian filed a further petition, setting forth that in the negotiations which he had made with the United States Mortgage Company prior to presenting his second petition, it was contemplated by it and the guardian that the mortgage should embrace a lot not included in the petition, which, by accident, was omitted in the petition and order; and that by reason of that omission he was not able to consummate the loan. He therefore prayed that the order be amended so as to include in it, and the

mortgage to be executed, the omitted lot. An order was entered allowing the prayer of this petition. Under these orders the guardian made a second mortgage to the United States Mortgage Company, to secure a loan of \$70,000 in gold. No formal order appears to have been entered approving this mortgage, but on the tenth of July following the guardian filed a report, setting forth, in substance, the petition for authority to execute this mortgage, and the order allowing the prayer, and showing that, in pursuance of the power granted, he had procured from the United States Mortgage Company a further loan of \$70,000 in gold, and had executed a bond and mortgage, which were also described; that he had received \$21,595.30 in gold of this loan, which he had converted into currency, receiving a premium of \$2,559.38. This report was duly approved by the court.

The guardian filed another report on the seventh of August of the same year, setting forth that he had received \$40,000 more in gold under the second mortgage, upon which he had realized a premium of \$6,500. This report was also approved by the court.

Sperry resigned his trust on the thirty-first of July, 1873, and Mrs. Eva Lawrence, the minor's mother, was thereupon appointed. Mrs. Lawrence filed an inventory on the seventh of November, 1873, showing as incumbrances the two mortgages, and that there was a balance of \$8,404.70 due in gold under the last mortgage. This inventory was approved by the court.

On the second of April, 1874, Mrs. Lawrence filed a report, in which she stated that the estate was subject to the two mortgages, and that she had received the balance due on account of the second mortgage. She resigned her trust on the third of February, 1875, and Heman G. Powers was appointed her successor.

On the twelfth day of October, 1876, Powers filed a petition, setting forth at length the proceedings authorizing the two prior mortgages; that both had been submitted to and approved by the court; that the money loaned on the first mortgage had been duly expended by Sperry in payment of the indebtedness then existing, and in the erection of the contemplated buildings; that all the money received under the second mortgage (\$61,595.30) had been expended by Sperry for the purposes expressed in the petition and order authorizing the loan, except the sum of \$16,934.09, which he had paid to his successor, Mrs. Lawrence; that the balance of the second loan, namely, \$8,404.90, had been paid to Mrs. Lawrence, and she had filed a report showing a balance in her hands of \$517.77; that considerable sums still remained due and unpaid to contractors for the erection of the buildings, which were set forth in detail; that there was still due Thomas Swan, \$10,000, which was a charge upon the real estate; that there was due and unpaid to the mortgage company, for interest on its loans, \$51,987.04; that the mortgaged premises had been sold for city taxes for the year 1873, and that the mortgagee, under a provision in the mortgages, and at the request of the guardian, had advanced

\$10,150.78, the amount necessary to purchase the tax certificates; that the state and county taxes for the year 1875, and previous years, amounting to about \$9,000, remained unpaid; that the guardian had conferred with parties holding claims against the estate, and could compound and settle such claims on favorable terms; that \$4,000 was due for cut stone used in the erection of the building, for which amount a personal judgment had been rendered against Sperry; that the supreme court of the state had declared Sperry was entitled to be indemnified out of the estate; that the revenue of the estate consisted of the rents, which were insufficient to meet the expenses and pay the various items of indebtedness, and the sums due Mrs. Kingsbury and Mrs. Lawrence as dower, and for the maintenance of the ward; that the mortgagee was willing, upon the authority of the court, to loan \$95,000 more in gold, on the security of a third mortgage upon the same real estate, and that this sum, converted into currency, would be sufficient to enable the guardian to satisfy all the indebtedness of the estate.

An order was entered granting the prayer of this petition, and authorizing the guardian to execute and deliver a third mortgage upon the real estate to secure the loan. Mrs. Kingsbury united with the guardian in all the mortgages, and Mrs. Lawrence united with him in the first and second mortgages. Powers resigned his trust on the twentieth of September, 1877, and John V. Le Moyne was thereupon appointed his successor. This suit was brought to foreclose the mortgages.

Section 18 of article 6 of the constitution of Illinois, adopted in 1870, declares that county courts shall be courts of record, and shall have original jurisdiction in all matters of probate, settlement of estates of deceased persons, appointment of guardians and conservators, and settlement of their accounts, and such other jurisdiction as may be provided for by general law.

The legislature of Illinois enacted a statute in relation to guardians and wards in 1872, which was in force when the three mortgages in controversy were executed. Section 2 of this act confers power upon county courts to appoint guardians of minors. Section 4 provides that, under the direction of the court, guardians shall have the custody, nurture, and tuition of their wards, and the care and management of their estates. Section 7 requires the guardian to give bond conditioned that he will faithfully discharge his trust, and manage and dispose of the estate according to law, and for the best interests of his ward. Section 19 provides that the guardian shall manage the estate of his ward prudently, and without waste, and apply the income and profits thereof, so far as the same may be necessary, to the comfort and suitable support and education of his ward. Section 22 provides that it shall be the duty of the guardian to put and keep his ward's money at interest upon security to be approved by the court, or invest the same in United States bonds, or other United States in-

terest-bearing securities. Personal security may be taken for loans not exceeding \$100. Loans of any larger amounts shall be upon real-estate security. Section 23 provides that the guardian may lease the real estate of the ward upon such terms, and for such length of time, not exceeding beyond the minority of the ward, as the county court shall approve. Sections 24 and 25 read thus:

"Sec. 24. The guardian may, by leave of the county court, mortgage the real estate of the ward for a term of years, not exceeding the minority of the ward or in fee; but the time of the maturity of the indebtedness secured by such mortgage shall not be extended beyond the time of minority of the ward.

"Sec. 25. Before any mortgage shall be made, the guardian shall petition the county court for an order authorizing such mortgage to be made, in which petition shall be set out the condition of the estate, and the facts and circumstances on which the petition is founded, and a description of the premises sought to be mortgaged."

Section 28 provides that—

"On the petition of the guardian, the county court of the county where the ward resides, or if the ward does not reside in the state or the county where the real estate or some part of it is situated, may order the sale of the real estate of the ward, for his support and education, when the court shall deem it necessary, or to invest the proceeds in other real estate, or for the purpose of otherwise investing the same."

Did the three petitions which were presented to the county court give that court jurisdiction to enter the orders authorizing the execution of the mortgages? And if they did, was the plaintiff authorized to contract for the prevailing rate of interest in Illinois at the time the mortgages were executed? These are the real questions presented by the record.

It is contended by the defendant's counsel that the jurisdiction of the county court is wholly statutory, and that it can encumber a ward's estate by mortgage to raise money for the expenditures and investments specified in the statute, and for no other purpose; that neither the statute nor the common law authorizes expenditures in making repairs or permanent improvements upon the ward's estate; and that neither the county court nor a court of chancery has inherent original jurisdiction to direct that an infant's real estate be sold or mortgaged. The guardian's authority over the estate, it is urged, is limited to its care, management, and preservation, the putting of money out at interest, and the use of the income, or so much of it as may be necessary, in the support and education of the ward. It is admitted, however, that under the statute the county court may authorize the guardian to mortgage the ward's real estate when necessary for the ward's support and education, or for the preservation of the estate.

A guardian, under the direction of the court, and when the interest of the estate clearly seems to require it, may lay out money in repairs and permanent improvements; he may change real into personal property, and *vice versa*; and, in short, he may do what a prudent

man would do in the management of his own affairs. *Chamb. Inf.* §§ 505, 541, 596.

The only source of income may be the ward's improved real estate, which is liable to become unproductive by fire or other cause. In such a case it is said the guardian may lease or sell the real estate. But he may not be able to do either without manifest injury to the estate. The expenditure of a comparatively small sum in making needed repairs, or in erecting buildings, may be clearly necessary and judicious, and yet, we are told, the power exists to do neither. The guardian is charged with the duty of preserving and managing the ward's estate, and in the discharge of that duty it may be quite as necessary to repair and make permanent improvements upon real property as to lease or sell it. The power to do either is liable to be abused, but no good reason can be given why it should exist in one case and not in the other.

The language of section 24, conferring power to mortgage, is as unqualified as the language in other sections which confer the power to lease and sell. Section 24 does not say the mortgage shall be executed to raise money for a particular purpose only, or for the purpose specified in the statute. In *Smith v. Sackett*, 5 Gilman, 534, the court said:

"The jurisdiction of the court of chancery to order the sale of the whole or portion of the estate of an infant, or to order it to be incumbered by mortgage whenever the interest of the infant demands it, will not be denied, whether that interest be of a legal or an equitable nature."

Allman v. Taylor, 101 Ill. 185, was decided as late as 1881, and in that case the court referred with approval to the ruling in *Smith v. Sackett*, *supra*.

It would seem, from a careful reading of the statute, that the legislature intended to confer upon the county courts a general jurisdiction over guardians of infants and the management of their estates. In speaking of the powers and jurisdiction of such courts in this connection in *Bond v. Lockwood*, 33 Ill. 212, the supreme court of Illinois said:

"The authority of the county court in this regard is similar to that of a court of chancery. The provisions of the statute in relation to guardians were not designed as a complete code, but were enacted to confer upon the county court power to appoint guardians, and to regulate their conduct in accordance with their duties at common law. Some imperfections in the common law were remedied, and a more simple and convenient mode of procedure was introduced. While some of its provisions were declaratory of the common law, and were appropriately introduced in conferring jurisdiction upon a new tribunal, it is evident that many of the powers and duties, rights and liabilities, of guardians are not, by the statute, specifically defined. The statute contains such provisions as were necessary to define the nature of the jurisdiction conferred, prescribe the manner of its exercise, and correct some of the defects of the law as it then existed. In other respects the common law regulating the powers and duties, rights and liabilities, of guardians was left

in force. At common law all guardians were regarded as trustees, clothed with such powers and rights as were necessary for the discharge of the trusts imposed upon them, and they were held accountable for the faithful discharge of their duties."

Section 25 provides that before any mortgage shall be made, the guardian shall petition the county court for an order authorizing such mortgage, in which petition shall be set out the condition of the estate, and the facts and circumstances on which the petition is founded, and a description of the premises sought to be mortgaged.

The petitions which were presented to the county court satisfied that section, and gave the court jurisdiction to enter upon the inquiry which resulted in the orders authorizing the guardians to execute the bonds and mortgages. Those orders cannot be attacked collaterally, and they are conclusive in this suit. The petitions and the orders which were based upon them were not adversary proceedings against the ward. *Allman v. Taylor, supra.*

A further objection is made to the second bond and mortgage that they were not approved by the court. The statute required no such approval; but if it did, the court was more than once informed that the bond and mortgage had been executed, and they were in effect approved, as the statement of facts shows.

The complainant was incorporated, under a special act passed by the legislature of New York in 1871, to loan money to individuals, corporations, associations, states, cities, provinces, towns, and other municipal bodies on bond and mortgage on real estate situated within the United States. Section 21 of the charter reads as follows:

"No loan shall be made, directly or indirectly, to any director or officer of the company, nor shall any loan or advance be made at a rate of interest exceeding the legal rate."

It is contended that under this section the complainant is not permitted to contract for a rate of interest in excess of the rate allowed by the laws of New York at the time the loan is made, and that the bonds and mortgages in this case, so far as they relate to interest, are absolutely void, although the interest contracted for was legal at the time and place of the contract.

Every country determines for itself what is a just compensation for the use and risk of money lent within its own territorial limits. The rate varies in different states and countries according to the varying conditions affecting the value of money. A rate which will reasonably compensate the lender in an old country, where money is abundant and values are less fluctuating, would not be reasonable in new countries where capital is needed and investments are attended with greater hazard. The rate of interest is regulated according to the risk attending the loan and the value of the money in the country in which it is lent. 3 Bing. 193.

At the time the act was passed chartering the complainant, 7 per cent. was the legal rate in the state of New York, and 10 per cent. was

the legal rate in Illinois and other western states. Other New York corporations, as well as citizens of that state, were at liberty to go into other states and loan their money at rates allowed by the local laws; and what reason could have operated for prescribing a different rule for the complainant? Can it be said that the legislature of New York intended to arbitrarily determine that whatever money might be worth from time to time in that state should be taken as its value by the complainant in making loans in other states? The question admits of but one answer. Usury laws are local, having no extraterritorial effect, and no special reason has been given, or can be given, why the legislature which incorporated the complainant intended that it should not be allowed to loan its money abroad at a rate which was fair and just at the place of contract. Each state may be safely trusted to determine what is a just compensation for the use of money within its own territorial limits, and to protect its own citizens against avarice. The people of Illinois and other states do not need the protection of the laws of New York in this respect; and it cannot be assumed that the legislature of that state has undertaken to afford such protection.

The bonds and mortgages expressly provide that they shall be construed and governed by the laws of Illinois in force at the date of the contract. Those laws allowed 10 per cent. as a just compensation under existing conditions. The loans were at 9 per cent. The court is asked to hold that the bonds and mortgages, so far as they relate to interest, are *ultra vires* and void, because 7 per cent. was the maximum legal rate in New York. Nothing but the most positive and explicit expressions could justify the belief that the legislature of New York intended to prohibit one of its own corporations from employing its capital in other states on terms less favorable than the laws of such other states allowed as just.

The complainant's charter simply required that it loan money at no higher rate than the legal rate at the time and place of the loan. This was in conformity with a well-established usage and rule of law. It may be conceded that this construction renders unnecessary that part of section 21 which relates to interest, but unnecessary and useless provisions are frequently inserted in statutes and charters out of abundance of caution. *Philadelphia Loan Co. v. Towner*, 13 Conn. 248; *Bowen v. Lease*, 5 Hill, 221.

But admitting that the complainant violated its charter in contracting for interest in excess of the legal rate in New York, still the defendants cannot escape payment. The complainant fully performed the contracts on its part. It paid the guardians the full amount of the several loans, and common sense and justice alike require that the other parties to the contract should not be permitted to escape performance by pleading want of authority in the complainant. It is for the state of New York to deal with the complainant if it has violated its charter. *National Bank v. Matthews*, 98 U. S. 621. Courts are not inclined to allow parties who have received the full benefit

of *ultra vires* contracts to escape payment of the sums justly due from them, under shelter of a plea of *ultra vires*.

A decree will be entered in favor of the complainant, in accordance with this opinion.

BUNT and others v. SIERRA BUTTES GOLD MIN. CO.¹

(Circuit Court, D. California. September 2, 1885.)

1. PRACTICE—NONSUIT—DIRECTING JURY TO FIND FOR DEFENDANT.

In the circuit court a nonsuit will not be granted at the close of plaintiff's case; but when the evidence fails to make out a *prima facie* case, the proper practice is to move the court to instruct the jury to find for the defendant.

2. SAME—MOTION, WHEN GRANTED.

Where the evidence is such that the court would feel bound to set aside any verdict in favor of plaintiff, it should direct a verdict for defendant.

3. MASTER AND SERVANT—ASSUMING RISK OF KNOWN DANGER.

An employe in a mining tunnel, who, knowing that the roof of the tunnel is in an unsafe condition at a certain point, while employed in making it safe sits down under the dangerous point during a suspension of the work, and is killed by the falling of the roof, is guilty of contributory negligence, and the owners of the mine will not be liable.

Motion to Instruct Jury to Find for Defendant.

J. C. Black, for plaintiffs.

Harry I. Tornton and *Eugene R. Garber*, for defendant.

SAWYER, J. At the conclusion of plaintiff's testimony in this case on yesterday, the counsel for the defendant moved the court to instruct the jury to find a verdict for the defendant, on the testimony introduced by the plaintiff, on the ground that, upon the case made by the plaintiff's evidence, all taken as true, the defendant is not liable; that, taking the evidence in its strongest light against the defendant, the plaintiff presented no case upon which she is entitled to recover. In such cases a motion of this kind is the proper practice in this court. The application is a substitute for a motion for nonsuit in the state courts. This court never grants a nonsuit; the proper motion being to instruct the jury to find a verdict for the defendant. This case, like many others of a somewhat similar character that I have had occasion to try, is one that necessarily excites sympathy in favor of the plaintiff. We are bound, however, to be governed by the rules of law, and the legal rights of the parties. On an examination of the authorities presented by the counsel last night, and in view of numerous others that I have before had occasion to examine, I am satisfied that this is not a case in which the plaintiff is entitled to recover. All of the numerous cases cited by plaintiff's counsel have other features that distinguish them from this case and cases like it.

¹See note at end of case.

Taking the evidence presented by plaintiff as all true, and viewing it in the light most favorable to her, it does not present a case in which, under the law, she is entitled to recover. In excavating the tunnel, the roof, according to all the testimony, was left solid at first. It was originally a roof of solid rock, but subsequent blasts beyond had somewhat shattered it. In October, and just before the accident which caused the death of the plaintiff's husband, the superintendent of the mine was in the tunnel, and he saw that the roof looked somewhat shattered. He examined it, striking the roof at various points with a pick, and found that it might be dangerous. He thereupon directed those working in the tunnel, of whom the deceased was one, to put in a set of timbers to support the roof. There was one post only there, but, according to the testimony, which was not contradicted, it was not put there to support the roof; but placed in a narrow seam in the side of the tunnel, to prevent the light, soft vein matter from running into the tunnel from the side; and not for the purpose of supporting the roof. One of the two men in charge,—there being two in equal authority, of whom the deceased was one,—George Dubourdieu, asked the question, if it would not be better to remove that post, and put in the set, so that one of the posts of the set should stand in the same cut occupied by the post already there. The superintendent told him that if they thought they could do it with safety, they might do it in that way; but to satisfy themselves that it would be safe before moving the post, and if it would not be safe, to set one of the posts of the new set by the side of that post, a little beyond it. The deceased with George Dubourdieu and the others had a conference on the subject, and considered the question whether they could remove the post there standing with safety, and they came to the conclusion that they could. They acted on their own judgment. Both deceased and George Dubourdieu were experienced miners, who had been a long time at work in this tunnel, and were doubtless as well informed on the question, and as well qualified to judge of the safety of the act, as the superintendent himself. On examination deceased assented to the conclusion with the others. They discussed the question, and concluded that they could remove the post without danger, and put one of the set in its place. They proceeded to do that. The post was knocked out. The deceased assisted in moving it out of the way. He was just as well informed of the condition of that roof, and the dangers attending the work, as was the superintendent himself. He was consulted in regard to it, formed his own opinion as to the danger involved, and concluded that the removal could be made with safety. The men—and he was one of the shift bosses—acted on their own judgment in the matter. It is manifest that they were parties who were capable of judging of those matters. In proceeding to do that work, and knowing the danger, they voluntarily took the risk. I think this is a much stronger case for the ruling I make than *McGlynn v. Brodie*,

31 Cal. 376, in which the question arose on a motion for nonsuit, and where all the authorities on the subject are fully discussed. That was a case in the state court, and the nonsuit was sustained by the supreme court of the state. This is a much stronger case for the ruling I make than that case. So, in *Kielley v. Belcher S. Min. Co.* 3 Sawy. 502, which was a case in Nevada, not clearer than this, I was compelled to rule in favor of the defendant. The deceased in this case was just as well informed as the defendant or the superintendent himself was, and voluntarily, with knowledge of the danger, assumed the risk of the work. It was not, therefore, the fault of the defendant. In this case there was no defective machinery at all. It was the condition of the roof in the tunnel, produced in part by the act of the deceased in blasting.

If the accident could be regarded as the result of the carelessness of George Dubourdieu, the latter was a fellow-servant, and there is no liability on that ground. *Buckley v. Gould & C. S. Min. Co.* 8 Sawy. 395; S. C. 14 Fed. Rep. 833. But deceased had equal authority with George Dubourdieu, and he himself was consulted, and the negligence was as much his own as of George Dubourdieu. More than that, at the moment when the accident happened the deceased was not actually engaged in doing anything relating to that matter. His duty at the time of the accident did not require him to be in the position of danger at all. He had performed the duty of removing the post from the place, and put it out of the way, and he was at the time not engaged in the performance of any duty connected with the work. Having a little leisure, while the other workmen were clearing out the place to put in the other timbers, he sat down to rest himself, and deliberately sat directly under the shattered roof. Knowing its condition, he voluntarily selected that place for a seat upon which to rest himself. He was doing nothing at the time. There was, at that time, no occasion at all for him to sit or be at the point where the accident occurred. He assumed voluntarily, for his own convenience and comfort, the responsibility of selecting that particular place in which to sit, and he sat immediately under the shattered rock. The space shattered was only four or five feet wide. If he had selected a place in which to sit two feet further out, he would have been clear of danger, and would have escaped. After his attention had been called to the condition of the roof, and having discussed the question as to whether it was safe to take this post out, and at a point of time when he had nothing at all to do with the work,—no duty to perform in connection with it,—he deliberately, of his own accord, sat down directly under the dangerous place; whereas, if he had selected a place two feet or more further out he would have been out of danger. That is an act of his own, and the company cannot be held responsible for the consequences resulting from it. Knowing all the circumstances of the case, he performed that act for his own comfort, and while sitting at the point

so selected by himself, under the circumstances indicated, the rock fell. He was evidently on the lookout, for he was the first to discover the giving away of the rock, and he called out to the others, "Boys, it is coming," or something to that effect, and sprang out. Under the state of facts indicated, which is shown by the uncontradicted testimony, but one conclusion can be reached on the law applicable to the case, which is that the plaintiff is not entitled to recover. In my judgment, the deceased lost his life in consequence of his own fault, rather than from the fault of the defendant. If the defendant was at fault at all, deceased contributed to the result in such manner, and to such extent, as to exonerate the defendant from liability. Without his reckless concurring act, this accident would not have happened. I think, therefore, that the defendant is entitled to the instruction asked.

I will say in conclusion that I find that the case was tried once before Mr. District Judge SABIN. At the close of the plaintiff's testimony on that trial there was no such motion as is now made. The case went to the jury on the testimony, and the jury found for the plaintiff. For the same reasons which I have now given, and I suppose upon similar testimony, Judge SABIN held that the verdict was not justified by the evidence, and granted a new trial on that ground. Where the evidence is such that the court would feel bound to grant a new trial in case the jury should find a verdict for the plaintiff, it is the settled doctrine of the supreme court of the United States that it is the duty of the circuit court to direct the jury, at the close of the plaintiff's testimony, to find a verdict for defendant. Being satisfied that there is no case for liability against the defendant, and that I should be compelled to set aside any verdict that the jury might find for the plaintiff in this case, I am in duty bound to follow that direction of the supreme court, and give the instruction required.

The circuit judge then directed the jury to find a verdict for defendant, which was done.

NOTE.

1. DIRECTING VERDICT FOR DEFENDANT. See *Buckley v. Gould & Curry Silver Min. Co.* 14 Fed. Rep. 833; *Adams v. Spangler*, 17 Fed. Rep. 133; *Washburne v. Pintsch*, Id. 582; *Brockett v. New Jersey Steam-boat Co.* 18 Fed. Rep. 156; *Randall v. Baltimore & O. R. Co.* 3 Sup. Ct. Rep. 322; *Schofield v. Chicago, M. & St. P. Ry. Co.* 5 Sup. Ct. Rep. 1125.

2. NEGLIGENCE, WHEN QUESTION FOR JURY. *Huff v. Ames*, 19 N. W. Rep. 623; *Eldridge v. Minneapolis & St. L. Ry. Co.* 20 N. W. Rep. 151; *Taylor v. City of Austin*, Id. 157; *Goodale v. Portage Lake Bridge Co.* 21 N. W. Rep. 366; *Kaples v. Orth*, Id. 633; *Mares v. Northern Pac. R. Co.* Id. 5; *Abbott v. Chicago, M. & St. P. Ry. Co.* 16 N. W. Rep. 266; *Dahl v. Milwaukee City Ry. Co.* 22 N. W. Rep. 755; *Parish v. Town of Eden*, Id. 399; *Baker v. City of Madison*, Id. 141; *Hoye v. Chicago & N. W. Ry. Co.* 23 N. W. Rep. 14; *Cartwright v. Chicago & G. T. Ry. Co.* 18 N. W. Rep. 380; *Dickinson v. Port Huron & N. W. R. Co.* Id. 553; *Atkinson v. Goodrich Transportation Co.* Id. 764; *Rogstad v. St. Paul, M. & M. Ry. Co.* 17 N. W. Rep. 287; *Luebke v. Chicago, M. & St. P. Ry. Co.* Id. 870; *McCorkle v. Chicago, R. I. & P. Ry. Co.* 16 N. W. Rep. 714; *Huff v. County of Poweshiek*, 15 N. W. Rep. 418; *Bohan v. Milwaukee, L. S. & W. Ry. Co.* Id. 801; *Williams v. Northern Pac. R. Co.* 14 N. W. Rep. 97; *Pool v. Chicago, M. & St. P. Ry. Co.* Id. 40; *Sorenson v. Menasha Paper & Pulp Co.* Id. 448; *Houser v. Chicago, R. I. & P. R. Co.* Id. 778; *Milne v. Walker*, 13 N. W. Rep. 101; *Brusberg v. Milwau-*

kee, L. S. & W. Ry. Co. 12 N. W. Rep. 416; Michigan Cent. R. Co. v. Hasseneyer, Id. 155; Gibbs v. Chicago, M. & St. P. R. Co. 4 N. W. Rep. 819; Michigan Cent. R. Co. v. Smithson, 7 N. W. Rep. 791; Chicago & N. E. Ry. Co. v. Miller, 9 N. W. Rep. 841; Atchison & N. R. Co. v. Bailey, Id. 50; Atchison, T. & S. F. R. Co. v. McCandliss, 6 Pac. Rep. 587; Denver, S. P. & P. R. Co. v. Conway, 5 Pac. Rep. 142; Hynes v. San Francisco & N. P. R. Co. 4 Pac. Rep. 23; Andrews v. Runyon, Id. 669; Weidekind v. Tuolumne Co. Water Co. Id. 415; Davis v. Utah Southern R. Co. 2 Pac. Rep. 521; White v. Missouri Pac. Ry. Co. 1 Pac. Rep. 611; Hart v. Town of Cedar, 24 N. W. Rep. 410; Buckley v. Gould & Curry Silver Min. Co. 14 Fed. Rep. 833; Randall v. Baltimore & O. R. Co. 3 Sup. Ct. Rep. 322; Schofield v. Chicago, M. & St. P. Ry. Co. 5 Sup. Ct. Rep. 1125; Myers v. Indianapolis & St. L. R. Co. 1 N. E. Rep. 899.

UNITED STATES *ex rel.* GOELET and others v. CITY OF ELIZABETH.

(Circuit Court, D. New Jersey. August 13, 1885.)

MANDAMUS—COMPELLING CITY TO LEVY TAX TO PAY JUDGMENT.

Mandamus to compel the city of Elizabeth, New Jersey, to assess and levy, in addition to the regular taxes, the amount of principal, interest, and costs due relators on a judgment obtained against said city, denied because of a want of competent proof of the facts justifying issue of the writ within the rule laid down in *Wolff v. New Orleans*, 103 U. S. 358; *Nelson v. St. Martin's Parish*, 111 U. S. 716; S. C. 4 Sup. Ct. Rep. 648; and *Commissioners v. Sewell*, 99 U. S. 627.

Rule to Show Cause, etc.

Jos. F. Randolph, for the rule.

Frank Bergen, *contra*.

NIXON, J. This is a rule to show cause why a writ of *mandamus* should not issue against the city of Elizabeth, commanding the corporation to assess and levy, in addition to the regular taxes, the amount of principal, interest, and costs due to the relators upon a certain judgment obtained against the city on April 19, 1884. Under the authority of *Wolff v. New Orleans*, 103 U. S. 358; *Nelson v. St. Martin's Parish*, 111 U. S. 716; S. C. 4 Sup. Ct. Rep. 648; *U. S. v. New Orleans*, 98 U. S. 381; and *Commissioners v. Sewell*, 99 U. S. 627, I am inclined to hold that an alternative writ may be issued when the relators make competent proof of the facts which are necessary to justify the court in acting.

It has not been done in the present case, and the writ must be denied.

OBERTEUFFER and others v. ROBERTSON.

(Circuit Court, S. D. New York. August 20, 1885.)

CUSTOMS DUTIES—GLOVES IN CARTONS AND BOXES—MARKET VALUE—ACT OF MARCH 3, 1883, § 7.

Whenever goods are sold in the markets of the country of exportation, whether usually or only occasionally in boxes, cartons, or coverings of any kind, which make the goods attractive and desirable, and the boxes, cartons, etc., enter into the price there of the goods as merchantable commodities, the boxes, cartons, etc., are accessories of the goods, and actual market value includes them as an element of the value of the goods in the condition in which they are purchased.

At Law.

WALLACE, J. The plaintiffs sue for duties which they claim were illegally exacted by the defendant, as collector of the port of New York, upon their importation in July, 1883, of certain gloves and hosiery. The merchandise was purchased by plaintiffs in Chemnitz, Germany, and at the time of the purchase was in cartons. According to the custom of trade there, gloves and hosiery, when intended for the markets of the United States, are usually prepared for sale by the manufacturers in cartons, not for the purpose of transportation, but because purchasers for our markets prefer them put up in that form; and the manufacturers there ordinarily include the price of the cartons in the price of the gloves and hosiery. For the purposes of shipment and transportation outside cases inclosing the cartons are used. The cartons are preferred because the goods are more conveniently kept and handled by retailers in that form than when loose. In estimating the dutiable value of the gloves and hosiery, the appraiser added to the price appearing in the plaintiff's invoices as the cost price of the gloves and hosiery, a sum sufficient to cover the cost or value of the cartons also; that item having apparently been omitted in the invoices, and not included in the cost price of the gloves and hosiery, presumably in order to present the main question which has been discussed in this case. That question relates to the construction to be placed upon section 7 of the act of congress of March 3, 1883, under which the plaintiffs contend that the value of the cartons should be excluded by the appraiser in ascertaining the dutiable value of the goods.

A verdict was ordered for the defendant upon the trial, on the ground that the plaintiffs' protest was insufficient to present the objections relied upon by them to the exaction of the duties in controversy. It is not necessary, for the decision of this motion for a new trial, to consider the question of the sufficiency of the protest, because the conclusion is reached that the plaintiffs' contention upon the main question is not tenable, and that the verdict should stand, because the duties were not illegally exacted.

The meaning and effect of section 7 of the act of March 3, 1883,

were carefully considered by the attorney general of the United States in his opinion of the date of January 11, 1884. One of the questions presented for his judgment was whether the section prohibits the inclusion in the dutiable value of merchandise of the value of the boxes and coverings which are part of its preparation for sale in the markets of the country of exportation. After a full review of the pre-existing legislation, he answered this question in the negative. His opinion is so satisfactory that it is adopted for present purposes with a single qualification. He states incidentally that the cost of boxes or coverings with which goods are *ordinarily* prepared for sale in the foreign market, and in which they are *usually* sold and purchased there, must be regarded as entering into or as being an element of the actual market value of the goods. If it is intended by this to indicate that the cost of the boxes or coverings should not be included unless the goods are ordinarily and usually prepared and sold in the foreign market in such boxes or coverings, that suggestion is not assented to. It seems to be founded upon the language of CLIFFORD, J., in *Cobb v. Hamlin*, 3 Cliff. 191, 200, in which case it was said by that learned judge:

"But no doubt is entertained that the words 'actual market value,' without more, would include the cost of the box, package, or covering in all cases where the merchandise in question was actually purchased in the box, package, or covering, and is usually so purchased and sold for shipment in the foreign market, and where the price includes the box, package, or covering, as well as the goods therein contained."

The precise question upon which this part of the opinion was expressed was not involved in that case, and there is no reason to suppose that it was intended to decide that the cost of the box, package, or covering should not be considered as entering into the actual market value of the goods, when they are treated as part of the goods, and when the goods are actually purchased in the box, package, or covering, and the price includes the box, package, or covering, as well as the goods contained therein. When section 7 declares that none of the charges imposed by existing law, nor the value of the usual and necessary sacks, etc., shall be estimated in ascertaining the value of the goods in order to determine their dutiable value, the language refers to the actual or usual charges for putting up, preparing, and packing the goods for transportation and shipment, including the sacks, boxes, or covering of any kind in which they are contained, which, by the provisions of section 2907, Rev. St., are to be added to the wholesale price or market value of the goods at the time of the exportation in the principal markets of the country of exportation. Although upon first consideration it would seem that this part of the section was unnecessary, if something more than the repeal of section 2907 was not intended by congress, the clause, when read with the proviso annexed to it, appears to have been added to the repealing clause in order to emphasize the intent of congress, and at the same

time to denote explicitly that coverings, etc., although employed ostensibly for the purpose of transportation and shipment, should not escape duty if used with the design to evade duty, or for any purpose other than the *bona fide* preparation of the goods for transportation. Section 7 is therefore to be construed as merely repealing pre-existing laws so far as they relate to adding the cost and expenses of transportation, shipment, and transshipment, including those of preparing and packing the goods, to the wholesale price or actual market value in the principal markets of the country of exportation in order to ascertain dutiable value. Its effect is to abrogate section 9 of the act of March 28, 1866, (section 2907,) and restore the provisions of section 7 of the act of March 3, 1865. While it abrogates the existing provisions for determining dutiable value, it does not contemplate prescribing any new rule for ascertaining market value. This is to be ascertained by ascertaining the actual value or wholesale price of the goods in the condition in which they are purchased and sold in the foreign market, without reference to special preparation for transportation and shipment. The "usual and necessary sacks, crates, boxes, and coverings," which are not to be estimated as part of the value of the goods in determining their dutiable value, are not those which are employed in the preparation of the goods for sale in the markets of the country of exportation, but are those which are usually and necessarily employed in preparing and packing them for transportation and shipment. Whenever, therefore, goods are sold in the markets of the country of exportation, whether usually or only occasionally, in boxes, cartons, or coverings of any kind, which make the goods attractive and desirable, and the boxes, cartons, etc., enter into the price there of the goods as merchantable commodities, the boxes, cartons, etc., are accessories of the goods, and actual market value includes them as an element of the value of the goods in the condition in which they are purchased.

In this case the appraiser properly added to the plaintiffs' invoice price of the hosiery and stockings a sufficient sum to include the value of the cartons, the cost or value of which was not apparently included in the invoice price of the goods. He did this in order to determine the market value of the goods in the condition in which they were offered for sale in the principal markets of the country of exportation. If he erred in adding a sum larger than was necessary to include the value of the cartons, the plaintiffs should have applied for reappraisal. They cannot attack his decision collaterally upon the theory that the duties exacted were excessive.

The defendant was entitled to a verdict for these reasons, and the motion for a new trial is therefore denied.

DUFFY v. REYNOLDS and others.

(Circuit Court, D. New Jersey. August 11, 1885.)

1. PATENTS FOR INVENTIONS—EVIDENCE—ORIGINALITY OF INVENTIONS.

When, in a suit for infringement of a patent, it is set up as a defense that complainant derived his idea of the patented invention from some third party who first conceived it, the burden of proof is on defendant, and any doubt respecting the evidence is fatal to the defense.

2. SAME—PATENT NO. 184,352—APPARATUS FOR DRYING HIDES.

On examination of the evidence, *held*, that James N. Duffy must be considered as the original and first inventor of the combined mechanism of the second, third, and fourth claims of patent No. 184,352, granted to him November 14, 1876, for "improvement for apparatus for drying hides."

3. SAME—INFRINGEMENT—PUBLIC USE—CONSTRUCTION OR PURCHASE OF MACHINE WITH KNOWLEDGE OF INVENTOR—REV. ST. §§ 4886, 4899.

Rev. St. § 4899, must be construed in connection with section 4886, and it may be said generally that, while section 4886 makes void every patent where it is shown that the invention was in public use or on sale for the period of two years before the application for the patent, section 4899, although allowing the letters patents to stand, excepts from liability to the inventor all persons who have used for less than two years any patented machine or article that has been purchased or constructed with the knowledge and consent of the inventor prior to his application for the patent. Infringement not shown.

In Equity.

G. E. P. Howard, for complainant.

G. G. Frelinghuysen, for defendants.

Nixon, J. This suit charges the defendants with infringing letters patent No. 184,352, granted to the complainant, November 14, 1876, for "improvement for apparatus for drying hides." The patentee states that the object of his invention is to furnish an improved means for drying and stretching hides, * * * being so constructed that the hides may be stretched in any desired direction, and to any desired extent, and thus dried without fold or wrinkle. In the specifications he thus states the nature of his invention:

"The invention consists in the extensible frame to receive the hide, formed of the four bars, having their ends slotted, and the clamping bolts; in the combination of the sliding bars, and their pins, with the extensible frame and with the table; in the combination of the lever, and the pivoted fulcrum bars, the ropes, the shafts, the ratchet-wheels, the pawls, and the hand-levers, with the table and the sliding bars; and in the combination of the swinging blocks, and their pivoting straps, with the extensible frame and the clamping bolts, as hereinafter fully described."

There are four claims, all of which, except the first, are combination claims. The elements of the mechanism are old, but it is claimed that a new and useful result has been secured, to-wit, a larger surface area of the hide by stretching it in every direction under a strain equally and simultaneously distributed over the whole surface.

Various defenses have been set up in the answer, but on the final hearing the principal stress seems to have been laid upon the two following: (1) That the complainant was not the original and first inventor of the combined mechanism of the second, third, and fourth claims. (2) Not infringement, as the only machine used by the de-

endants was constructed with the knowledge and consent of the inventor before any application was made for the patent.

1. With regard to the first, it is insisted by the defendants that the mechanism of the second and third claims was the invention of one Levi Dederick, and that the fourth claim was suggested by the defendant Reynolds. It appears from the testimony that during the summer of 1876, and while the complainant was a member of the firm of Reynolds, Duffy & Co., he was engaged in perfecting his devices preparatory to applying for a patent. He caused to be constructed, at the expense of the firm, a completed mechanism in order to test the practicability and usefulness of his machine for stretching hides. A machinist named Dederick was called upon to do the work. The complainant testifies that he explained the invention to him, and consulted with him as to the best means of accomplishing the desired result.

"I took him up stairs," he says, "and showed him a frame of the table with which I had been experimenting and explained their operation to him; and, standing there at the table, I told him, 'I now want a table constructed with an outside frame similar to this one, and in it put eight slides or arms to be operated with levers and a windlass, so connected that when the windlass is turned the levers will cause the slides to move outwards all at the same time, just like moving your hands out this way, [stretching apart his hands.] The slides or arms moving out from the sides must be near the ends; those moving out from the ends must be near the sides. In these slides I want holes bored and pegs or stops made to fit them, so they may be moved from one hole to another, as may be needed. These pegs must stand high enough from the top of the slides to catch the sides and ends of the table; then the operation will be this: Put the frame on the table; loosen the corner bolts; see the size of the hide; adjust the frame and pegs or stops to it; tack the hide on; turn the windlass; that moves the slides; the pegs move with them and extend the frame; when far enough extended, fasten the corner bolts, loosen the windlass, take the frame off the table, and the slides fall back to the starting point.' I then asked him if he understood my description. His answer was: 'I do; give me the measurements, and I will make the table just as you have described.'"

Mr. Dederick gives the whole statement an unequivocal denial. He says that he was temporarily residing in Newark from the month of February, 1876, to the spring of 1877, occupying a part of the tannery of Reynolds & Word, endeavoring to develop a new tanning process. While he was there the complainant became a member of the firm. About the month of May, 1876, Mr. Duffy took the witness to an upper room in the building and exhibited to him a stretching table and frame, and explained to him its construction and mode of operation. He also stated to him the result he sought to accomplish, but gave no hint or made any suggestion of the way of doing it. His plan of spreading the frame, so as to stretch the hide, was carried out by the use of screws, which, he said, was too slow in operation. He asked him if he could get up anything that would answer that purpose and be better. The witness replied that he thought he could. He then studied upon the matter, and afterwards explained to Duffy

and Reynolds the plan that he conceived, and they concluded to try the experiment. He expressly claims that, excepting the frame, all the parts and mechanism of the table were made after his own planning, without a suggestion from the complainant of any method or mechanism by which it could be made operative. He first tried a simple lever to be operated with the foot, but this proved insufficient in power. He then substituted the windlass with a hand-lever and the pawl and ratchet.

It is also claimed that the swinging blocks attached to the clamping bolts of the stretching frames (the subject of the fourth claim of the patent) were the invention of the defendant Reynolds, and was communicated by him to the complainant. Reynolds testifies that when the frames were first put in use it was found that there was a looseness at the shoulders of the hide, between the neck and the fore-shank, which was objectionable. To remedy this he proposed to Duffy the use of the swinging block, as shown in the model, and made a drawing of the same on an iron door with chalk, which he exhibited to the complainant. The latter thought it was a good device, and said they had better have some made for trial, which was done. Afterwards all the frames were provided with these swinging blocks.

This statement is explicitly denied by Duffy. He says that after Dederick had completed the frames under his directions, and after the firm of Reynolds, Duffy & Co. had begun to use them, he discovered that the bag-piece hung over, and that there was not sufficient tacking surface on the face of the frame to accommodate it, and he ordered the pieces to be put on the outside edge of the ends of the frames, to increase the tacking surface, and also the piece on the inside of the neck, where the middle of the neck came, for the same purpose.

"After that," he continued, "I told Reynolds * * * that I wanted an attachment made for the frames. I said to him, 'Please come with me to the drying loft, and I will explain to you just what I want made.' He did so; and at the table, standing right over it, I said to him: 'I want a piece of board this shape,' describing it just as it is here, pointing with my finger, [the witness points to the swinging corner-blocks in complainant's exhibit model,] 'fastened with hoop-iron straps to the corner bolt, light and narrow straps on the board in this shape, and long enough to cross each other, so as to admit of being riveted to one end of a wider and heavier strap, which at the other end I want punched to admit the corner bolt. These straps on the board must be narrow, so as to interfere as little as possible with the tacking surface, and the connecting strap wide enough and heavy enough to leave stick enough, after punching, to insure the necessary strength. Have a few of these made till I see how they will work.' * * * The corner pieces were made in exact accordance with my request, were applied, worked well, and became part of the frame."

Such contradictions, arising, it is hoped, from lapses of the memory, are painful and embarrassing. Looking through the testimony for corroboration of one story or the other, I do not find much in the

case to materially strengthen either side. There are some acknowledged facts, however, in the subsequent conduct of the witnesses which add weight and force to the statement of the complainant. For instance, he shortly afterwards applied for the patent, embracing all these elements of the combination, making oath that he was the original and first inventor, and with the knowledge of Reynolds and Dederick, and without any opposition on their part except, as they allege, a feeble and half-hearted inquiry whether he did not intend to recognize their suggestions as entitling them to some interest in the patent. The firm of which Reynolds was a member, and with his assent, began to pay to the complainant royalties for its use as soon as the letters patent were granted, and Dederick acknowledges that years after the patent was obtained he asked permission of the patentee to construct a single machine for the use of a relative, which was refused unless he would agree to pay the fixed royalty for the same.

But, waiving all this, the burden of proving such a defense is upon the defendants. Any doubt respecting the evidence is fatal. This was held to be the law by the circuit justice (BRADLEY) and the judge of this circuit (McKENNAN) in *Patterson v. Duffy*, 20 Fed. Rep. 641, in which these learned judges, when considering the allegation that the complainants derived their idea of the patented invention from some third party who first conceived it and communicated it to them, said:

"The proofs are conflicting, and while we are of the opinion that the scales incline in favor of the complainants, it can, at least, be said with confidence that the defense is not clearly sustained. That is enough to resolve the case in favor of the complainants."

2. The second point has been more perplexing and troublesome. Section 4899, Rev. St., declares that every person who purchases of the inventor, or with his knowledge and consent constructs, any newly-invented machine prior to the application of the inventor for a patent, or who sells or uses one so constructed, shall have the right to use, and vend to others to be used, the specific thing so made or purchased without liability therefor. The provision is explicit, and has existed in the several patent acts since the enactment of section 7 of the act of March 3, 1839. As was stated by the supreme court in *McClurg v. Kingsland*, 1 How. 208, its object was twofold: (1) To protect the person who has used the thing patented, by having purchased, constructed, or made the machine to which the invention is applied, from any liability to the patentee or his assignee; (2) to protect the rights granted to the patentee against infringement by any other persons. For before this section any public use or sale of the thing patented, with the consent and allowance of the inventor, before his application for a patent, was a defense which anybody might set up, and which if successful avoided the patent altogether. See section 15 of the act of July 4, 1856, (5 St. 123.)

But section 4899 must now be construed in connection with section 4886 of the Revision, and it may be said generally that while the latter section makes void every patent where it is shown that the invention was in public use or on sale for the period of two years before the application for the patent, the former one, although allowing the letters patent to stand, excepts from liability to the inventor all persons who have used for less than two years any patented machine or articles that has been purchased or constructed with the knowledge and consent of the inventor prior to his application for the patent.

Let us consider the facts of the present case in connection with the statute. The application for the patent was made October 14, 1876. Duffy, the patentee, became a member of the firm of Reynolds, Duffy & Co. in the early spring of the same year. He had been experimenting upon a stretching-machine a year or two before this time, and had not succeeded in constructing one that worked to his satisfaction. Accepting his statement as true, because, although denied, it has not been overborne by satisfactory preponderating evidence, he exhibited to Reynolds and to Dederick, shortly after his promotion to the partnership, the point to which he had reached in his invention, and the mechanism with which he proposed to complete it. At his request, and with the assent of Reynolds that the firm should be responsible for the expenses, Dederick began to construct a machine embracing, in order to make it effective, the mechanism which was afterwards patented, and finished the same as early as June or July of that year. When completed it was set up in the establishment of Reynolds, Duffy & Co., and used by them before and after the application for the patent; the patentee consenting that they should have it without the payment of royalty as long as the firm continued. The partnership was dissolved in the month of February, 1882, and the machine and frames were sold and transferred by Duffy, the retiring partner, to the defendants. It is in evidence, and not disputed, that when the sale took place the complainant asked the defendant Reynolds whether he expected to pay the usual royalty, stating that no use would be allowed without such payment,—this was in February, 1882,—and Reynolds replied that he would think about it. He thought about it until the month of June following, when he wrote to Duffy, declining to pay anything for the use of the invention, not because he had purchased the machine and therefore had the right to use it, but because he considered the patent entirely invalid and worthless. What right or privilege of using the machine and frames did the defendants acquire by such construction, purchase, and use prior to the application for a patent? Or, in other words, was this such a public use or sale, with the knowledge and consent of the inventor of the thing afterwards patented, that, under the provisions of section 4899, the patentee is estopped from demanding royalty for its continued use?

I have no difficulty about the first construction by Dederick, under the direction and supervision of Duffy. That was, doubtless, allowable. The facts clearly show that it was by way of experiment, or in order to bring the invention to greater practicability. Curt. Pat. § 134; *City of Elizabeth v. Pavement Co.* 97 U. S. 134. He had the right to defer his application for the patent, and to hold the completed machine for a reasonable time for experimental purposes. But after it was completed and tried and found to be successful, did he not fly in the face of this section by consenting to and sanctioning its public use by Reynolds, Duffy & Co. before he filed his application for a patent, and can he now complain because the purchasers of the "specific machine" demand the privilege of its further use without compensation to the inventor?

After some hesitation, I have reached the conclusion that, while the complainant's patent is valid, there has been no infringement by the defendants, under the provisions of section 4899, by their use of the invention, and will not be as long as they confine themselves to the "specific machine" and frames, the use of which the inventor consented to and allowed before he applied for the patent.

Let the bill be dismissed.

THE MAX MORRIS.

(District Court, S. D. New York. August 18, 1885.)

1. STEVEDORES—PERSONAL INJURIES.

Vessels employing stevedores to work upon the ship are bound to provide reasonable safeguards against danger arising from peculiarities in the construction of the vessel.

2. SAME—MUTUAL FAULT.

The steamer *M. M.* employed the libellant as one of a gang of stevedores' men to shovel coal at night. There was a "lower bridge," about 50 feet long, amid-ships, extending across from rail to rail, about six feet above the main deck, over which the libellant had to pass. He went up a ladder forward on the port side, through the opening in the guard-rail, passed directly aft to an opening in the rail corresponding to that forward, except that the opening was four inches narrower. Supposing it to lead to a similar ladder, he went to step down, but, no ladder being there, he lost his hold, fell, and broke his collar-bone, and was laid up three months. The latter opening had never been used for a ladder, and was not guarded. *Held*, that there was negligence on both sides: in the ship, because the opening was unusual and dangerous, and should have been guarded; in the libellant, for not using more caution in the nighttime upon a ship with which he was unacquainted.

3. SAME—DAMAGES ALLOWED.

Following *The Wanderer*, 20 Fed. Rep. 140, 72 days' wages were allowed the libellant, notwithstanding his concurrent negligence, as within the discretionary power of a court of admiralty, and because demanded in the interests of justice and humanity, as well as of public policy, to prevent the multiplication of accidents whereby the poor become a public charge through the concurring fault of others. Various classes of cases cited in which damages are divided in admiralty.

In Admiralty. Personal injuries.

Jas. A. Patrick, for libelant.

Butler, Stillman & Hubbard and *W. Mynderse*, for claimant.

BROWN, J. The libelant was one of a gang of stevedores' men who, on the evening of October 27, 1884, went aboard the steam-ship *Max Morris*, lying at her wharf, to shovel coal. In passing from forward aft, the libelant was obliged to pass over what is termed the "lower bridge," a structure about 50 feet long amid-ships, extending from rail to rail, and about 6 feet above the main deck. He went up a ladder of the usual kind on the port side; passed directly aft on that side; and, finding an opening through the guard-rail at the after-end of this lower bridge, corresponding in place with the forward opening, supposed it to lead down to a ladder similar to the ladder forward. It being nearly dark, he did not observe and did not suspect that no ladder was there; and, putting his foot down to the supposed steps, lost his hold, fell to the main deck below, broke his collar bone, and was for a time disabled. This libel was filed to recover his damages.

Each side strenuously contends that the other is solely to blame for this accident. The ship is claimed to be responsible, because her construction was unusual; because this rear opening was dangerous and calculated to mislead persons not previously acquainted with the peculiar structure of the ship; because the opening through the railing was in a place where a ladder would naturally be expected; and because, being unguarded by a chain or otherwise, and not notified to the libelant, it was no better than a pitfall for the unsuspecting workmen. The libelant is claimed to be solely responsible, because he exercised no reasonable caution in going in the night-time about a ship with which he was unfamiliar; because ships vary in the details of their construction as much as houses, and no set type can be presumed upon; because the opening in the rail at this place was not designed for a ladder, but for the play of the small-boat which was upon the outer side of it; because no ladder had ever been there, and the opening was but 14 inches wide, whereas the opening for a ladder is always at least 18 inches wide; and because it was evident carelessness, as it is said, for a laborer to push through so narrow an opening at night and undertake to go down without first ascertaining whether there was a ladder there or not.

The evidence shows that the construction of this "lower bridge" was somewhat unusual but not unexampled, and that the descent aft was on the starboard side from a platform extending fore and aft and facing amid-ships. The experts examined differed as to the propriety or necessity of a guard at an opening of but 14 inches, such as that through which the libelant fell. The very competent expert on the part of the steam-ship apparently based his testimony, in part at least, upon the assumption that a man could not pass through such an opening without turning or squeezing. Experiment, however,

shows that this might possibly be done, though not readily; and that it would not be likely to happen in a person's ordinary movements, the rail being about three feet high.

The considerations urged upon each side are manifestly entitled to weight; and I find myself constrained to hold each in substantial fault contributing to the accident. It is impossible to absolve landmen, accustomed to work upon vessels in port, from reasonable care and attention to their movements about vessels with which they are unacquainted. The darkness in this case made it the duty of the libellant to exercise the greater care in his movements, or else to supply himself with one of the several lights that were provided by the ship, but were unused. On the other hand, reasonable consideration for the safety of workmen coming on board is a duty imposed by law upon the owners and masters of vessels, both from humanity to the workmen, and from policy, to prevent them from becoming, through accident, a public charge. Reasonable consideration demands that some safeguards shall be provided against any peculiarities of the vessel that are naturally calculated to mislead the unwary, and to involve them in danger and injury unawares. Though this opening was somewhat smaller than the usual opening for ladders, it was not so small as to be impracticable for such a use. The difference was slight, certainly not sufficient to be ordinarily observable in the dark, nor sufficient to be in itself a notice that the opening was not a passage-way, or to serve as a warning in the night-time, when its small size might not be, and in this case was not, perceived; while its position, where a ladder is usually found, and being opposite to the forward ladder, afforded so strong a natural supposition that a ladder was there that not a doubt of it occurred to the libellant. In my judgment, it was clearly dangerous; it should have been guarded by a chain, or some other precautionary measure, such as might easily have been provided. *The Manhassett*, 19 Fed. Rep. 430; *The Pilot Boy*, 23 Fed. Rep. 103.

As I must find the libellant also chargeable with negligence in the particulars above mentioned, the question is presented whether, in a court of admiralty, in a case of personal injuries to landsmen arising from the concurrent negligence of the ship and of the libellant, any damages can be awarded; or whether the libel must be dismissed, according to the rule in common-law cases. That the rule of the municipal law should be followed has been presumed or implied in several cases in the district courts. See *The Germania*, 9 Ben. 356; *Holmes v. Oregon & C. Ry. Co.* 5 Fed. Rep. 523, 538; *The Chandos*, 4 Fed. Rep. 645, 649; *The Kate Cann*, 8 Fed. Rep. 719; *The Manhassett*, 19 Fed. Rep. 430. The cases of *Sunney v. Holt*, 15 Fed. Rep. 880, and *Dwyer v. National S. S. Co.* 17 Blatchf. 472, S. C. 4 Fed. Rep. 493, were cases at law. The cases cited of injury through the negligence of fellow-servants are not applicable.

This question has recently been carefully examined in the circuit

court by Judge PARDEE, of the Fifth circuit, in the cases of *The Explorer*, 20 Fed. Rep. 135, and *The Wanderer*, Id. 140. No decision has been made upon the precise point in this circuit. It is clear that in admiralty causes, even in cases of personal injuries, this court is not strictly bound by the common-law rules. The language of the supreme court in *The Marianna Flora*, 11 Wheat. 54, and *The Palmyra*, 12 Wheat. 1, cited by Judge PARDEE, sufficiently shows this. But the same considerations of justice, of prudence, and of policy, which have caused that rule to be adopted so widely in the common law and in the civil law, should doubtless lead to its observance in ordinary cases in admiralty. See *The E. B. Ward, Jr.*, 20 Fed. Rep. 702. "A party who is *in delicto*," says STORY, J., in *The Marianna Flora*, above cited, "ought to make a strong case to entitle himself to general relief."

But not infrequently cases do arise in which the common-law rule is manifestly inequitable; strong cases, in which justice, humanity, and public policy alike demand that those who, by their concurrent negligence, have caused great suffering and injury to those dependent upon their daily earnings for support should not be exempted from all charge, simply because some contributory fault may be found in the sufferer. The practice in admiralty to apportion damages in cases of mutual fault is not strictly confined to collisions and prize causes. It has been applied in this district and in this circuit to cases of loss by negligent navigation by tugs, where both parties are chargeable with fault, and public policy demands that both be made responsible, (*The Wm. Murtaugh*, 3 Fed. Rep. 404; S. C. 17 Fed. Rep. 260; *The Wm. Cox*, 3 Fed. Rep. 645, affirmed in the circuit court, 9 Fed. Rep. 672; *Connolly v. Ross*, 11 Fed. Rep. 342; *The Bordentown*, 16 Fed. Rep. 270;) where the tow was not in proper condition, (*Philadelphia & R. R. Co. v. New England Transp. Co.* 24 Fed. Rep. 505; *The Oswego*, 8 Ben. 129;) to injuries of boats on the bottom of slips; (*Christian v. Van Tassel*, 12 Fed. Rep. 884;) to injuries to old boats, (*The Syracuse*, 18 Fed. Rep. 828; *The Reba*, 22 Fed. Rep. 546;) and, by Judge SPRAGUE, to loss by leakage from different causes attributable to each party. *Snow v. Carruth*, 1 Spr. 324.

These cases proceed upon an equitable judgment and discretion that are admissible in the admiralty to a greater extent than exists in common-law causes. Where the common-law rule controls, or is supposed to be binding, the demands of obvious justice are constantly leading to new modifications of what shall be deemed such contributory negligence as to bar recovery, and to the adoption of peculiar views of the facts, both by the court and by juries, such as would not be taken but for the hardship of the case.

Deference to the ruling of the circuit judge of the Fifth circuit in the cases above quoted, as well as the approval of my own judgment, leads me to follow the rule suggested by him in cases of this kind, involving great hardship and suffering, at least until this view be overruled,

viz., "to give or withhold damages according to principles of justice and equity, considering all the circumstances of the case, not as full compensation for the injury, but as required by decency and humanity from a party without whose fault there would have been no injury." This rule has been again recognized by him in the case of *The Mabel Comeaux*, 24 Fed. Rep. 490, though not applied, because the vessel was found not in fault. I may add that the same considerations of public policy that demand that every person shall take proper care of himself—Shear. & R. Neg. (2d Ed.) § 42—also demand that ships in port, on board which accidents are constantly multiplying from the increasing complications of their arrangements, and from their modern appliances, shall not be practically exempted from the duty of taking any reasonable precautions against accident by proof of some slight fault in the sufferer; and that they shall not, by their fault and negligence, cause those who are dependent on their daily earnings for support to become a burden and a charge upon the public. "The moiety rule in collision causes was adopted," says BRADLEY, J., in *The Alabama*, 92 U. S. 697, "for the better distribution of justice among mutual wrong-doers." See, also, per NELSON, J., *The Catharine*, 17 How. 170; *The Hudson*, 15 Fed. Rep. 166.

The more equal distribution of justice, the dictates of humanity, the safety of life and limb, and the public good will, I think, be clearly best promoted by holding vessels liable to bear some part of the actual pecuniary loss, where their fault is clear, provided that the libellant's fault, though evident, is neither willful, nor gross, nor inexcusable; and where the other circumstances present a strong case for his relief. Such a rule will certainly not diminish the care of laborers for their own safety, while it will surely tend to quicken the attention of the owners and masters of vessels towards providing all needful means for the safety of life and limb.

The libellant in this case was treated at the public hospital without charge. His collar-bone was broken. He was disabled from work for about three months; and, though working steadily now, suffers some drawbacks from the accident, and probably will do so throughout his life. This is a case sufficiently strong, as it seems to me, to require the claimants to bear some part of the damage that their concurrent negligence occasioned. Following the precedent of *The Explorer*, *supra*, I shall charge to the libellant's own fault all his pain and suffering, and all mere consequential damages; and charge the vessel with his wages at the rate of two dollars per day for 75 working days, making \$150; for which sum a decree may be entered, with costs.

WINCHELL v. CARLL and another.

(Circuit Court, D. Connecticut. September 17, 1885.)

REMOVAL OF CAUSE—CITIZENSHIP—FORECLOSURE OF MORTGAGE—CONNECTICUT STATUTE.

W., the mortgagee, a citizen of Connecticut, brought suit in the state court of Connecticut to foreclose a mortgage on land situated in that state, and to obtain possession of the land, making C., the mortgagor and maker of the note, a citizen of Connecticut, and D., a citizen of New York, to whom C. had conveyed the equity of redemption, parties defendant. C. and D. were in possession of the land, and, under the statute in force in Connecticut, D. was a necessary party to the suit. *Held*, that the suit was not removable into the United States court; following *Ayres v. Wiswall*, 112 U.S. 187; S. C. 5 Sup. Ct. Rep. 90.

Motion to Remand.

John W. Alling, for complainant.

John H. Whiting, for defendants.

SHIPMAN, J. This is a motion to remand a cause to the state court upon the ground that it was improperly removed. It was removed under the second clause of section 2 of the act of 1875.

Winchell, the mortgagee, a citizen of Connecticut, brought before the proper state court of Connecticut a complaint for foreclosure of a mortgage of real estate, in said state, against Carll, the mortgagor, and maker of the note secured by the mortgage, a citizen of Connecticut, and Coney, a citizen of New York, to whom Carll had conveyed the equity of redemption. Carll and Coney are alleged to be in possession of the mortgaged land. The complaint prays for foreclosure and possession. A statute of the state of Connecticut, passed in 1878, (Sess. Laws 1878, p. 314,) is as follows:

"Section 1. The foreclosure of a mortgage shall be a bar to any further suit or action upon the mortgage debt, note, or obligation, unless the person or persons who are liable for the payment thereof are made parties to such foreclosure.

"Sec. 2. Upon the motion of any party to a foreclosure the court shall appoint three disinterested appraisers, who shall, under oath, appraise the mortgaged property within ten days after the time limited for redemption shall have expired, and shall make written report of their appraisal to the clerk of the court where said foreclosure was had, which report shall be a part of the files of such foreclosure suit, and such appraisal shall be final and conclusive as to the value of said mortgaged property; and the mortgage creditor, in any further suit or action upon the mortgage debt, note, or obligation, shall recover only the difference between the value of the mortgaged property as fixed by such appraisal and the amount of his claim."

Another statute of said state, passed in 1875, (Sess. Laws 1875, p. 30,) is as follows:

"Whenever any foreclosure or other suit in equity shall be brought asking for any relief in relation to lands, the petitioner may in his bill pray for the possession of such lands, and the court may, if it grant his petition and find he is entitled to the possession of such lands, issue its execution of ejectment, commanding the officer to eject the person in possession of such lands, and to place the petitioner in possession thereof; and such officer shall proceed

v.24F,no.16—55

with such execution in the same manner as in executions in ejectment at law: provided, no execution shall issue against any persons in possession who are not made parties to the petition."

The question depends entirely upon these statutes, or one of them. Did they not exist, Carll would have been an unnecessary party. *Swift v. Edson*, 5 Conn. 532.

I shall refer only to the statute of 1878. The complainant, in order to preserve his legal rights against the maker of the note, was compelled to make him a party to the complaint for foreclosure. Complete relief could not be obtained unless this had been done; for, although an execution could not be issued against Carll in this proceeding, no judgment could ever be rendered against him unless he had been made a party to this suit. There is, as in the case of *Ayres v. Wiswall*, 112 U. S. 187, S. C. 5 Sup. Ct. Rep. 90, "but one cause of action,"—the mortgage, and the debt which it secured;—and it was indispensable, if the complainant wished to preserve the legal liability of Carll upon the note, and to keep unimpaired his own right to complete relief upon his cause of action, to make Carll a defendant. The question which is here involved comes within the principle decided in *Ayres v. Wiswall*.

The motion to remand is granted.

ELGIN CANNING CO. v. ATCHISON, T. & S. F. R. CO.

(Circuit Court, N. D. Iowa, E. D. 1885.)

JURISDICTION — FOREIGN RAILROAD CORPORATION — WRONGFUL DELIVERY OF GOODS IN ANOTHER STATE—CODE IOWA, §§ 2582, 2585.

The state and federal courts in Iowa have no jurisdiction of an action brought by a citizen of Iowa for damages for the wrongful delivery of goods in Colorado, shipped over a line of railroad forming a continuous or through line, against the railroad company making such delivery, which was chartered in Kansas and operated its line of road in that state, and in Colorado and New Mexico, but not in Iowa, and that had no agent or office in the latter state.

At Law. Demurrer to plea to jurisdiction.

Rickel & Bull, for plaintiff.

McCrary & Hagerman and *James Hagerman*, for defendant.

SHIRAS, J. This action was originally brought in the superior court of Cedar Rapids, Iowa. The defendant, at the time it appeared in that court, filed a plea to the jurisdiction of the court, and also a petition for the removal of the cause into this court, which petition was granted. Upon the filing of the record in this tribunal the plaintiff demurred to defendant's plea to the jurisdiction, and the cause is now before the court upon the issue thus presented. In the petition filed, the plaintiff avers that it is a corporation organized under

the laws of the state of Iowa, and that on the twenty-fourth of October, 1884, one O. C. Evans, of Pueblo, Colorado, ordered of plaintiff certain goods, to be forwarded to Pueblo; that the plaintiff delivered said goods to the Burlington, Cedar Rapids & Northern Railway Company, "as the initial line of railway engaged in transporting said goods to said point;" that said plaintiff, not knowing said Evans, and not wishing to deliver said goods to him until he had paid for the same, consigned said goods to themselves at Pueblo, and drew a draft for the price thereof upon Evans through the First National Bank of Pueblo, accompanied with an order upon defendant for the delivery of the goods; that the defendant delivered the goods to said Evans wrongfully, before he had paid for the same; that Evans is insolvent, and plaintiff has been unable to collect the price of said goods from him; wherefore, defendant is liable to the plaintiff for the loss thus caused. In the plea to the jurisdiction of the superior court of Cedar Rapids, filed by defendant, it is averred that the defendant is a corporation, created under the laws of the state of Kansas, engaged in operating a line of railway in Kansas, Colorado, and New Mexico; that it was not organized for the purpose of operating any line of railroad in Iowa, and that it is not now operating, nor has it ever operated, any such line in Iowa; and, further, that the cause of action sued on did not grow out of, and is in nowise connected with, any office or agency of defendant in Iowa. The question, therefore, for determination is whether the courts of Iowa have jurisdiction of the defendant under the facts disclosed upon the record in this cause.

Section 2582 of the Code of Iowa provides that "actions may be brought against railway corporations * * * in any county through which the line or road thereof passes or is operated." Section 2585 further provides that "when a corporation, company, or individual has an office or agency in any county for the transaction of business, any suit growing out of or connected with the business of that office or agency may be brought in the county where such office or agency is located." These provisions apply to foreign as well as to domestic corporations, and hence, if it appeared that the defendant was operating any line of railway in the state of Iowa, or that it had an office or agency in any county for the transaction of business, and the cause of action arose out of business connected with such office or agency, then the courts of the state would have jurisdiction over the defendant, as the case would then be within the principles laid down in *Ex parte Schollenberger*, 96 U. S. 369.

In the case now before the court, the averments of the plea, which are admitted by the demurrer, show that the defendant is a foreign corporation, and that it is not operating a line of railway within the state of Iowa; and that the cause of action did not grow out of any business transacted at any office or agency of the defendant in Iowa. Under these circumstances, the defendant corporation cannot, at the time of the alleged service of the notice upon it, be said to have been

within the jurisdiction of either the state or federal courts in the state of Iowa.

It is urged in argument that the defendant, by its appearance in the state court, waived all objection to the jurisdiction under the provisions of paragraph 3 of section 2626 of the Code. This section defines the mode of appearing to an action, and is not intended to define or establish the jurisdiction of courts over non-residents. An appearance, even though for a special purpose, obviates the necessity of giving the party appearing any further or formal notice of the pendency of the action. If, however, the filing of a plea to the jurisdiction is an appearance which confers jurisdiction, according to the argument of plaintiff, then it would be impossible for a defendant to question the jurisdiction, or to obtain a ruling thereon in his favor. As is said by the supreme court of Iowa in *Cibula v. Manufacturing Co.*, 48 Iowa, 528, paragraph 3 of section 2626 "is applicable to cases wherein there are objections to 'the substance or service of the notice.'" An appearance to object to the sufficiency of the notice is one thing, and an appearance to object to the jurisdiction of the court is another. If the jurisdiction does not exist, an appearance for the purpose of making the objection does not confer jurisdiction.

Counsel for plaintiff insists in argument "that if the court had no jurisdiction to try the case, it was because the subject-matter of the action was not within its jurisdiction." Herein lies the error of the position assumed on behalf of plaintiff. The subject-matter of the action is within the jurisdiction of the superior court of Cedar Rapids; but that court did not have jurisdiction of the *person* of the defendant. The defendant, being a corporation, has its legal home in the state under whose laws it was created; that is to say, in this instance, in the state of Kansas. It may, however, by its agents transact business in other states, unless prohibited from so doing by the laws of such other state or the restrictions in its charter. As is expressly ruled by the supreme court in *Ex parte Schollenberger*, *supra*, it may under such circumstances "consent to be found away from home for the purposes of suit as to matters growing out of its transactions."

The state of Iowa has in substance provided that any corporation, company, or individual, having an office or agency in any county in this state for the transaction of business, may be sued in such county upon any cause of action connected with or growing out of such agency or office, or the business transacted thereat. A foreign corporation doing business in this state comes within this statute, and is deemed to have consented to be found within the state for the purpose set forth in the statute. It cannot, however, be held that the foreign corporation has consented to be found here for every purpose, nor to consent to be sued in the courts of Iowa in cases not embraced within the provisions of the statute. But in the case at bar it does not appear that the defendant corporation ever transacted any business in Iowa, or ever had any office or agent located in the state. The re-

turn of the officer who served the original notice shows that he served the same upon the "Atchison, Topeka & Sante Fe Railroad Co., by reading the same to S. M. Osgood, agent of said company, and delivering to him a true copy of the same, in Linn county, Iowa." For aught that appears, Osgood may have been a traveling agent, without any office in Iowa. But, however this may be, the demurrer to the plea admits that the defendant corporation was not operating any line of railway in Iowa, and that the cause of action sued on did not grow out of any business transacted in any office or agency of the defendant in Iowa.

Under these circumstances the defendant, as to such cause of action, had not consented to be found within the state of Iowa; and therefore, being a foreign corporation, it was not within the jurisdiction of the courts of Iowa, either state or federal.

The demurrer to the plea should therefore be overruled; and it is so ordered.

PRATT v. CALIFORNIA MIN. CO.

(Circuit Court, D. Nevada. November 17, 1883.)

1. CONVEYANCE TO ASSOCIATION—PERSONS NOT NAMED.

When land is conveyed to an association of persons without naming all of them, the court may inquire and determine what persons composed the association at the date of the deed, and the interest to which each would be entitled in the land.

2. SAME—INTERESTS—ACTS OF PARTIES.

The acts of the parties in disposing of the property may be considered as showing their understanding of their interests therein at the time the deed was made.

3. LACHES AS DEFENSE IN EQUITY.

No formal pleading of the statute of limitations is necessary to raise a defense of laches in equity. It may arise upon the bill or upon the evidence as produced by the complainant.

4. SAME—CHARACTER OF PROPERTY.

Where the property in litigation is of a speculative and fluctuating value, the parties interested will be held to a greater degree of diligence in asserting rights therein than where it is of permanent and fixed value.

In Equity.

W. E. F. Deal and *J. F. Lewis*, for complainant;

R. S. Mesick, for defendant.

Before SAWYER and SABIN, JJ.

SABIN, J. The complainant in this suit alleges that he is the owner of thirteen feet and one and one-half inches of mining ground, undivided, described in his bill, situated on the Comstock lode, in Virginia City, Storey county, Nevada, the same being a portion of that certain mining ground and claim known as and called the California claim; that he has been such owner thereof since December 22, 1859; that

defendant owns the remainder of said mining claim or ground, and holds the same as tenant in common with complainant; that defendant has removed from said mining ground ores to the value of \$30,000,000 and upwards, which it has converted to its own use. Complainant prays to be adjudged to be the owner of said thirteen feet and one and one-half inches of said mining ground or claim, for partition thereof, for an accounting, and for general relief.

The answer denies all right, title, or interest of complainant in and to said ground, or any part thereof. It is full and responsive to the bill, and contains substantive averments by way of defense, which need not be here recited. The answer admits that defendant has removed ores from said mining claim of the value of \$20,000,000, which admission is accepted by complainant, and no evidence was taken thereon. It also admits that complainant has received no part of the proceeds of said ores, and denies all right in him thereto.

It is admitted, and so stipulated, that whatever interest or estate complainant ever had or now has in said mining ground was acquired by him through and by virtue of a certain deed executed by James Walsh, dated December 22, 1859, submitted in evidence as complainant's Exhibit No. 4. This deed, so far as material to this case, reads as follows:

"For and in consideration of six thousand dollars paid to me by an association of persons now owning and running a water-mill for the purpose of crushing quartz on Carson river, about one and a half miles above China Town, on said river, in the territory of Utah and county of Carson, said association originally consisting of Joseph Woodworth, Mr. Hastings, Mr. Pratt, Mr. Wilson, and myself, I have this day sold and quit claimed to said association my one-fourth, undivided, of," etc. [Describing the property.]

This deed was duly executed and recorded December 22, 1859. Both parties to this suit derive title to the ground in controversy through this deed.

The defendant, in its answer, avers that one William Stuart was a member of that association on the date of said deed, and that he took an interest in the property conveyed of one-twentieth of all the ground so conveyed to the association; and it further avers that complainant's interest in said ground was never one-fifth thereof, but only one-twentieth thereof. And upon these averments of the answer arise the real issues decisive of this case.

It is necessary for us, then, to determine these two questions of fact upon the evidence submitted: (1) Who composed that association on the twenty-second of December, 1859? (2) What interest or estate did each member thereof respectively take in the property conveyed by this deed?

It is conceded by both parties that Walsh and the four persons named in the deed were members of the association at the date of the deed, and took under it. It will be observed that the deed runs, not to the persons named, but to "said association." A presumption

might arise that the persons named as the original members of the association were the only members thereof at the date of said deed, though the peculiar phraseology of the deed would suggest the contrary. But when an issue of fact is raised on this very point, the presumption would yield to the truth and fact, as established by the evidence.' The evidence on this issue ought to be clear, strong, and convincing.

Complainant's case, as made, rests almost wholly upon his own deposition. That of the defendant has a wider range. It is supported by the depositions of James Walsh, the grantor in said deed, C. H. Fish, and various deeds vesting the title to this mining ground in defendant. We do not deem an extended review of the evidence necessary in this opinion, as it is all of record. Walsh, in his deposition, tells us very clearly and plainly when, where, and how this association was formed; who composed it, and the interest which was allotted to and taken by each member thereof under his deed in the property conveyed. He tells us distinctly that it was composed of Woodworth, Wilson, Hastings, Pratt, Stuart, and himself; that he wrote the deed, but cannot tell how it happened that Stuart's name was omitted therefrom as a member of the association, but that he was such, and took his allotted interest under his deed. Strongly corroborative of this statement is the fact that, within six months from the date of that deed, Walsh paid Stuart \$3,500 for the very interest which Stuart acquired in this property by this deed of Walsh to this association.

The deeds submitted in evidence by defendant, conveying the various alleged interests of all these parties in this ground, strengthen and confirm the deposition of Walsh in all material points. Walsh was virtually the "head and front" of this association. He owned this property; had purchased it from Comstock in the month of August, 1859. It is manifest, from all of the evidence, that he and Woodworth were the managers and the controlling spirits of the association. If Walsh did not know who composed this association on the twenty-second of December, 1859, we have no knowledge from the evidence, aside from the deeds, who did compose it on that date. Pratt is wholly silent on this point, as we shall hereafter see. The deposition of Walsh is in harmony with his action subsequent to his conveyance to this association; in harmony with the action of every member of the association in disposing of his interest in this property; in harmony with the declarations made by Woodworth in March, 1860, and in 1865, to Pratt, as to the extent of Pratt's interest in this property; and it is in harmony with all of the deeds made by all of these parties, submitted in evidence, conveying their interests in this property. These deeds were executed in 1860, when all, or nearly all, of these men were on the ground,—when this matter was fresh and clear in their minds. They were not executed with a view of serving as evidence in this case; but they were intended to be, and

doubtless were, absolute verities at the time they were executed, and they are the perpetual record of how all of these six persons then understood this whole matter, both as to who composed the association, and the respective interest of each in this property. And we are compelled, in view of all of the evidence, to give this deposition of Walsh full credence on all material points.

We cannot say this of the deposition of Pratt. He confessedly knew but little of the association or of its affairs at any time, and the lapse of more than 20 years when he gave his deposition had not strengthened or brightened a knowledge originally limited, uncertain, and vague. It is remarkable that in his deposition, covering 64 pages, he nowhere tells us who did compose this association. He testifies that he did not know whether it was formed by any written articles of association or otherwise; whether or not it had or kept any records; who were its officers; what funds it had, or what became of them; how much he or any member contributed to it; or what became of its property after he left Gold Hill, Nevada, in April, 1860. He says they shipped and worked about 100 tons of ore, worth about \$250 per ton. His counsel, in his argument, states that this ore ought to have netted the association at least \$17,500, yet Pratt does not know what was done with this large sum of money,—seems never to have inquired about it, though entitled, as he claimed, to one-fifth of it. We cannot but think that he stated both the source and extent of his knowledge of this matter when, in reply to a question as to who was present when the association was formed, he says:

"I don't know where they met, and I don't know who were present. All I know, Joe Woodworth told me we had formed a company of five. I was down at Carson river when he told me."

It may serve no useful end to review his evidence at length. Walsh contradicts Pratt on many—nearly every material point; and we cannot but think that Walsh was much the best informed in regard to this association, and all of its affairs, at the dates of which he speaks, and that his testimony is far the most credible. Walsh has no interest in this suit, and his deposition is consistent throughout. See deposition of Walsh, pp. 6-8, 20-23. On the other hand, Pratt's testimony is very unsatisfactory, and sometimes confused and contradictory. See deposition of Pratt, pp. 17-34.

In order fully to understand the strength or weakness of these depositions, they must be carefully studied, compared the one with the other, and both with the documentary evidence in the case, and the subsequent conduct of all of the parties composing the association, not omitting that of complainant himself. And it is permissible for the court to take into consideration the contemporaneous and subsequent action of these various parties in reference to this property, as evincing their construction and understanding of their respective rights and interests under this deed executed by Walsh to this association. *Mulford v. Le Franc*, 26 Cal. 88; *Steinbach v. Stewart*, 11

Wall. 576; *Hamm v. City of San Francisco*, 9 Sawy. 31; S. C. 17 Fed. Rep. 119.

After careful examination of all of the evidence, we are convinced, and so find and hold, that on the twenty-second of December, 1859, the association to which Walsh conveyed this property, by his deed of that date, was composed of Joseph Woodworth, James Walsh, J. W. Hastings, Metcalf Pratt, complainant, George Wilson, and William Stuart, and that they each took an interest in the property conveyed.

We pass to the second question: What interest did each take in this property? The presumption arising from the deed, unexplained, would be that they took in equal shares or proportions. This, however, is but a presumption, and may be overcome by evidence not necessarily inconsistent with the deed, in the same manner that a deed, absolute on its face, may be shown to be only a mortgage, or that a legal title may be shown to be held by the grantee in trust, or that property, apparently community property, may be shown to be the individual property of either spouse. In either case, the extent of the interest or estate may be inquired into and determined.

Much that we have said, in our review of the evidence, as to who composed this association, applies as to the interest which each member thereof took in this property. Walsh tells us, in his deposition, that when he and Woodworth decided what property they would give these men an interest in, they allotted to each his share or interest in the property; that Woodworth and himself reserved each a three-eighths interest, Hastings was given a one-tenth interest, and Pratt, Stuart, and Wilson, a one-twentieth each; and that Woodworth informed the men of their respective interests, and had the deed recorded. Now, the deeds in evidence show that this was true, and that each member of that association then so understood the matter, and each one thereafter conveyed just his allotted share or interest, and never claimed any other than his allotted interest in this property, except complainant. Is it possible that all of these five men were mistaken as to their interests, not one of them correct, when they were all at work together, knew the property, and were on the ground, and that Pratt, who confessedly knew but little of the association or of its affairs, is alone correct?

These deeds, executed in 1860, seem much more convincing than the confused statement of an interested witness made long subsequent thereto. Walsh conveyed this property to this association December 22, 1859. On March 23, 1860, Pratt, complainant, conveyed to Woodworth one-twentieth of this property, his allotted interest. July 23, 1860, Hastings conveyed to Woodworth one-tenth of this property, his allotted interest. August 16, 1860, George Wilson conveyed to King and Othel his one-twentieth interest in this property. There was a mistake evidently in the first deed executed by Wilson, and another deed was executed by Wilson and wife, August 27, 1860, to

King and Othel, corrective of the first deed. September 15, 1860, Stuart conveys to Walsh his one-twentieth of this property. Walsh, by two deeds to Sparrow, of date September 9, 1860, and October 9, 1860, and by one deed to Barron, conveys his original three-eighths interest in this property and the twentieth interest purchased from Stuart. In the deed of Walsh to Sparrow of September 9, 1860, after mentioning this association, is this recital: "My interest in the property of said association being originally three-eighths of the whole." Woodworth joins with others in conveying all of their interests in this ground to the grantors of defendant, and hence no particular description appears in this deed of the specific interest conveyed by Woodworth.

These deeds confirm the deposition of Fish as to the sources whence defendant derived title to this property, and the interest conveyed by each member of that association. It is more than probable that, could we have the testimony of Woodworth on this point, it would confirm the testimony of Walsh and these deeds. Pratt testifies repeatedly that Woodworth told him that he, Pratt, owned only a twentieth interest in this property. He told him this when he purchased his interest in 1860, and repeated it in 1865. There is no support for the suggestion that this association was a purchaser of this property for value. The interest conveyed to each was evidently a gratuity, and was so understood by them all, as is shown from the fact that each disposed of his allotted interest, and never claimed any other or greater interest therein, excepting complainant. Pratt testifies that he contributed his labor and expenses to the association. Walsh testifies that he understood that all of the men were paid, and thinks they were; and it is undisputed that Walsh sent \$200 to Woodworth, by Pratt, with which to pay Pratt for his labor just before he left, in November, 1859, to return to his home at Grass Valley, California. We think the evidence settles as clearly what the interest of each of these persons was in this property as it does the fact who composed the association. And from it we find and hold that Woodworth and Walsh each took and held, under this deed to the association, a three-eighths interest in the property conveyed; that Hastings took and held a one-tenth interest therein; that Wilson, Pratt, (complainant,) and Stuart each took and held a one-twentieth interest therein, and no more.

It is conceded that Pratt conveyed to Woodworth one-twentieth of this mining ground, by his deed of March 23, 1860. It follows, therefore, from our decision on the last question, that he then conveyed away all of the interest or estate which he ever had in this association property. And we cannot resist the belief that he well knew at the time of the sale of his interest that he was parting with his entire interest in the property. Woodworth assured him then that he was so doing; and he had a right to believe Woodworth, for he tells us virtually that Woodworth had told him all he ever knew of the asso-

ciation. If, however, there could be any doubt on this point, the conduct of Pratt for more than 21 years after this conveyance, in reference to this property, would seem to place that doubt at rest. In August, 1860, he was at Gold Hill, and received from Woodworth \$500, the balance due on the purchase money of his interest in this property. He goes away; abandons this and all other interests which he then had at Gold Hill; keeps watch of this property; knows its great value; talks about it; knows that defendant is in possession of it, and working it; and yet for 15 years he never even demands his interest in it. At the end of that time he makes demand, is denied, and again goes away and is silent for more than six years longer before attempting to assert his alleged rights. This is not the usual conduct of men where great interests are at stake, who are strong in the belief of their rights, and diligent in the assertion of them. His conduct, during all of this time, was just such as we might expect of a man who knew that he had parted with his entire interest in the property, and regretted that he had done so.

Another matter of defense is urged upon our attention, to-wit, the staleness of plaintiff's claim. And we consider it, since if we are wholly wrong in our determination of the questions of fact involved in this case, we still think that, in view of complainant's laches, neglect, acquiescence, and delay in the assertion of his alleged rights, he has no standing in a court of equity to demand the relief sought, or any relief. Upon this point, complainant's counsel insist "that the statute of limitations of Nevada must control the court in the determination of this question." We do not view the subject in this light; but if counsel's position be true, it seems to us that it is absolutely fatal to complainant's standing. The statute of limitations has little, if anything, to do with this defense—that of complainant's laches—unless by way of analogy. This defense arises independently of the statute, and may arise either upon the bill of complaint as presented to the court, or upon the whole case as disclosed by the evidence.

We will, for a moment, consider the statute of limitations of Nevada. By this statute, the limitation for the recovery of a mining claim, or the possession thereof, is fixed at two years; that of other realty, at five years. The statute also declares what shall be considered adverse possession of a mining claim. We presume it will hardly be contended, under this statute, at least, but that defendant and its grantors have been in the adverse possession of this ground since 1860, when it acquired title thereto and went into possession thereof. See *Abernathie v. Con. Virginia M. Co.*, 16 Nev. 260, and cases there cited. But if this be denied, it certainly must be conceded that defendant has been in adverse possession of this ground since April, 1875, the time when Pratt made his demand, whatever that demand was, and was denied any interest in this property.

The bill of complaint virtually alleges an ouster of complainant, but does not fix the date thereof; but this is supplied by the evidence.

The answer virtually avers the same thing. The bill alleges a demand by complainant upon defendant for his interest and estate in this property, and for an accounting; that defendant has refused the same, and denies "that plaintiff has, holds, owns, or is entitled to any interest whatever in or to said premises, or any part thereof." This denial by defendant of all participation by complainant in the rents and issues of the property, coupled with a denial of all right or interest of complainant in the property itself, is, as between co-tenants, equivalent to actual ouster; and such ouster would be found from the date of such denial. *Freem. Co-tenancy*, §§ 235, 242; *Abernathie v. Con. Virginia M. Co.*, *supra*.

This denial is fixed by the evidence as early, at least, as April, 1875,—even if it is not fixed as early as March 23, 1860,—when Pratt's further interest in the property was denied by Woodworth, and all possession thereof by Pratt ceased. If, then, this court is controlled, in the matter of this defense, by this statute, what possible standing has plaintiff in court? In limiting the recovery of mining claims to two years, and extending it to five years as to other realty, the state has declared its fixed policy,—has said that it would not tolerate unreasonable delay,—and it charges upon all persons, at their peril, that they be diligent in the prosecution of all mining rights and interests. There is wisdom in this policy and law of the state, and we see no reason why it should not be enforced in this or any proper case. In the case before the court, the bar of the statute is not invoked by formal plea. Defendant, being a foreign corporation, could not, under the rulings of the supreme court of Nevada, plead the statute in this action had it desired to do so. This, however, is of slight significance. As we have observed, this defense arises independently of the statute of limitations. The doctrine of laches in equity courts is much older than any statute of limitations. The jurisdiction of equity courts was established by act of parliament in 1349, though these courts had existed long prior thereto, with a somewhat uncertain jurisdiction. The statute of limitations of James I. was enacted in 1624, nearly 300 years after the establishment of equity courts by act of parliament. In *Smith v. Clay*, 2 Amb. 645, decided in 1767, Lord CAMDEN says:

"Laches and neglect are always discountenanced; and therefore, from the beginning of this jurisdiction, there was always a limitation to suits in this court."

On this subject, however, it will be amply sufficient to call attention to rulings of the supreme court of the United States upon the defense here urged. In *Badger v. Badger*, 2 Wall. 87, a case strongly analogous to the case at bar, the court says:

"Courts of equity, in cases of concurrent jurisdiction, consider themselves bound by the statutes of limitations which govern courts of law in like cases, and this rather in obedience to the statutes than by analogy. In many other cases they act upon the analogy of the like limitations at law. But there is

a defense peculiar to courts of equity, founded on lapse of time and staleness of claim, where no statute of limitations governs the case. In such cases courts of equity, acting upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, refuse to interfere where there has been gross laches in prosecuting the claim, or long acquiescence in the assertion of adverse rights. Long acquiescence and laches by parties out of possession are productive of much hardship and injustice to others, and cannot be excused but by showing some actual hinderance or impediment caused by the fraud or concealment of the parties in possession, which will appeal to the conscience of the chancellor. The party who makes such appeal should set forth in his bill specifically what were the impediments to an earlier prosecution of his claim; how he came to be so long ignorant of his rights, and the means used by the respondent to fraudulently keep him in ignorance; and how and when he first came to a knowledge of the matters alleged in his bill; otherwise the chancellor may justly refuse to consider his case on his own showing, without inquiring whether there is a demurrer or formal plea of the statute of limitations contained in the answer."

In that case the bill was dismissed in the lower court, on the ground of complainant's neglect and delay in the prosecution of the demand. And in affirming that decree, the court further says:

"If a further reason were required for affirming this decree, it might be found in the statute of Massachusetts, [the statute of limitations.] * * * But we prefer to affirm the decree for the reasons given, without passing any opinion on the effect of this statute."

In *Sullivan v. Portland, etc., R. Co.*, 94 U. S. 811, this subject is further discussed. In this case, the bar of the statute of limitations was not pleaded. The court says:

"To let in the defense that the claim is stale, and that the bill cannot therefore be supported, it is not necessary that a foundation shall be laid by any averment in the answer of the defendants. If the case, as it appears at the hearing, is liable to the objection by reason of the laches of the complainants, the court will upon that ground be passive and refuse relief. Every case is governed chiefly by its own circumstances; sometimes the analogy of the statute of limitations is applied; sometimes a longer period than that prescribed by the statute is required; in some cases a shorter time is sufficient; and sometimes the rule is applied where there is no statutable bar. It is competent for the court to apply the inherent principles of its own system of jurisprudence, and to decide accordingly. A court of equity, which is never active in giving relief against conscience or public convenience, has always refused its aid to stale demands, wherever a party has slept upon his rights, and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence. Where these are wanting, the court is passive, and does nothing. Laches and neglect are always discountenanced, and therefore, from the beginning of this jurisdiction, there was always a limitation to suits in this court."

In *Twin-lick Oil Co. v. Marbury*, 91 U. S. 587, the court adverts to the character of the property involved, and the relative obligation of diligence resting upon those claiming rights or interests therein. The court says:

"The fluctuating character and value of this class of property [oil mining property] is remarkably illustrated in the history of the production of mineral oil from wells. Property worth thousands to-day is worth nothing to-morrow; and that which would to-day sell for a thousand dollars, as its fair

value, may, by the natural changes of a week, or the energy and courage of desperate enterprise, in the same time be made to yield that much daily. The injustice, therefore, is obvious of permitting one holding the right to assert the ownership in such property to voluntarily await the event, and then decide, when the danger which is over has been at the risk of another, to come in and share the profit. While a much longer time might be allowed to assert this right in regard to real estate whose value is fixed, on which no outlay is made for improvement, and but little change in value, the class of property here considered, subject to the most rapid, frequent, and violent fluctuations in value of anything known as property, requires prompt action in all who hold an option whether they will share its risks or stand clear of them."

The delay in this case was less than four years, and in affirming the decree of dismissal of the lower court, the court further says:

"We think, both on authority and principle,—a principle necessary to protect those who invest their capital and labor in enterprises useful but hazardous,—that we should hold that plaintiff has waited too long."

See, also, *Hayward v. National Bank*, 96 U. S. 611, and cases there cited; 2 Story, Eq. Jur. § 1520, and note 4; Story, Eq. Pl. § 813, and note; 1 Pom. Eq. Jur. §§ 420, 421; *Gottschall v. Melsing*, 2 Nev. 185; *U. S. v. Flint*, 4 Sawy. 80; *Manning v. San Jacinto Tin Co.*, 7 Sawy. 418; S. C. 9 Fed. Rep. 726; *Dannmeyer v. Coleman*, 8 Sawy. 51; S. C. 11 Fed. Rep. 97; *U. S. v. Tichenor*, 8 Sawy. 142; S. C. 12 Fed. Rep. 415; *Hart v. Clarke*, 19 Beav. 349; S. C. 6 H. L. Cas. 655; *Clements v. Hall*, 24 Beav. 333; *Hart v. Clarke*, 6 DeG., M. & G. 232; *Norway v. Rowe*, 19 Ves. Jr. 144.

Now, what was the complainant's conduct in regard to this property, from the time he sold this interest, in March, 1860, to the time of the commencement of this suit, a period of nearly twenty-one years and a half? There can be no dispute on this point, for we take his own statement thereon. Immediately after selling this interest, March 23, 1860, he returned to his home at Grass Valley, California, to look after his mines there; returned to Gold Hill, Nevada, in August of the same year, and collected \$500 due him from Woodworth; returned then to Grass Valley; remained there until 1870, when he went to Mineral Hill, Eureka county, Nevada, where he remained at work for wages until 1881, when he went to Idaho territory, returning from there to testify in this case. In April, 1875, he visited Virginia City, called at the office of defendant, and demanded his interest in this property, and was refused. He returns to Mineral Hill, waits six years and a half longer, and then brings this action. When asked by defendant's solicitor why he had not looked after this property, his answer is, "Because I neglected it." And when asked how he came to neglect it, he says, "It was through my carelessness; that's all." When questioned further by his own solicitor on this point, he tells us that he never had the necessary means from April, 1860, to the time he gave his deposition with which he could assert his rights to this property. And then, as if in travesty of his last statement, he tells us that he did commence this action without advancing a dollar,

and that the only expense he had been to was in coming from Idaho territory to testify upon the hearing before the commissioner. For twenty-one years and a half he was so poor that he could not do anything towards asserting his rights, but at the end of that time he could bring suit and press it to judgment without expense or liability.

Now, this excuse is without merit, if not untrue. It is a fair inference from the testimony that Woodworth paid Pratt \$1,000 at the time he purchased his interest, March 23, 1860. In August following, Pratt tells us that Woodworth paid him \$500, balance due for purchase money. He could certainly then have commenced suit for this property, and this was the very time when he should have done so, when the witnesses were all there, and before the property had passed to innocent purchasers in good faith. He tells us he owned valuable mines at Grass Valley, California, worked for wages when he wished to do so, and during his 10 or 11 years at Mineral Hill, he had accumulated between \$1,500 and \$1,600. We do not believe that during these many years, with all of these means and money, and health to labor when he wished to do so, he was still too poor to bring suit to assert his rights. But if he was poor and embarrassed, of which there is no evidence, it was no excuse for his neglect and carelessness. In *Hayward v. National Bank, supra*, complainant sought to excuse his delay by reason of his poverty. He said "he felt too cast-away to speak to anybody; could not help himself, nor pay the loan; cared very little about anything." Of this the court says:

"No sufficient reason is given for the delay in suing. His poverty or pecuniary embarrassment was not a sufficient excuse for postponing the assertion of his rights."

In view of the authorities cited and the facts in this case, can it be contended that complainant has shown any excuse for his delay in bringing this action? Diligence is a relative term, and the law justly charges all persons claiming rights or interests in property of a speculative or fluctuating value with a far higher diligence in the assertion of those rights than where the property involved is of a value fixed, permanent, and little changing. The changes in values occurring in a mining town or locality in five or ten years are often far greater than those which occur in an agricultural community in half a century. Complainant is a miner. He knew the fluctuating, changing, speculative value of mining property. He knew this mining ground was valuable, and advancing in value. He kept watch of it through the papers, talked and corresponded about it with his friends, and knew all this time what was being done with the property; and yet for 15 years he never says a word in assertion of his rights, and then, after demand and refusal, he waits six and a half years longer before doing anything to enforce his alleged rights.

There is no suggestion of any fraud on the part of the defendant in this whole matter. It has lawfully done all that it has done about

this property. It came into the possession of it in 1873, from grantors whose possession runs back to 1860. From that time to the present its possession has been peaceable, exclusive, and adverse to all, unless as to complainant, and certainly adverse to him since April, 1875. By its energy, enterprise, and means it has developed a great mine at great expense and toil and risk. It has taken this vast sum of \$20,000,000 from this mining ground, which has been distributed in a thousand different channels. During all this time complainant has stood quietly by, saying nothing, doing nothing, contributing nothing, incurring no expense, risk, or liability, and now demands his alleged distributive portion of this vast sum taken from this property. The demand is without merit, unconscionable, and stale. We have not been cited to, nor have we found, a single case in any way analogous to this where any relief has been granted by a court of equity.

Let decree be entered dismissing complainant's bill, with costs.

SNELL v. CAMPBELL, Co. Treasurer, and others.

(Circuit Court, N. D. Iowa, O. D. June Term, 1885.)

1. TAX IN AID OF RAILROAD—RES ADJUDICATA.

Action to set aside tax sale and enjoin execution of tax deed, in so far as the validity of the tax in controversy is concerned, *held*, barred by the former suit brought by complainant and others against the county treasurer to test the validity of said tax, and decided against them in the state court. See 55 Iowa, 553; S. O. 8 N. W. Rep. 425.

2. SAME—EFFECT OF REPEAL OF STATUTE IMPOSING PENALTY FOR NON-PAYMENT—REDEMPTION—AMOUNT OF TENDER.

The repeal of a statute under which a penalty is assessed against a tax-payer who fails to pay his taxes within a specified time is a remission of the penalty, and it cannot be collected after such repeal, and, when such penalty has not been collected of the delinquent tax-payer, he may redeem from tax sale without making a tender of the amount of the penalty in addition to the amount of the tax properly assessed, with legal interest thereon.

In Equity.

Cole, McVey & Clark and Barcroft & Bowen, for complainant.

J. F. Duncombe, for defendants.

SHIRAS, J. The complainant, who is a citizen of the state of Illinois, avers in his bill of complaint that he is now, and was in 1877, the owner of certain realty, situated in Waukonsa township, Webster county, Iowa; that in 1877 a tax of 5 per cent. was levied on said realty in aid of the Fort Dodge & Fort Ridgely Railroad Company, in pursuance of a vote of the electors in said township under the provisions of an act of the general assembly of the state of Iowa, approved March 15, 1877; that on or about the eighteenth of June, 1883, the treasurer of said Webster county, at a sale of lands for delinquent taxes, sold the realty owned by complainant for said railroad

tax, the same remaining unpaid; that Wm. M. Grant, one of the defendants, bought said realty at such tax sale; that the treasurer, in making said sale, added to the amount of the tax at five per cent. a penalty for the non-payment thereof at the rate of 1 per cent. a month for the first three months, 2 per cent. per month for the second three months, and 3 per cent. a month for the remaining months thereafter up to the day of the sale; that, unless restrained from so doing, the county treasurer will execute a treasurer's deed to the purchaser or his assignee, thereby casting a cloud upon complainant's title to said realty; that the act of the general assembly of March 15, 1877, is contrary to the provisions of the constitution of the state of Iowa; that the vote taken was not in pursuance of the act in question, and the tax levied is void and of no effect; that taxes in aid of railroads had already been voted in Waukonsa township in excess of 5 per cent., and that the power to vote a tax under the statute was exhausted; that if valid no penalty attached to the failure to pay the tax assessed, and that the sale by the treasurer is void, because these penalties had been added.

To this bill the proper county officers, together with the purchaser at the tax sale and the owner of the certificate of sale, were made parties, and have fully answered thereto.

The first question made by defendants upon the pleadings and the evidence is that the matters relied upon by complainant have already been adjudicated against him, and that he is now estopped from relitigating them in the present action.

It appears that the complainant, Snell, uniting with a number of other tax-payers owning property in Waukonsa township, filed a bill in equity in the district court of Webster county, Iowa, at the February term, 1879, against A. Leonard, the then county treasurer of Webster county, to enjoin and restrain the collection of the tax voted and levied in aid of the Fort Dodge & Fort Ridgely Railroad Company. In substance, the grounds of complaint were that the petition asking for a submission of the question of aiding the railroad was not signed by the requisite number of freeholders; that the trustees had no power to order an election; that the company had not complied with the provisions of the proposition submitted to the voters; and that the road was not properly constructed, and had been changed from a narrow to a standard gauge road.

A temporary injunction, restraining the treasurer from collecting the tax, was granted by the judge of the district court. The defendant answered the bill thus filed, and upon a hearing the temporary injunction was dissolved, and the bill ordered to be dismissed. The order dissolving the injunction is in writing, signed by the judge, and was made in vacation, and it is not shown that a formal judgment or decree based thereon was entered upon the records of the court. The plaintiffs, however, appealed the case to the supreme court of the state, and in that court attacked the constitutionality of the act of the gen-

eral assembly under which the tax was voted. The supreme court held the act constitutional, and affirmed the order or decree of the district court. See *Snell v. Leonard*, 55 Iowa, 553; S. C. 8 N. W. Rep. 425.

The defendants in the present suit plead and rely upon the action had in *Snell v. Leonard* as an adjudication estopping the complainant from again questioning the validity of the tax assessed upon complainant's property in aid of the Fort Dodge & Fort Ridgely Railroad Company.

Upon part of complainant, it is insisted that it has not been proven that there was any legal or binding adjudication had in that cause, in that it does not appear that the order of the judge dissolving the injunction and dismissing the bill ever ripened into a full and final decree entered of record during a term of the court. It clearly appears that the answer filed in that cause took issue upon the merits of the bill of complaint, and that the judge upon the hearing dissolved the injunction previously granted and ordered the dismissal of the bill. The complainants evidently treated this as the end of the case in the district court, and appealed the cause to the supreme court, stating in the notice of appeal that "the plaintiffs in said action have appealed from the judgment of the district court rendered in favor of the defendant at the March term thereof," etc.

In the supreme court the case was fully heard upon its merits, and the judgment of the district court was affirmed. Under these circumstances it is not open to the complainant to say that there was not an adjudication against him upon the merits of the controversy involved in the bill of complaint filed against the treasurer of Webster county.

Treating the record as sufficient evidence of an adjudication upon the merits of that controversy, the question then arises whether that adjudication bars the complainant from the relief sought in the present proceedings.

In *Cromwell v. Sac Co.*, 94 U. S. 351, the general rule applicable to this plea of *res judicata* is very fully and clearly stated. It therein appeared that one Smith had brought an action against Sac county upon certain coupons attached to bonds issued by the county. It was therein adjudged that the bonds were fraudulent, and, it not appearing that Smith was an innocent holder for value, it was further adjudged that he could not recover. Subsequently an action upon other coupons attached to the same bonds was brought in the name of Cromwell against Sac county, and by way of defense the adjudication in the case of *Smith v. Sac Co.* was pleaded, with the averment that Cromwell had been at all times the owner of the coupons sued on, and that the suit in name of Smith was really for his benefit. The supreme court held that,—

"There is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or de-

mand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Thus, for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defense actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. If such defenses were not presented in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defenses never existed. * * * Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever. But when the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted upon the determination of which the finding or verdict was rendered; * * * only upon such matters is the judgment conclusive in another action."

Applying these principles to the facts of the case, the court held that the second suit, being upon different coupons than those involved in the first suit, was for a different cause of action; that the judgment in the former suit, holding the bonds invalid against the county, estopped the plaintiff from averring the contrary in the second suit, but that plaintiff was not estopped from showing that he was an innocent holder of the coupons declared on in the second suit, because that question was not involved in nor passed upon in the first suit.

In *Block v. Commissioners*, 99 U. S. 686, it appeared that one Lewis was the owner of 100 coupons attached to bonds issued by Bourbon county, Kansas. In 1873 he applied to the supreme court for a *mandamus*, for the purpose of compelling the county commissioners to levy a tax and provide for the payment of the coupons held by him. An alternative writ was issued, and the commissioners answered it, setting up, among other things, that the bonds and coupons held by Lewis were unauthorized by law, because a majority of the electors of the county had not sanctioned the issuing of the bonds. The supreme court gave judgment for the defendants, refusing the *mandamus*. Thereupon Lewis delivered the coupons to Block, who brought suit thereon, in reality in the interest of Lewis. To this suit, brought in the United State circuit court, the judgment in the *mandamus* case was pleaded as a defense, and the supreme court held it was a conclusive bar to the action.

In *Stout v. Lye*, 103 U. S. 66, the record presented the following facts: On the tenth of November, 1873, one Lye executed to the First National Bank of Delphos a mortgage on certain real estate in Allen county, Ohio, to secure a debt due the bank. On the twenty-ninth of December, 1875, John W. and Jacob O. Stout brought suit

in the United States circuit court for Northern district of Ohio against Lye and others to recover judgment on a debt due thereon. On the fifteenth of January, 1876, the bank commenced suit in the state court of Allen county against Lye for the foreclosure of its mortgage. To this suit the Stouts were not made parties. On the thirty-first of January, 1876, the Stouts obtained judgment against Lye in the United States circuit court. This judgment was a lien upon the mortgaged realty. On the twenty-third of February, 1876, the Stouts commenced a suit in the United States circuit court, making the bank a defendant, in which they sought to set aside the mortgage as illegal for want of authority to take it, and also seeking to have certain payments of usurious interest credited on the principal debt. On the seventh of March a judgment was rendered in the state court in the suit of the bank against Lye for the full amount of the note, and ordering a sale of the mortgaged property. Thereupon the bank answered in the suit pending in the United States court, setting up the judgment of foreclosure as a bar to the action on part of the Stouts. The supreme court held that the suit to foreclose the mortgage in favor of the bank was pending when the Stouts obtained a lien upon the realty by virtue of the judgment in their favor against Lye; that, consequently, they were in privity with Lye, and although they were not parties to the record in the foreclosure suit, they were nevertheless bound by the decree therein; that although Lye, in the foreclosure suit, did not in fact set up the defense of want of authority in the bank to take the mortgage, yet he was at liberty to do so, and that he could not, nor could the Stouts, afterwards be heard to say in the suit in the United States court that the mortgage was for any reason invalid or void.

In the cases of *Corcoran v. Chesapeake, etc., Canal Co.*, 94 U. S. 741, and *Louis v. Brown Tp.*, 109 U. S. 162, S. C. 3 Sup. Ct. Rep. 92, it is ruled that in chancery cases adverse interests between defendants will be deemed settled, as between such defendants, by a decree in the cause, if the parties had an opportunity of asserting their rights.

Applying the rules thus enunciated to the facts of the present case, what is the result? In the case brought in the state court, the present complainant was one of the complainants therein, and so far as he was concerned the record shows that that proceeding, like the present one, was brought to restrain and enjoin the collection of the 5 per cent. tax voted in aid of the Fort Dodge & Fort Ridgely Railroad Company and levied upon complainant's property. The object and purpose of both suits is identical, and the ultimate question presented for decision is the same, to-wit, whether the tax voted is legal and binding. The former suit was against the then treasurer of the county in his official capacity; the present suit is against the present treasurer, the auditor, and the purchaser at the tax sale. It is apparent that these latter parties are in privity with and represent exactly the same interests as did the defendant in the former suit. In the former suit the decision was that the act of the general assembly

under which the tax was voted was constitutional, and the tax was legal and binding, and the complainant's property liable therefor. The judgment in that case concluded the complainant upon these questions, no matter whether the same objections were then made to the validity of the tax or not.

It is not now open to the complainant in this case to litigate the validity of the tax in question. In the former suit, he had the opportunity to present for decision every question touching the constitutionality and validity of the tax voted; and as the two suits are for the same relief and based upon the same facts, the former adjudication concludes him, not only upon the objections he then made, but upon all he might have made. None of the points made, therefore, against the constitutionality of the act of the general assembly, or against the validity of the tax as voted and levied, are open for investigation before this court in the present cause.

The bill filed, however, presents another question, and that is as to the amount necessary to be paid in order to redeem the property from the tax sale. This sale did not take place until after the final decision of the case of *Snell v. Leonard*, and the question of the right of redemption and the amount to be paid was not involved therein. The rights of the parties growing out of the sale of the realty for the tax in question have not been adjudicated, and are open to contest in the present proceeding.

The stipulation of facts filed in the present cause shows that after the decision of the supreme court in the case of *Snell v. Leonard* was rendered, the complainant herein tendered to the treasurer of Webster county the amount of the tax assessed upon his property in favor of the Fort Dodge & Fort Ridgely Railroad Company, together with interest thereon at the rate of 10 per cent. up to the date of the tender, which was made on May 10, 1881. The treasurer refused to accept the amount thus tendered, and in June, 1883, sold the lands as already stated.

The reason assigned by the treasurer for refusing to accept the tender was that, under the act of the general assembly authorizing the voting and levy of the tax, the complainant must pay a penalty at the rate fixed in the general tax law of the state, and the question is now presented whether, under the act of the general assembly, this penalty can be exacted.

Counsel for complainant criticise the language of the act providing for the penalty, claiming that the provision that "said taxes shall be collected at the time or times specified in said order, in the same manner, and be subject to the same penalties for non-payment after they are collectible, as other taxes, or as may be stated in the petition asking said election," is meaningless, because it declares that the tax shall be subject to the penalty, instead of declaring that the property, or the owner thereof, is subjected to the penalty.

While the language used may be open to exception, still it is suf-

ficiently clear that the legislature intended to thereby provide that if not paid when due, the tax was liable to be increased by the amount of the penalty. By section 3 of the act it is provided that the aggregate amount of the tax to be voted or levied under the act in any township shall not exceed 5 per centum of the assessed value of the property in the township. Section 4 provides that the moneys collected under the provisions of the act shall be paid by the county treasurer to the treasurer of the railroad company. All sums, therefore, collected as penalties belong to the railroad company. In *Barnes v. County of Marshall*, 56 Iowa, 20, S. C. 8 N. W. Rep. 677, it was decided that the county acquires no beneficial interest in the taxes voted in aid of the railroad company and paid to the county treasurer, and is not liable for the repayment thereof if the company forfeits the same. All sums, therefore, collected from the tax-payers under the provisions of the act in question, whether called a tax or a penalty, are sums contributed by the property owner to the railroad company for the purpose named in the statute, to-wit: to aid in the construction of a designated line of railroad.

As already stated, the limitation on the amount of tax that can be levied under the act is 5 per cent. If, therefore, as in the case now under consideration, the full amount of 5 per cent. is levied as a tax, it is very questionable whether any further sum can be collected and paid to the railroad company, even under the guise of a penalty. This additional amount is not to cover expenses. It goes into the treasury of the company, just as the amounts realized from the 5 per cent. tax do, and for the same purpose. Under the decision of the supreme court of Iowa, that the beneficial interest in the tax voted in aid of a railway belongs, not to the county, but to the railway company, it is difficult to distinguish the amount due from a given tax-payer to the company for the tax voted from any other debt he might owe to the company. The tax-payer is under legal obligation to pay, and the railroad company has a legal right to demand and enforce payment of the tax. The statute, however, expressly limits the amount that the tax-payer can be compelled to pay to 5 per cent. If, therefore, a tax for the full amount of 5 per cent. is levied, is it within the power of the county treasurer or the railroad company to insist upon payment of a sum equal to 10 per cent. if the tax-payer does not promptly pay the tax when due?

The claim is not made that the additional sum is to be considered as interest upon an overdue debt. In that case the rate would be fixed by other provisions of the law. The additional sum is claimed to be due as a penalty; but it is a penalty, not for a failure to pay a tax due to and belonging to the state or county, but for a failure to pay a sum due to the railroad company. The penalty, when paid to the county treasurer, belongs to the railway company, and in effect is a sum paid by the tax-payer to aid in the construction of a line of railway. In no respect, therefore, does it seem to differ from the

sum paid as a tax, and there is reason in the proposition that calling the sum a penalty does not change the fact that it is a sum paid by the tax-payer to aid in the construction of a railway, and that under the act in question the sums thus collected from the tax-payer for that purpose shall not exceed in the aggregate the amount of 5 per cent.

But, without deciding this proposition, it is clear that under the provisions of the act in question the tax-payer cannot be subjected to a tax greater in amount than 5 per cent. If any further sum can be collected, it must be as a penalty; that is, an amount assessed against the tax-payer over and above the full legal amount of his tax as a punishment for his failure to pay the sum due as a tax at a given date. The sum in excess of 5 per cent., if collectible at all, can only be collected as a penalty, and not as part of the tax. If, therefore, it is a penalty pronounced against the delinquent tax-payer for the failure on his part to perform the duty and obligation of payment cast upon him by the act of the general assembly, then as a penalty its enforcement may be waived, and a repeal of the act providing for the penalty, before the penalty is enforced, will terminate the right to enforce the penalty. "The repeal of the law imposing the penalty is of itself a remission." *State v. Baltimore & O. R. Co.*, 3 How. 534; *Confiscation Cases*, 7 Wall. 454.

The act of March 15, 1877, was expressly repealed by chapter 159 of the acts of the Twentieth general assembly. Being thus repealed, its penal provisions cannot be enforced; that is to say, the repeal of the act terminated the right to collect any penalty that remained uncollected at that date. If the realty had not been sold at a tax sale by the treasurer before the repeal of the act, it could not now be sold in order to collect the penalty claimed.

The record shows that in 1881 the complainant tendered to the treasurer the full amount of the 5 per cent. tax assessed upon his property, with 10 per cent. interest added, but the treasurer refused to accept the tender, and in June, 1883, sold the realty for the taxes and penalty added. The complainant, denying his liability to the penalty, brought the present action in order to determine whether such penalty could be collected from him. He has, as yet, paid nothing, and one object of the present suit is to determine the amount which he is under legal obligation to pay in order to discharge the tax assessed against him, and redeem his property from the sale made thereof. It cannot, therefore, be fairly said that the penalty in this case has been collected and distributed, so far as the question lies between the complainant and the railway company. The right to collect the penalty is in dispute, and if the complainant can show that he has been relieved from the payment thereof, he has the right so to do, as against the company. So far as the tax is concerned, the company may obtain or perfect a vested right therein before it is collected; but to the penalty no vested right attached until it is collected, and thus placed

beyond the power of the tax-payer to contest its validity. So long, therefore, as the right to the penalty has not vested in the company by its collection, the same may be remitted by the legislature, and, in the language of the supreme court of the United States in *State v. Baltimore & O. R. Co.*, *supra*, "the repeal of the law imposing the penalty is of itself a remission."

What the rule would be as against some third party not interested in the tax, who should, at a tax sale, bid in the property for the tax and penalty, and actually pay such amount into the treasury, is not considered or determined. The certificate of sale in this case was issued to W. M. Grant, who was a stockholder in the company. It does not appear that he has as yet paid any money on such purchase, or that he bought the property in his own right. The testimony of the county treasurer, who conducted the sale, shows that no money was paid him on the bid made, but that he accepted the receipt of the treasurer of the company instead of the money, and delivered the certificate of sale to the treasurer.

Under these circumstances the question of the right to exact the penalty as a condition to the right to redeem the land from the sale is one solely between complainant and the company, and, as between them, the right to exact the penalty, if it ever existed, was terminated by the repeal of the act under which the tax was voted. The complainant, having pleaded the tender made May 10, 1881, and relied thereon, which was for the full amount of the tax levied, and interest thereon at 10 per cent. to that date, has thereby admitted that, equitably, that amount was then due to the railroad company. The payment of that amount, with interest thereon at 6 per cent. from May 10, 1881, will fully discharge the indebtedness due from complainant, and relieve his property from any lien or claim by reason of the tax levied in aid of the Fort Dodge & Fort Ridgely Railroad Company.

The order and decree will therefore be that, upon the payment of the amount above indicated to the treasurer of Webster county within 90 days from the date of this decree, the sale of said realty for taxes as aforesaid shall be canceled and set aside, and the defendants, and parties claiming under them, be restrained and enjoined from executing or receiving a treasurer's deed of said realty, or from asserting any title to said realty under the sale for taxes made June 18, 1883. The complainant, having sought by his bill to set aside the sale as wholly void, and escape the payment of any sum, and having failed to make good his bill in these particulars, is adjudged to pay the costs of this proceeding.

BARNEY v. WINONA & ST. P. R. Co.¹

(Circuit Court, D. Minnesota. September 11, 1885.)

1. RAILROAD LANDS—WINONA & ST. PETER RAILROAD COMPANY—MINNESOTA CENTRAL RAILROAD COMPANY—ACT OF MARCH 3, 1865.

Under the decisions of the supreme court of the United States in *St. Paul & S. U. R. Co. v. Winona & St. P. R. Co.*, 112 U. S. 720, S. C. 5 Sup. Ct. Rep. 334, and *Winona & St. P. R. Co. v. Barney*, 113 U. S. 618, S. C. 5 Sup. Ct. Rep. 606, the grant of four sections made by the act of March 3, 1865, must be adjudged a grant of quantity, and not one of lands in place.

2. SAME—DEDUCTION UNDER ACT OF 1865, § 3.

The term "any lands which may have been granted to the territory or state of Minnesota," in the proviso of section 3 of the act of 1865, and which are to be deducted from the grant made by that act, includes all land the title to which had passed to the territory or state of Minnesota, whether these lands were lands in place or indemnity lands.

3. SAME—DEDUCTION, HOW DETERMINED.

As, within the overlapping limits of the Winona & St. Peter Railroad and the Minnesota Central Railway, neither company received anything like its quota of coterminous lands, the proper deduction to be made from the grant of 1865 can be determined by ascertaining the amount of lands within those limits which had theretofore passed to the Minnesota Central Railroad Company under the act of 1857.

In Equity.

Gordon E. Cole, for plaintiff.

Thos. Wilson, for defendant.

BREWER, J. In the case of *Barney* against *The Winona & St. Peter Railroad Company*, the plaintiff, Mr. Barney, and others had a contract with the defendant, the Winona & St. Peter Railroad Company, entitling them to all the lands to be earned by the Winona & St. Peter Company in the construction of its road for a certain distance. Upon the construction of that road the plaintiffs brought this action to compel the defendant to convey to it lands to which they claim they are entitled by virtue of that contract. Several years ago they obtained a decree in this court for the conveyance of 197,000 and odd acres. From that decision the defendant appealed to the supreme court of the United States, which reversed the decree, and remanded the case, with these instructions: "The case must therefore go back, that the proper reduction may be made by reason of this interference of the two grants, and the elder grant be deducted from the extension made by the act of 1865."

What reduction, under that ruling of the supreme court, must be made? is the question now presented. The deduction arises from the fact that the Minnesota Central road crosses the Winona & St. Peter, and at the point of junction there was an interference between the land grants of the two roads given them by the act of March 3, 1857.

The act of March 3, 1865, purports to give an additional four sections, with this proviso: "That any lands which may have been

¹ Reported by Robertson Howard, Esq., of the St. Paul bar.

granted to the territory or state of Minnesota"—and that refers simply to the lands given by the act of 1857—"for the purpose of aiding in the construction of any railroad, which lands may be located within the limits of this extension of said grant or grants, shall be deducted from the full quantity of lands hereby granted;" that is, from the four sections granted by the act of 1865 to this defendant road was to be deducted any lands granted to any other road by prior grant. There was a very long discussion between counsel as to the effect and meaning of this act of 1865. On one side it was contended that the meaning of this act had been determined by the supreme court in the case of *St. Paul & Sioux City Railroad Co. against The Same Defendant*, 112 U. S. 720, S. C. 5 Sup. Ct. Rep. 334; and in the present case, in the same court, 113 U. S. 618, S. C. 5 Sup. Ct. Rep. 606; and on the other side it was with equal zeal contended that the true construction of that act had not been determined in either case, and that any language to be found in the opinion therein which might look to an interpretation of that act must be regarded as pure *dictum*, and not called for by the necessities of the case.

With the highest respect which we both feel for the members of that court, and with the utmost deference to their decision, we both of us are strongly of the opinion that the construction which is indicated in the language of these two opinions is not the true construction of that act. In these opinions they say that this grant of land of four sections was not intended as an extension of the grant of lands in place, but was a mere grant of lands in quantity. Without discussing that question at length, it seems to us very clear that the intention of congress in the later act was simply to make an extension of four sections, to be taken in the same manner as the grant of the six sections, and subject to the same conditions; meaning, thereby, to extend it from a grant of six sections in place to a grant of ten sections in place, and with the indemnity limits extended from 15 to 20 miles. As I said before, I shall not discuss that question at length, nor name the various reasons which, on examination of the statute, have led us to think that this is the true construction. The decision of these two cases seems to settle the question adversely to the opinion which we entertain, and of course those decisions are conclusive upon us.

In the case of *St. Paul & Sioux City Railroad Co. against The Winona & St. Peter Railroad Co.*, Mr. Justice MILLER, speaking of the acts of 1864 and 1865, says:

"There is nothing in either of these statutes which indicates or requires that the six-mile limit of the original grant is to be enlarged so that, within a limit of ten miles, all the odd sections fall immediately within the grant on the location of the road. Such language was used in the fourth section of the act concerning the Union Pacific Railroad in 1864, only a few weeks later than the act of that year under consideration." 5 Sup. Ct. Rep. 339.

And after some words with reference to that act he says:

"In addition to this significant fact, both the act of 1864 and of 1865 speak of the additional sections to be *selected*.—a word wholly inapplicable to lands in place which are not ascertained by selection, but are fixed and determined by the location of the line of the road. The act of 1865, which is to be considered *in pari materia* on this point, provides that these lands shall be indicated by the secretary of the interior." 5 Sup. Ct. Rep. 339.

In the other case, (this very case in the supreme court,) Mr. Justice FIELD says:

"As to the effect of the reservation in the third section of the act of 1865 of lands previously granted to Minnesota for the purpose of aiding in the construction of any railroad, there should be little doubt. The grant by the act of 1857 is one of description; that is, of land in place, and not of quantity. * * * [That is, the original grant.] The act of 1865 enlarges the quantity from six sections to ten, and the indemnity limits from fifteen miles to twenty. The character of the grant, so far as the six sections are concerned, is not thereby changed from one of lands in place, or by description, to one of quantity. The use of the terms 'quantity of lands granted' in the first section, in referring to the amount granted by the act of 1857, is of no significance. It is the same thing as though the act had used the words 'six sections' instead of the word 'quantity,' and had said that they should be increased to ten sections. The four sections are to be selected by the secretary of the interior beyond the twelve and within the twenty miles limit; and as to them the grant may be regarded as one of quantity, though the coterminous principle applies to them, and they are to be selected along and opposite the completed road." 5 Sup. Ct. Rep. 611.

In those cases it seems to us that the construction of the act with reference to this question was fairly before the court, and that this language can in no proper sense be considered as mere *dictum*, but is to be taken as the determination of the court as to the true construction of that act of 1865. So we hold, as the first proposition, that under the decisions of the supreme court in *St. Paul & S. C. R. Co. v. Winona & St. P. R. Co.*, 112 U. S. 720, S. C. 5 Sup. Ct. Rep. 334, and *Winona & St. P. R. Co. v. Barney*, 113 U. S. 618, S. C. 5 Sup. Ct. Rep. 606, the grant of four sections made by the act of March 3, 1865, must be adjudged a grant of quantity, and not one of lands in place.

The next question to be considered arises on the third section of the act of 1865, and the proviso states:

"Provided, further, that any lands which may have been granted to the state of Minnesota for the purpose of aiding in the construction of any railroad, which lands may be located within the limits of this extension of said grant or grants, shall be deducted from the full quantity of lands hereby granted."

"Lands which may have been granted to the territory or state of Minnesota." Now, the word "grant" in these land acts has two significations. It is used oftentimes technically to refer to lands in place which are spoken of as granted lands, in contradistinction to lands which are to be selected, or indemnity lands. And then it is oftentimes used, both in land legislation and opinions, to refer to all lands the title to which has passed either as lands in place or by se-

lection. It is contended, on one side, that it has the narrow signification, and that the only lands excluded from the grant of 1865 are these lands in place which were, in the narrow signification, "lands granted." On the other hand, it is contended that it has the broad signification, and includes all lands to which the title had passed by act to the state of Minnesota. I think the latter is the true signification. Mr. Justice FIELD, in this case, says:

"This reservation of the lands previously granted to Minnesota from the grant of the additional four sections—that is, from the extension of the original grant of 1857—was only a legislative declaration of that which the law would have pronounced independently of it." 5 Sup. Ct. Rep. 611.

That is, in other words, congress, by the act of 1865, meant to grant, as it could only grant, lands the title to which it still held, and which had not theretofore passed to the state of Minnesota. That would be the law, independent of any express declaration in the statute, and this expression, meaning the same thing, as Mr. Justice FIELD says, would exclude all lands the title to which had passed to the state of Minnesota by any previous grant. And so, secondly, we hold that the term "any lands which may have been granted to the territory or state of Minnesota," in the proviso of section 3 of said act, includes all land the title to which had passed to the territory or state of Minnesota, whether these lands were lands in place or indemnity lands, and the word "granted" has the broad rather than the narrow signification.

The third question thus arises: "Any lands which may have been granted to the territory or state of Minnesota for the purpose of aiding in the construction of any railroad, which lands may be located within the limits of this extension of said grant or grants," "located within the limits of this extension." If this grant be a grant of lands in quantity, and not a grant of lands in place or by description, how can it be said that there was any area of extension? That seems to imply certain definite limits to the land as granted. It might mean, inasmuch as the act of 1865 enlarged the indemnity limits from 15 to 20 miles, simply the extra limits within which these four sections were to be selected, and did not include the narrow limits within which the indemnity lands could be selected under the act of 1857. But, as they have said that these four sections were to be selected within the limits of 6 and 20 miles, it seems to us that the only fair interpretation is that the area within the 6 and 20 miles limits was the body of land which could be said to be "within the limits of this extension" of said grant or grants.

It is conceded by counsel on both sides that neither road could get within these overlapping limits anything like its quota of coterminous lands, and that grant of four sections was to be of coterminous lands, so the supreme court says. Therefore, thirdly, we would say that, as it is conceded that within the overlapping limits of the Winona & St. Peter road and the Minnesota Central Railroad neither company

received anything like its quota of coterminous lands, the proper deduction can be determined by ascertaining the amount of lands within those limits which had theretofore passed to the Minnesota Central Railroad Company under the act of 1857.

The case will therefore be referred to the two masters heretofore appointed, and who have made prior reports, to report the number of acres which had, prior to March 3, 1865, passed to the Minnesota Central Railroad within 15 miles of its line, and between the 6 and 20 miles limits of the Winona & St. Peter Railroad Company's line; and this amount will be the amount of deduction. Then, further, in order that if the construction we have placed upon these decisions of the supreme court be incorrect, they may have the needful *data* before them to make the proper reduction, without sending it back to this court, the masters will also report separately the amount of lands which had, prior to March 3, 1865, passed to the Minnesota Central Railroad Company within the following limits: (1) The amount within 15 miles of the Minnesota Central line, and within the 15 and 20 miles limits of the Winona & St. Peter Railroad. (2) The amount within 6 miles of the Minnesota Central Line, and within the 6 and 10 miles limits of the Winona & St. Peter Railroad Company's line. (3) The amount within the 6 and 15 miles limits of both lines. (4) The amount within the 6 and 15 miles limits of the Minnesota Central, and within the 15 and 20 miles limits of the Winona & St. Peter Company's line.

We do this so that if the case should go to the supreme court they can determine and make the deduction, having all the *data* before them.

SILSBY MANUF'G Co. v. TOWN OF CHICO.

(Circuit Court, D. California. September 7, 1885.)

1. SALE—ARTICLE MANUFACTURED FOR PURCHASER.

Where, under a contract, an article is to be made and delivered which shall be satisfactory to the purchaser, *it must in fact be satisfactory to him*, or he is not bound to take it.

2. SAME—FRAUD ON PART OF PURCHASER.

Where the purchaser is in fact satisfied, but fraudulently and in bad faith declares that he is not satisfied, the contract has been fully performed by the vendor, and the purchaser is bound to accept the article.

3. SAME—STEAM-ENGINE—COMMITTEE TO BE SATISFIED.

Where a steam-engine satisfactory to a committee of a town is furnished, and after the contract is made, and before tender of the engine, the members of the committee are changed, the committee to be satisfied is the committee existing when the contract is performed and the tender made.

At Law.

Wm. H. H. Hart, Park Henshaw, and A. B. Colton, for plaintiff.
W. C. Belcher, J. D. Sproul, and F. C. Lusk, for defendant.

SAWYER, J. The only question in the case upon which I have any difficulty arises out of the following provision of the contract:

"The Silsby Manufacturing Co. will send the above-described steam fire-engine to Chico, *subject to the approval of the fire committee, and will warrant the workmanship, finish, and performance of the machine satisfactory to them, or remove the same without expense,*" etc.

The authorities are abundant to the effect that upon a contract containing a provision that an article to be made and delivered shall be satisfactory to the purchaser, *it must be satisfactory to him*, or he is not required to take it. It is not enough that he ought to be satisfied with the article; he *must* be satisfied, or he is not bound to accept it. Such a contract may be unwise, but of its wisdom the party so contracting is to be his own judge, and if he deliberately enters into such an agreement he must abide by it. To this effect are *McCarren v. McNulty*, 7 Gray, 139; *Brown v. Foster*, 113 Mass. 136; *Zaleski v. Clark*, 44 Conn. 218; *Gibson v. Cranage*, 39 Mich. 49; *Gray v. Central R. Co.*, 11 Hun, (N. Y.) 70; *Hallidie v. Sutter St. R. Co.*, 63 Cal. 575; *Heron v. Davis*, 3 Bosw. 336; *Wood Machine Co. v. Smith*, 50 Mich. 570; S. C. 15 N. W. Rep. 906; *Hoffman v. Gallaher*, 6 Daly, 42.

At the time the contract in question was made Messrs. Burke, Snook, and Hendricks constituted the fire committee. At the date of the required performance and of the tender of the engine there had been a change of two members, and the committee was composed of Messrs. Burke, Noonan, and Croissant. I think the committee to be satisfied is the one in existence at the time of the performance and tender. The old committee had ceased to exist, and had no longer any authority to act in the capacity of a committee.

It is admitted by both parties that the engine failed on the first trial, and some of the witnesses testified that the failure was a complete and signal one; but the vendor claimed the failure to be in consequence of poor coal. A second and more thorough trial was had with better coal,—cannel coal,—and it is claimed by plaintiff that the engine in fact performed all its functions strictly in accordance with the specifications and requirements of the contract, and that the committee ought to have been satisfied, if they were not. The testimony was very full on this point, though to a considerable extent in conflict. Although there seems to be some ground for a difference of opinion on this point, upon the whole I am constrained to think, though not with entire confidence, that it did come up to the specifications, and that the committee might well have been satisfied. All the three parties who composed the committee at the time the contract was made, and who signed the contract, were satisfied with its performance, and considered that the engine, in all particulars, came fully up to the requirements of the contract; and they so reported to the board of trustees. But a majority of the committee, as then constituted, Messrs. Noonan and Croissant, officially reported that the performance was not satisfactory to them; that the engine failed to get up

steam in the time required, and to keep up steam to a sufficiently high point to work continuously and effectively; and that they were not satisfied with its performance in these particulars. Burke, constituting a minority of the committee of three, made a contrary report. The town trustees, acting on the report of the majority, rejected the engine. If this were all, there can be doubt upon the authorities, I think, that the engine was properly and lawfully rejected.

But it is insisted, and there is some ground for suspicion on this point, that notwithstanding the report of Mr. Noonan that he was not satisfied with the engine in the particulars indicated, yet he was in fact satisfied in his own mind, and so expressed himself in private conversations with Mr. Silsby and other private parties, but that in consequence of popular feeling, and an opposition to the contract and to the purchase of any engine of that make and character at all, developed in the town of Chico after the making of the contract, he had ignored his own convictions in regard to the performance of the engine, and falsely and in bad faith reported against it, in obedience to general popular clamor, in order not to injure his business or his own popularity among his neighbors.

I am disposed to think that if such were clearly shown to be the state of facts, the court would be justified in disregarding the official report, as having been made in bad faith and in fraud of the rights of the other contracting party, and in adopting Noonan's own real conviction upon the subject. But I cannot say that the state of facts claimed is so satisfactorily shown as to justify me in holding the performance of the engine to be in fact satisfactory to Mr. Noonan, in the face of his official report, and his positive testimony to the contrary. There is, undoubtedly, testimony tending strongly to support the hypothesis insisted on by plaintiff, and circumstances tending to throw strong suspicion upon the acts in question. Mr. Silsby testifies that on the evening of the test, Mr. Noonan "expressed himself as being perfectly satisfied with the engine." He says:

"The next day after the trial, at his store, in Chico, Alderman J. C. Noonan said to me: 'Mr. Silsby, I am perfectly satisfied with the engine. There is a great deal of feeling here over the matter, and I am afraid it will injure me in my business. They are bringing strong pressure on me to vote against the acceptance of the engine, and if I do so, I shall brand myself a coward, because the engine is all you claim for it.' "

Mr. Burke testifies that Noonan told him, in answer to a question as to how he liked the engine, "that it did all and more than was required of it,—that is my recollection;" but that he could "not purchase the steamer," because "public opinion was so great;" that "public opinion was too strong against it," and "I will vote against it, and I will vote myself a coward in doing so." Mr. Sproul testified that in a conversation with Noonan, in regard to the merits and demerits of the machine, in the month of April, after the arrival of the engine, but he could not tell "whether it was after this test or not," in which

he referred to public opinion against the engine, and in that connection said: "So far as I can see, the engine fulfills all the qualifications."

Mr. Noonan positively denies having any conversations of such character as stated by the witnesses; denies that he ever stated to either of them that he was satisfied with the engine, or that he should vote to reject it in consequence of public opinion. He admits having a conversation with Mr. Silsby upon the subject, but not of the purport stated by Mr. Silsby. The following, said he, is "just exactly the shape I put that in: I said that I did not care to prejudice myself as against public opinion; that it would not be fair for me to condemn his engine because of public opinion; *that it would be condemned for other causes; that I did not think the engine came up to the requirements of the contract.*" He states that he expressed his dissatisfaction to Silsby, and the particular points among them were: "As I understood the contract, and was disposed to interpret it, we were to have a body of water on the house on fire in four to six minutes; that this was needed in a town built of wood, like Chico, where there are very dry summers. Inasmuch as she did not produce such a stream, I thought it was wrong; I thought she should do that." And there was testimony that there were other engines that would do that. In another place he says a stream of water could not be got on a house in less than 13 minutes. He said Silsby appealed to his sympathy, and said he would rather give a thousand dollars than to have the engine rejected, it would do him so much injury. He says that he did sympathize with Silsby, and was desirous that the engine should stand the trial.

Under the contract the engine was "warranted to raise steam from cold water in *from four to six minutes*, and to generate and maintain an ample working pressure of steam for effective fire purposes." Noonan claims to have been dissatisfied on both these points. There is room for discussion as to what is meant by the phrase, "raise steam from cold water in from four to six minutes." Testimony of witnesses was taken upon the point, and different witnesses understood the phrases differently. Mr. Noonan appeared to be a candid and intelligent witness, and there is nothing to throw suspicion on his truthfulness except the testimony as to his statements different from those made as a witness on the stand. He appears to be a somewhat prominent business man of Chico, and to hold one of the most important city offices.

No two witnesses seem to have heard the same conversation. Loose conversations, heard and considered from different standpoints, are liable to be misunderstood or misinterpreted, as well as misremembered, after the lapse of considerable time. Noonan certainly ought to know what he intended to say. If he intended to disregard his own convictions, and do an act which he acknowledged at the time to be both wrong and cowardly, it seems highly improbable, if

not impossible, that he would boldly declare his base and cowardly purpose to the man he was about to injure by such action. I cannot help thinking that there must have been some misapprehension as to what he did say, or intended to say, or some misrecollection of his language. At all events, in the face of his formal official report and action, and his positive testimony on the stand as to what he intended to say, and what he did in fact say, the testimony in regard to loose conversations on the occasions referred to by the other witnesses, whose views and sympathies were with the other side, and who viewed the matter from a different standpoint, is scarcely sufficient to brand Mr. Noonan with acting in bad faith, and perpetrating a deliberate fraud upon complainant by reporting himself as not being satisfied, when in fact he was satisfied, or to convict him of deliberate perjury in support of his action. The burden of showing, by preponderating evidence, that he did this act in bad faith, and in fraud of the plaintiff's rights, is on the plaintiff.

There were other witnesses who did not think the engine came up to the specifications in its performance. Although it is not without some hesitation, I am disposed to think, upon the whole, that the committee ought to have been satisfied, and accepted it. Yet it must be confessed, I think, that there might well be an honest difference of opinion upon the subject. I cannot, therefore, find upon the evidence that Noonan was in fact satisfied with the performance of the engine, or satisfied that it came fully up to the guaranty in its performance. The first trial was conceded to be a failure, and was stated by some witnesses to be a lamentable one. In order to make the final test a success, it was necessary to send to the neighboring city of Marysville, both for the quickest coal for fuel that could be had and for an engineer of long experience with this kind of engine to manage it. Some of the witnesses said it took three men to fire her during the trial, one to break the coal into small pieces, and two to supply the engine. Some witnesses on the other side said the door was open a considerable portion of the time; others did not see the door open except when necessary to put in coal, although in a position to see such occurrences. Undoubtedly, it required the most favorable conditions, and most earnest and persistent efforts, to make the test a success; and from the testimony it may well be doubted whether in actual practice at fires the performance would come fully up to the requirements of the guaranty. Under all the circumstances, however, I am inclined, upon the whole, though with considerable hesitation, to think that the committee ought to have been satisfied; yet upon all the evidence I cannot say that it has been satisfactorily proved by a preponderance of evidence that Noonan was in fact satisfied, and, notwithstanding his convictions, in bad faith fraudulently reported that he was not satisfied. I must therefore reject the hypothesis sought to be maintained on this point, and relied on by plaintiff.

There is no claim that the other member of the committee who acted with Noonan did not act in strict accordance with his convictions.

As the engine was to be furnished "*subject to the approval of the fire committee,*" and its "*performance*" "*warranted*" to be "*satisfactory to them,*" or "*to be removed without expense to the town,*" and it was *not* approved by them, and its performance *was not satisfactory* to them, there can be no recovery on the contract.

It is clear to my mind, from the evidence, that there was no acceptance of the engine on the part of the town of Chico, and no act of the defendant, or its officers, by which it is estopped from denying the liability of the defendant on the contract, or otherwise. As there is no appeal, I have considered the case with great care, in order to reach a correct conclusion, and I am constrained to say that in my judgment the plaintiff is not entitled to recover; and that judgment must be rendered for defendant. Let a general finding be drawn in favor of defendant, and judgment be rendered accordingly.

NAUMBURG and others *v.* HYATT and another.

(Circuit Court, W. D. North Carolina. May Term, 1885.)

1. PRACTICE AND PROCEDURE—CONFLICTING CLAIMS—CODE POLICY.

The general policy of the code system in this state aims to adjust in one action, when practicable, all conflicting claims.

2. SAME—JUDGMENTS—MARSHAL—SUBSEQUENT LEVIES—PRIORITY OF LIENS.

A marshal who has received and served one attachment may receive and levy a subsequent attachment on the property in his possession, where it issues from the same court, and the right of priority among creditors in having satisfaction of their debts depends upon priority of levy thus made, and not upon priority of judgment. But where the subsequent attachment and levy are made by a different officer, or issue from another court, such proceedings cannot be had.

3. SAME—ATTACHMENT—APPOINTMENT OF RECEIVER—EFFECT.

Where an attachment has been sued out, and a levy made upon the property of the defendant, a receiver may rightfully be appointed to take charge of the property in the interest of the creditors of the defendant, and will hold the same subject to the attachment lien.

4. SAME—RECEIVER—SUIT AGAINST—CONTEMPT OF COURT.

Where a receiver has been appointed to take charge of the property and effects of a debtor in the interest of his creditors, suit cannot be instituted against such receiver without first obtaining leave, and to do so without such leave is contempt of court.

5. EXEMPTIONS—ATTACHMENT AND EXECUTION—FRAUDULENT CONVEYANCE.

The personal property exemptions of an insolvent debtor cannot be reached by an attachment or execution, and his right to such exemptions is not forfeited by the fraudulent conveyance of his property.

Motion in the Cause.

McLoud & Moore, for motion.

J. H. Merrimon and Norwood & Smathers, contra.

DICK, J. The fund in controversy between the parties to this motion came into the possession and under the control of this court by virtue of attachment proceedings instituted by the plaintiffs as a provisional remedy in their civil action, commenced on the eighteenth day of October, 1884, to recover a debt of the defendants, J. R. Hyatt and J. Willis, merchants, trading under the name and style of "J. R. Hyatt & Co." The warrant of attachment was founded upon an affidavit of an agent of the plaintiffs, alleging that the defendants, on the ninth day of October, 1884, with the intent to hinder and delay creditors, had executed a mortgage to M. H. Love, conveying to him a stock of goods and merchandise worth about \$4,000, to indemnify him as surety on the stay of certain judgments, amounting to about \$427.

Upon a motion at fall term of this court, held on the eleventh day of November, 1884, to vacate said attachment, the court refused the motion, and declared said mortgage fraudulent and void as to creditors. At said term the plaintiffs recovered judgment, and were entitled to have an execution to sell the attached property in satisfaction of their judgment. It was manifest to the court that the sale of a miscellaneous stock of merchandise at public auction, under execution, would result in great loss and damage to creditors and other persons interested. The court, with the assent of parties, appointed a receiver to take possession of said property and sell the same, as soon as possible, in the usual course of trade, with a view to obtain the best prices for the goods, and to pay off the judgment of plaintiffs, and deliver the balance of the proceeds to the defendants.

On the twenty-first of November, 1884, after the adjournment of the court, the petitioners Tucker, Smith & Co. commenced a civil action in this court against the defendants to recover a debt, and at the same time sued out a warrant of attachment, founded upon an affidavit containing allegations of fraudulent intent, substantially the same as those mentioned in the affidavit of the plaintiffs in this case. This attachment was placed in the hands of the marshal before he had delivered possession of the goods to the receiver appointed by this court. The marshal indorsed on the process of attachment a formal levy on said goods and merchandise. Tucker, Smith & Co. then filed a petition praying that they might be heard in the pending cause as to the disposition of the balance of proceeds arising from the sale of goods after satisfaction of the judgment of the plaintiffs.

The court entertained the petition as a proceeding in the nature of an interplea provided for in section 189 of the Code of this state, and ordered a copy to be served on the plaintiffs, the receiver, and the defendants, together with a notice to show cause why the prayer of the petitioners should not be granted.

At May term, 1885, the report of the receiver was filed and approved, and the balance of the proceeds of the property sold, after

payment of judgment of the plaintiffs, was ordered to be deposited with the clerk of this court, and the receiver was relieved from further duty.

At this term the petitioners Tucker, Smith & Co. recovered a judgment on their debt, and insisted in this case that as creditors they were entitled to be heard as to the disposition of the balance of the fund in the hands of the court, and that they had acquired priority over any outstanding creditors by virtue of their attachment levy on the goods and merchandise while in the hands of the marshal.

By permission of the court, George H. Smathers, the late receiver, by way of an informal interplea under the provisions of the 189th section of the Code, insisted that he was entitled to the fund in controversy by virtue of a deed of trust executed to him by the defendants, J. R. Hyatt and J. Willis, on the fifth day of November, 1884, conveying to him, as trustee for the benefit of all the creditors of the firm of J. R. Hyatt & Co., the stock of goods and merchandise previously mortgaged to M. H. Love on the ninth of October, 1884. In this deed of trust the grantors expressly reserved their rights to claim \$500 each as their legal personal property exemptions, and have filed their petition in this cause to have the same duly laid off and allotted to them.

After careful consideration of the briefs and arguments of counsel, and the evidence filed, I am of opinion that the petitioners Tucker, Smith & Co. are entitled to be heard as interpleaders under the Code of this state, as they have a legal interest in the due administration of the fund in controversy in the hands of the court.

The general policy of the Code system in this state aims to adjust in one action, when practicable, all conflicting claims to the same property; and I think that this same policy can be carried out in an action at law in this court in disposing of funds in the hands of the court where no purely equitable element is involved. *Sims v. Goettle*, 82 N. C. 268; *Van Norden v. Morton*, 99 U. S. 378.

The petitioners, as creditors, commenced a civil action in this court to recover a debt due them by defendants, and upon sufficient affidavit the provisional remedy of attachment was duly issued and placed in the hands of the marshal, who had the property of defendants in possession under the attachment of the plaintiffs. As a general rule, a marshal who has served one attachment may receive and levy a subsequent attachment on the property in his possession, and the right of priority among creditors in having satisfaction of their debts depends upon priority of levy and not upon priority of judgment. Such proceedings cannot be adopted when the subsequent attachment is in the hands of a different officer, or issues from the court of another jurisdiction. *Peck v. Jenness*, 7 How. 612.

The fact that a receiver had been appointed with special and limited power to execute the judgment in this case before the levy of the attachment of petitioners does not necessarily avoid the levy and prevent the court from waiving the apparent contempt and recog-

nizing as valid such irregular proceeding. The petitioners were not asserting an adverse right to the plaintiffs, but were seeking a similar remedy in the same court.

The possession of the property was in no way disturbed, and there was no hostile interference with the proceedings in the pending cause. To constitute a contempt of court in such cases there must be some interference with or resistance to the possession of the officer of the court. If a suit is commenced against a regular receiver appointed by a court of equity, without leave of the court, such proceeding is usually regarded as a contempt, as it is the duty of a court of equity to protect such officer from the annoyance and embarrassment of litigation instituted by third persons in the same court or in another jurisdiction; but a receiver may waive his privilege of protection, and appear and plead.

The appointment of the receiver in this case was not necessary to secure the rights of the plaintiffs, as they could have had speedy satisfaction of their judgment by the ordinary process of execution. The execution was issued to preserve the lien, but the sale was ordered to be made by an officer specially appointed by the court with the assent of the parties. This proceeding was unusual and informal, but not irregular from a want of power in the court. The order appointing the receiver did not clothe him with the usual powers and rights of a receiver appointed by a court of equity in a creditors' bill, or by a court of this state in supplemental proceedings under the Code. He was only directed to sell the property in the hands of the court, and satisfy the judgment of plaintiffs, and hold balance of proceeds subject to further order. This course of procedure was adopted for the purpose of promoting the ends of justice, and protecting the rights of all parties interested in the property in the custody of the law.

The matter of the appointment of a receiver *pendente lite* to take charge of property in litigation until the rights of adverse claimants are determined is a subject for the jurisdiction of a court of equity, and such power is not usually exercised unless there is some dispute as to the title of the property, and it is in danger of being wasted or destroyed while in possession of one of the claimants. The title of the property is not transferred to the receiver, but he only holds it as a *custodian* of the court until the rightful owner is ascertained. *Battle v. Davis*, 66 N. C. 252. He is not strictly a trustee, as he has not the legal title, and has assumed the performance of no express or definite trusts. He only obeys the orders and directions of the court which he represents, in holding property. When there are adversary rights to be determined, an indifferent person between the claimants ought to be appointed receiver, as he is to hold the property for the benefit of such party as may establish his right.

In this state the appointment of receivers is regulated by statute, and the authority is vested in courts which can exercise legal and equitable jurisdiction in the same action. In the federal courts the

two systems of law and equity jurisdiction are separate and distinct, and legal and equitable remedies for ascertaining and establishing rights cannot be blended in the same action. Under the Code of this state (section 379) the superior courts are empowered to appoint receivers, "after judgment, to carry the judgment into effect." This provision seems to contemplate a proceeding in execution which the court may adopt when more effectual and beneficial than the ordinary process of law. I think that such a proceeding can be adopted by this court in an action at law as to property in its possession. It is a mere matter of procedure in execution, and does not involve the determination of any equitable right. Under the liberal and remedial provisions of section 916 of the Revised Statutes, a plaintiff who has obtained a judgment in an action at law in a federal court of this state may have the benefit of any remedy, by execution or otherwise, which is afforded to a judgment plaintiff in the courts of this state. *Ex parte Boyd*, 105 U. S. 647; *Fink v. O'Neil*, 106 U. S. 272; S. C. 1 Sup. Ct. Rep. 325.

By the above provision and other legislative enactments congress has clearly manifested a wise and enlightened purpose of bringing about, as near as may be, judicial harmony, convenience, and uniformity in the practice, procedure, and remedies in actions at law in the federal and state courts of the same locality. But, independent of the provisions of the above-named statute, I am of opinion that there is an inherent power in a court of law as well as a court of equity over its own process, and in the disposition of property in custody of the law, so as to prevent serious injury to the parties interested in such property, and to afford just and adequate relief. *Krippendorf v. Hyde*, 110 U. S. 276; S. C. 4 Sup. Ct. Rep. 27.

By reference to the case of *Rogers v. Odom*, 86 N. C. 432, and the cases cited, it will appear that the courts of this state, in the exercise of their protective jurisdiction, may commit to the keeping and management of their clerks, or other appointed officer, funds brought into the actual custody of the court, and may impose on such appointee the duty of selling property and collecting the proceeds under the direction of the court without investing such officer with the usual powers and rights of a receiver in equity.

It was insisted by the counsel of petitioners that the deed of trust to G. H. Smathers, dated November 5, 1884, is void, for the reason that at the time of its execution the property attempted to be conveyed was *in custodia legis* by virtue of the attachment of the plaintiffs, and could not be rightfully interfered with in any way by the owners.

To this proposition the trustee replied that the owners had a right to convey their interest subject to the lien of said attachment, and insisted that the levy of the attachment of the defendants, made after the appointment of a receiver, was invalid and a contempt of court, as the receiver's rights of possession, and actual possession, in con-

templation of law, commenced from the date of appointment. A warrant of attachment under the Code of this state is not an original process to bring parties into court, but is a provisional remedy, and is always ancillary to a civil action commenced by summons. *Branch v. Frank*, 81 N. C. 180. The possession of property taken by the sheriff under the attachment creates a lien in favor of the attaching creditor, and the property is held as a security for the satisfaction of any judgment which may be recovered in the action against defendant.

The attached property is *in custodia legis*, but the title of defendant is not divested until seizure and sale under execution. The court will not allow the possession of the sheriff to be disturbed, but the defendant can convey his interest in the property subject to the existing lien. *Murchison v. White*, 8 Ired. Law, 52. In the case of an execution levied upon personal property the seizure by the sheriff of the property, if of sufficient value, is a *prima facie* satisfaction of the judgment, and the defendant loses the property, and it vests in the sheriff for the special purpose of satisfying the debt. If the sheriff seizes more property than is necessary to satisfy the execution debt, then the title to the excess of such property remains in the defendant, and he has an interest capable of being sold and conveyed. *Alexander v. Springs*, 5 Ired. Law, 475.

In the case before the court the marshal attached property largely in excess of the debt claimed by plaintiffs. The defendants had a clear right to execute a *bona fide* deed of trust conveying their interest in such property subject to the attachment lien.

We will now proceed to consider the questions as to what interest was conveyed by said deed in trust, and was such deed fraudulent. The grantors had, on the ninth day of October, 1884, mortgaged all their stock of goods and merchandise to M. H. Love. This transaction was the foundation of the attachment proceedings in this case, and also of the attachment of the petitioners. The court was satisfied, from the facts and circumstances appearing in affidavits, that the mortgagors executed the mortgage with the fraudulent intent of hindering and delaying creditors, but there was no evidence that the mortgagee concurred in this fraudulent intent, and the mortgage would have been declared valid if it had not, *on its face*, been fraudulent in law. The mortgage is void as to creditors, but it is valid as between the parties. The mortgagors, therefore, only had an equity of redemption in the stock of goods mortgaged, and such was the extent of the interest conveyed by them to the trustee, G. H. Smathers, on the fifth of November, 1884. As to said trustee, the mortgagee, Love, had a right to said goods or their proceeds to the value of \$427, and was entitled to said amount against the claim of the defendant grantors for their personal property exemptions. The deed of trust to George H. Smathers is not upon its face void at law, and there are no facts and circumstances set forth in the deed which give rise to legal presumptions of fraud. The deed was duly registered on the day after

its execution, and it is not assailed in the affidavit which was made by the agent of petitioners as the ground of their attachment. In an action at law, where the fraudulent intent of the maker of a deed is involved, this question may be considered upon affidavits, and be passed upon by the court upon a motion to dissolve an attachment and restore the goods to the possession of the grantee; but when the right and title of the claimant are to be finally decided, the question of fraudulent intent must be determined by a jury.

It was further insisted by the petitioners that the trustee, George H. Smathers, by assuming the duties of a receiver, waived his rights under the deed of trust, and is estopped from making claim to the fund in court. The acceptance of the limited receivership by the trustee, for the purpose of selling the property for the benefit of all parties interested, was in no way inconsistent with his claim of title, or in conflict with his powers and duties as trustee. This deed of trust was duly registered, and was constructive notice to all adverse claimants. No title was conferred upon him by the order of appointment as receiver. There was no necessity for his asserting title when he assumed the duty of selling the property under the direction of the court. There was no improvidence on the part of the court in appointing the trustee, as he had the legal title, and was directly interested in selling to the best advantage of all the creditors, and he was not claiming adversely to the plaintiffs in the pending action. *Levenson v. Elson*, 88 N. C. 182. At that time the petitioners had no lien, and they were in no way deceived, misled, or defrauded of any right in dealing with the property. The doctrine of estoppel, when applied, always presupposes error on one side, and falsehood or fraud on the other, which has resulted in injustice or wrong to the party deceived or misled in dealing with the property involved. The doctrine is available only for protection, and cannot be used as a weapon of assault. *Dickerson v. Colgrove*, 100 U. S. 578. In this case none of the principles of either legal or equitable estoppel can be applied. The petitioners had constructive notice of the order appointing the receiver, and of the registered deed of trust, and they have acquired all the rights to which they are legally entitled by the levy of their attachment.

The petitioners further insisted that personal property exemptions ought not to be allowed to the defendants, Hyatt and Willis, out of the proceeds of goods and merchandise which they had obtained from their creditors by gross misrepresentations, falsehood, and fraud, when there are solvent notes and accounts in the hands of their trustee, and while there are other means in their possession and enjoyment which ought to be applied to the payment of their debts.

The petitioners, in their allegations and affidavits, present many strong circumstances of fraud and falsehood, and the defendants have filed several counter-affidavits in explanation and defense; but, in the view which I have taken of the matter, it is unnecessary for me

to express any decided opinion as to the preponderance of the conflicting evidence. In this proceeding I can only dispose of the property in the hands of the court, in accordance with the legal rights of the contending parties. The trustee, Smathers, by the deed of trust, acquired the equity of redemption, which the grantors had, under the mortgage, made to M. H. Love. The mortgage is valid as between the parties, and, as against the mortgagors and their trustee, Love had a right to claim property to the amount of \$427. Under the fraudulent mortgage Love cannot claim this amount against the petitioners, who are creditors, and have acquired a lien by virtue of the levy of their attachment. If the defendants were allowed this amount as their personal property exemptions, Love could recover the same from them, and thus he would obtain the benefit of the fraudulent mortgage, as against creditors. I am therefore of opinion that the petitioners are entitled to an order of the court for the payment of \$427 out of the funds in dispute.

The defendants, Hyatt and Willis, are not entitled to the balance of the fund, as they have conveyed all their interest to George H. Smathers, trustee, and they must look to him for the allotment of their exemptions. *Norman v. Craft*, 90 N. C. 211.

From the evidence filed it appears that the trustee has in his hands \$600 in solvent notes and accounts which belonged to the firm of J. R. Hyatt & Co., and this amount, when added to the amount received from this court as balance of proceeds of property sold by the receiver, will be sufficient for personal property exemptions.

I will not determine the rights of the mortgagor, Love, as against the defendant mortgagees, but I am strongly inclined to the opinion that they will not be entitled to any exemptions out of the proceeds of the goods embraced in the mortgage until the mortgage debts are paid.

The supreme court of this state, in several decisions, has established the doctrine that the personal property exemptions of an insolvent debtor cannot be reached by an attachment or execution, and his right to such exemptions is not forfeited by the fraudulent conveyance of his property. *Commissioners v. Riley*, 75 N. C. 144; *Gaster v. Hardie*, Id. 460.

The humane and beneficent provisions of the constitution and laws of this state as to exemptions were intended to prevent an insolvent debtor and his family from being reduced to a condition of absolute poverty, and deprived of the ordinary comforts of life. This right is given to honest debtors, and also to those debtors who have attempted to defraud their creditors. Before a dishonest debtor can be legally entitled to exemptions, all of his property must be available to creditors, and the debtor must not retain any of the fruits of his fraud, or remain in the enjoyment of any of his property except his exemptions. If any of his property remains in his hands unappropriated to creditors, or be by him put out of their reach by any fraudulent device or ar-

rangement, then such property, to the extent of its value, will be regarded by the law as a satisfaction of his claims for exemptions. *Bruff v. Stern*, 81 N. C. 183.

The affidavits filed by the petitioners tend strongly to show that the defendants, Hyatt and Willis, used a considerable amount of the proceeds of their mercantile business in building and furnishing handsome houses belonging to their wives, and are now in the possession and enjoyment of such property. With this matter I have nothing to do in this proceeding. It may be that creditors, by filing a bill in equity against the trustee and defendants, may be able to make all the property of defendants, except their legitimate exemptions, available in the satisfaction of debts. Courts of equity have ample powers and facilities for investigating, adjusting, and determining such matters, and affording adequate relief.

Let an order be draw in conformity with this opinion, directing the disposition of the funds in controversy.

ENGLISH *v.* CHICAGO, M. & ST. P. RY. CO.¹

(Circuit Court, D. Minnesota. September 11, 1885.)

1. MASTER AND SERVANT—DANGEROUS WORK OUTSIDE OF REGULAR EMPLOYMENT—LIABILITY OF MASTER FOR INJURY TO SERVANT—KNOWLEDGE OF DANGER.

Where a master commands a servant to go outside of his regular employment to do a work which is attended with special danger, and the servant, in response to the specific commands of his master, goes and does the work in the way and at the time directed, the fact that the servant knew it was dangerous does not exonerate the master from responsibility, or make the servant guilty of contributory negligence, unless the character of the danger be so patent and so extreme that no one but a foolhardy, reckless man would attempt it.

2. SAME—CONTRIBUTORY NEGLIGENCE—DISCRETION AS TO TIME AND MANNER OF DOING WORK.

Where a servant has equal means of knowing the danger, so that the master and servant stand equal in that respect, and the servant is not specifically commanded as to the time and manner in which the work may be done, but is told to do a particular thing, and has such discretion that he can have some control over the means, time, and manner of doing the work, then, unless he does it in a way and with the means which will be safest, he is guilty of contributory negligence.

Motion for New Trial.

Thomas Wilson, for plaintiff.

W. Gale and Bigelow, Flandrau & Squires, for defendant.

BREWER, J. This case was tried before Judge NELSON and a jury, and a motion is made for a new trial, and was argued before both Judge NELSON and myself. I always have a little hesitation in hear-

¹Reported by Robertson Howard, Esq., of the St. Paul bar.

ing a motion for a new trial of a case which has been tried before some other judge, for the reason that I think no one but the trial judge can really fully understand the merits of the case as developed by the witnesses. He has an opportunity which no other judge can have to determine whether upon the whole case substantial justice has been done, and the mere testimony in the record, when read, does not make the impression that testimony falling from the lips of living and present witnesses does; and if Judge NELSON and myself had not agreed in the conclusion which he asked me to announce, I should have hesitated a good deal about passing an opinion on this case; but after talking the case over, and reading the testimony as transcribed by the stenographer, and also in the light of his personal recollection, we have come to the following conclusion, which I am requested to announce:

Briefly, the facts are these: The intestate, Mr. English, was employed as a car-repairer by the defendant. On the day of the accident he was sent by his foreman, Mr. Goodman, to go to a water-tank and repair it. That water-tank stood upon standards 11 or 12 feet in height. At the summit of these standards, and at the base of the tank, there was a deck, octagonal in shape, encircling the bottom of the tank, sloping slightly from the tank, so that water would pass off. There was some little dispute as to the amount of deflection, perhaps three-fourths of an inch to one and one-half inches to the foot. The deck was in the narrowest place about 21 inches wide, and at the octagonal points a little wider than that,—about 30 inches. The work to be done required the workman to go outside the tank and let the water off, and then get inside and fix a valve, which was done by replacing a bolt and screwing on a nut. The water was taken out of the tank by four holes, closed by plugs,—two on each side. They were reached by walking around on this narrow deck.

There is a dispute in the evidence as to whether the deceased, Mr. English, was employed to do that work. It is very evident from the testimony this was not within the ordinary work of a car-repairer. There is testimony that when Mr. Goodman, the foreman, first employed intestate it was with the understanding that this was part of the work he had to do. But as the jury, by their verdict, seem to have found against that testimony, that may be laid outside of the case, and it must be assumed that this was not part of his business, and that he was sent by that foreman to do a work outside his regular business, and one of danger. You can easily understand that where there is a little deck or shelf along the base of a water-tank, sloping outwards, in the narrowest place 21 inches, and in the widest place two feet five or six inches, with no railing round the body of the tank to hold on by, and with nothing to support a man in case he lost his balance, at any time of the year it would have been a proceeding of some risk to walk round on that shelf and drive these plugs in, and a work of especial risk in the winter-time, for this

was in December, when a man might expect that there would be ice or snow on this sloping deck, which, of course, made it the more dangerous. If a man slipped there was nothing for him to hold on to. I do not think it needs any words to show that such a tank so circumstanced, with such a deck upon which to work, without any means of support or protection, was a dangerous place. And when the company called upon the deceased to go onto that place and fix that tank, it sent him into a position of danger. As the testimony shows, the deceased and a man by the name of McCarty were notified, in the morning, to go and make these repairs as soon as a certain train passed at 11:50. They went, knocked the plugs out so as to let the water flow out of the tank, and then went to dinner, and the water flowed out while they were gone. After dinner they went back. First they went inside and fixed the valve; then one of them went one side of the tank to put in two plugs, and the other on the other side to put in the two other plugs. There was ice on the deck where the deceased went, and he stepped on it, slipped, fell to the ground, and was killed.

The company was negligent, as I said, and there is no question but it was grossly negligent. It would have been a very simple thing to have put an iron rail on the outside of that tank, which a man might hold on to, and the company ought to have put it on.

But the question, and the only substantial question in the case, as counsel well say, is whether the deceased was guilty of contributory negligence. I take it the law, as stated by counsel for the plaintiff, is supported by many authorities, and is correct, that where a master commands a servant to go outside of his regular employment to do a work which is attended with special danger, and the servant, in response to the specific commands of his master, goes and does the work in the way and at the time directed, the fact that the servant knew it was dangerous does not exonerate the master from responsibility, or make the servant guilty of contributory negligence, unless the character of the danger be so patent and so extreme that no one but a foolhardy, reckless man would attempt it. For instance, where an engineer was told to take his engine in advance of a regular train over a track which he knew to be dangerous, and to keep out of the way of a coming train, and the engineer did so, and was killed, the fact that he knew the track was dangerous was held not to be such a fact as would render him guilty of contributory negligence. He had a specific command to take his engine and get to a certain point in advance of a following train. He had one of two alternatives: to obey the order, or leave the road. And, as the court say, it is not right that a burden should be cast on the employe, either to say "I will not do the work, but quit the service," or else be adjudged guilty of contributory negligence should an accident happen. But that rule has two or three limitations, one of which, we think, is applicable to this case, and is this: that where a servant has equal means of knowing the danger, so that the master and servant stand equal in

that respect, and the servant is not specifically commanded as to the time and manner in which the work may be done, but is told to do a particular thing, and has such discretion that he can have some control over the means, time, and manner of doing the work, then, unless he does it in a way and with the means which will be safest, he is guilty of contributory negligence. Thus, take an illustration from the case which I have just cited, where the engineer was told to run his engine over the track and to keep out of the way of a following train. He had no alternative but to run his engine at such a speed as would keep it out of the way of this train. But suppose he was told to take his engine and run it to such a place over a track which both parties knew to be dangerous, and the time at which he was to reach his destination was not specified, so that the rate of speed was reasonably within his control, and he, instead of going five miles an hour, which would be safe, goes at 30 miles an hour, which is unsafe, and on the trip he is injured, he cannot say, "I was told to make that trip, and although I went at that rapid speed I am not guilty of contributory negligence." Wherever he has within his control the manner of doing a thing, and the time of doing it, and the means of securing safety, he cannot do it in the quickest time and in the shortest manner, and neglect all means of security to himself. If he does so, he elects to take the risk.

Now, in this case, perhaps, the testimony is not very full upon that matter. The testimony of Mr. Goodman, the foreman, is that he told intestate to go and fix the tank, and he went and took the plugs out before dinner, and then after dinner went to fix the tank. When the foreman came to the tank the valve had been fixed, and the men were starting round on the deck to put in the plugs; and the first he saw of deceased he was picking the ice off with his hammer, and he called to him. Now, if the master or foreman had been standing there, and, as he came out of the tank and started to walk on that side, had said, "Don't wait to take the ice off,"—specifically commanded him to walk around on the deck without securing a ladder, or picking the ice off, or taking any other precaution for his safety,—it might be said that deceased was commanded to do that act in a specific way, with no discretion. But as Mr. Goodman says he did not come back until 15 or 16 minutes after dinner, it seems that English had had time to take precautions about doing this work. It does not appear from the testimony as to whether a ladder could or could not have been obtained; but he might have taken time to do something; he might have driven in some nails for his protection, or used other methods which would have afforded him protection. The testimony is silent upon this point, but it appears that there was no specific direction; nor was English commanded to do this in a specified way in a specified time. It is very clear from the testimony that he might have taken a good many precautions to protect himself, without infringing upon the commands which were given to him; but, instead of that,

he walked round, stood on a slippery place, and fell. Under these circumstances, can it be said that he was not guilty of contributory negligence? There is nothing to show that there was any stress laid upon him to do it within a particular time, or to do it in a particular way. There is nothing to show that he did not have within his power the means to protect himself as against the risk from this employment. He chose to take the risk, and did not seek to avail himself of the means which are open to every one; and it can hardly be said that he was free from responsibility. It is true that McCarty says, in a general way, that he was ordered to do that work; but he does not specify, as we understand the testimony, time or circumstances.

Then the court—properly, I think—instructed the jury that if the danger was equally known to both parties,—perhaps the limitation which I have suggested ought to be attached to it,—it could not be said that he was free from contributory negligence. This is one of the dangers whose existence and extent every one has equal capacity for determining. A slippery wall with ice on it, with no support,—you do not require to have any technical knowledge, or to be skilled in machinery, or to be learned in the law, to know that there is danger in walking thereon. When I walk on a shelving place I know it is dangerous, and if there is ice on it there is more danger, and if there is nothing to hold on by that makes it still more dangerous. Every one knows that. It is not as though the master had sent the servant among some machinery of whose danger only a mechanic may have full knowledge.

The motion for a new trial will be granted.

In re SNYDER.

(Circuit Court, E. D. Tennessee. 1885.)

ATTORNEY AT LAW—DISBARMENT—ABDUCTING INSANE PERSON—FRAUDULENTLY OBTAINING MONEY.

A weak-minded man, laboring under the hallucination that he had committed a crime, fled to Tennessee, and there concealed himself, but was discovered by certain detectives and officers, who, supposing he was in fact a criminal, had him arrested and committed to jail in the hope of obtaining a reward. They took an attorney at law into their confidence, and, acting with him, and under his advice, after learning that the supposed criminal was in fact innocent, procured his release fraudulently, and by preparing false and illegal papers, and after receiving and dividing large sums of money sent to their prisoner by relatives, carried him in disguise to New York and shipped him to Liverpool, where he was found by his relatives and brought home. *Held*, that this conduct on the part of the attorney was sufficient to justify striking his name from the roll of attorneys, and disbarring him from practice.

Proceeding to Disbar Attorney.

Mr. Snyder, (assisted by Moses Clift,) pro se.

BAXTER, J. On the trial of a civil suit of *Geo. H. Thomas v. The Respondent and others*, had in this court at its October term, 1884, the following extraordinary testimony was elicited: The plaintiff, Thomas, was an educated weakling. He had lived for a while just prior to his arrest, as hereinafter shown, in southeastern Missouri, where he was involved in a good deal of troublesome civil litigation, and to escape therefrom he fled to and took refuge with a friend at Bartow, Florida. From this place he wandered aimlessly to Chattanooga. Here he took lodging under an assumed name with an obscure family in the suburbs of the city. He was guilty of no criminal offense against the laws of Missouri, or any other sovereignty, but he was controlled by an unfounded and vague apprehension that his adversaries in Missouri would combine and charge him with some crime as a pretext for his arrest and extradition to enable them to bring other suits against him in that jurisdiction. Under this hallucination he contemplated flight to South America. While impelled by these fears, he wrote letters and tore them into pieces and scattered the fragments around his room. This singular and suspicious conduct attracted the attention of the city police, who gathered up the scattered fragments of his writings, and from them concluded that he had committed some grave criminal offense in Missouri from which he was endeavoring to escape. The policemen took Snyder, who is an attorney at law, into their confidence. After consultation they not unnaturally reached the conclusion that he was a fugitive from justice, for whom there was probably a reward offered. In this belief, which I have no doubt they honestly entertained, they determined to arrest him. A warrant was then obtained charging him with being "a fugitive from justice." It did not impute the commission of any specific crime, or allege any venue, and was consequently without authority of law. Nevertheless Thomas was arrested under it, and taken to the county jail for incarceration; but the sheriff, who is *ex officio* jailer of the county, declined to receive and detain him as a prisoner without a formal *mittimus*. Thereupon Sloop, a policeman who had been an active participant in making the arrest, and who then had him in custody, acting under Snyder's advice, applied to the justice who had issued the warrant for his arrest, told him in Thomas' absence that Thomas waived an examination, and upon this false representation, and without further inquiry, the justice issued a paper in these words:

"*State of Tennessee v. Geo. H. Thomas, alias Parkhurst.* Judgment that the defendant in this case waived examination through H. L. Sloop, officer, and was committed to wait further action of the court.

"G. M. SHERWOOD, J. P."

This paper, vicious upon its face, quieted the sheriff's scruples, and he consented to receive and hold Thomas as a prisoner. After taking the usual precautionary measures for his safe detention, including the taking of \$200 in money, which Thomas had on his

person, he committed him to one of the cells of the jail. Many reprehensible things were said and done in connection with Thomas' imprisonment which need not be enumerated here. It is sufficient, for the purposes of this case, to say that Snyder, who was jointly interested with the officers in the arrest in the hope of getting a reward therefor, became satisfied that Thomas was a weak-minded and partially demented creature; that he was innocent of any crime; that he was well connected, and could probably obtain advances from his relatives; and that the only hope of realizing any remuneration for his labor expended in connection with Thomas' arrest and imprisonment was to gain the confidence of Thomas and assume the office of his legal adviser. To effect this end he began and continued to play upon and intensify the prisoner's fears. He told him that one David Hughes, of Bartow, Florida, said that he "was wanted both in Florida and Missouri," and followed this fabrication with a long list of interrogatories and intimations, which were intended and calculated to intensify Thomas' apprehensions. Thus alarmed, Thomas expressed a wish to consult an attorney. To this request the sheriff said, in Snyder's presence, "It is of no use for you to apply for a writ of *habeas corpus*, for the hearing of the matter can be adjourned from day to day, and you will simply waste what money you have." At this juncture, Sloop, one of the interested policemen, demanded the key to Thomas' trunk, which the latter gave him, and the parties left him for a while to nurse his delusion alone. But subsequently Snyder returned to his cell, and told Thomas that "he had read the letters found in the prisoner's trunk, and was convinced that he was more sinned against than sinning; that there was a description of him published in the *National Detectives' Gazette*, coupled with an offer of \$500 reward for his capture; that he (Snyder) was not interested in the Missouri parties who wanted the prisoner, but would get his money if the prisoner was delivered to them; that the sheriff was going, in a few days, to Missouri, on other business, where he could get full information, but if the prisoner could get \$500, and give it to him, (Snyder,) he would arrange with the officers, and take him out of jail, under the pretext of taking him to Missouri, and would, as soon as they got out of Tennessee, turn him loose, and report that he had been taken back to Missouri, or, if the prisoner preferred to leave the country, he would go with and procure a passport for him; that he was an attorney, as well as a detective, and could act as an attorney for the prisoner; that he was on intimate terms with the officers of the jail, and would therefore be allowed more liberties than were accorded to other attorneys; that the officers of the jail expected to get a part of the reward offered for his apprehension, and would be on the watch; but that something would occur to enable Thomas to get off in such a way as that they (the jail officers) would lose their share of the reward, as they were not as suspicious of him (Snyder) as they were of others."

These suggestions produced the result they were intended to secure. Thomas accepted them as the best and surest method of escaping from the embarrassments which, in his diseased imagination, were impending over him, and retained Snyder as his attorney, and thereafter implicitly adopted and followed his counsel, without, as far as I can see, the slightest misgiving of its wisdom or fidelity. On application by Thomas, he was furnished by an uncle in Ohio with \$200, and by an aunt in Connecticut with \$700 more. These remittances passed through Snyder's hands. His friend in Florida sent by one Humphries, a special messenger, the further sum of \$800, but, in consequence of the facts to be hereinafter stated, this last remittance was not delivered either to Thomas or Snyder. The messenger intrusted with said last-mentioned sum was a young lawyer from Florida charged with the responsibility of inquiring into the nature of the accusation against Thomas, ascertaining the facts, and taking such steps as he might, in his judgment, deem necessary and proper for his release. On his arrival at Chattanooga he promptly reported to the deputy-sheriff, who, in the absence of the sheriff, had the custody and control of the county jail and the prisoners in it, told him who he was and the object of his visit, and requested permission to see and confer with Thomas. But this request was denied, except on the condition that Snyder should be present and hear what was said. Being unable otherwise to get access to Thomas, Humphries yielded to the condition imposed, and held a short and hurried conversation with Thomas in Snyder's presence. During the interview Snyder proposed that a Mr. Blount, a friend of Humphries and a stranger in Chattanooga, should "personate an officer from Missouri and pretend that he had come for Thomas, and that he (Snyder) would get up a pretended requisition from the governor of Missouri, and get a country-justice of the peace to order Thomas turned over to Blount," and in this way "get Thomas out of jail and turn him loose." Humphries declined to adopt the proposed scheme, and withdrew from the jail. After returning to the hotel and consulting with his friend Blount, Humphries determined to retain a firm of resident lawyers to assist him in the matter. But they, too, were, after repeated efforts, unable to get access to Thomas, and, as a *dernier resort*, proceeded to apply for a writ of *habeas corpus*, with a view of having a judicial inquiry into the cause of Thomas' detention. But, as well before as while they were engaged in procuring the writ, Snyder was actively engaged in preparing Thomas to co-operate with him in the audacious plans which he had conceived to defeat the proposed inquiry. Among other things tending to this result, he asked Thomas "if he was known in Cincinnati," and then told him "that there was a detective from Cincinnati in Chattanooga, who claimed that he had come for the purpose of taking him to Missouri," and "professed to have a requisition for that purpose; that said detective was working in conjunction with Officer Doty of the Chattanooga force; and that

Doty and the Cincinnati detective were probably planning to get hold of him." This was all pure fabrication. Snyder then advised Thomas "that he had better waive, in writing, a formal requisition," so as "to put himself in shape to get off on short notice as soon as his money (requested by him from his friends) should arrive." To this Thomas assented. Snyder then prepared a paper in these words:

"Having been arrested in this city upon the charge of being a fugitive from justice, and being held under bond until a requisition can be obtained, I hereby agree to waive the procurement of a requisition, and freely and voluntarily consent to be removed from the state of Tennessee by C. E. Stanley, or any one else designated by him, upon said charge at any time,"—

—which Thomas signed. Upon the faith of this paper Sherwood, the justice who had committed him to the jail, ordered that Thomas "be consigned to the custody of C. E. Stanley, deputy-sheriff, or any person to be designated by him, for the purpose of removal from the state of Tennessee." Stanley made the following indorsement thereon: "In pursuance of the above order of the court, I have this day consigned the defendant in said case to H. L. Sloop,"—and supplemented his indorsement by a letter of instruction addressed to his friends and the general public, in which he certified—

"That Geo. H. Thomas has freely and voluntarily waived, in writing, requisition and all formalities; and Geo. M. Sherwood, justice of the peace, having directed me to convey the said Thomas to Missouri, or to designate some one to convey him there, I have transferred to Henry Sloop, policeman, all authority vested in me to so convey him. I hope my friends will assist Mr. Sloop to land him safely in Missouri.

"P. S. If Mr. Thomas, or C. C. Snyder, his attorney, wishes a few days' delay on the way to Missouri, I would advise Mr. Sloop to accede to their wishes, provided Mr. Snyder will agree not to obtain a writ of *habeas corpus*."

Snyder was present when Thomas was discharged from jail and turned over to Sloop, and whispered to the prisoner privately, and said, "All that will be done this afternoon will be done in your interest." Sloop then directed Thomas "to follow him." The prisoner accordingly took his hand-bag, and went out, pursuant to respondent's directions, by a side door, where he found a buggy in waiting, which he entered with Sloop. They then went a circuitous route into the country, and after driving around for some time came back towards the city, stopping in a thicket near a beer garden. While on this ride, Thomas asked if the cause of his being taken out of jail was to avoid Doty and the Cincinnati detective. Sloop laughed, and said it was. Sloop fired a pistol, and told Thomas "to listen for shots in return." Several shots were heard a short distance away, and Sloop responded by another discharge of his pistol. In a short time Snyder came up in a buggy with James Turner. Thomas then wrote a letter under Snyder's direction to Humphries, in which he informed Humphries that he had employed Snyder as his attorney and did not desire any other lawyer. Snyder inquired if Thomas had any letters or other writings about his person that might serve to identify him. He then intro-

duced Turner to Thomas, and directed the latter to go with Turner. Turner then took Thomas, by unfrequented ways, a few miles into Georgia, to the home of one Little. Here they were again joined by Sloop. The three then went to Turner's; but before arriving there they held a consultation as to the best means of keeping Thomas concealed. After reaching Turner's, Snyder again appeared and represented to Thomas that "he was under a \$5,000 bond to produce him in court, and that Turner, as his deputy, was, when in charge of him, responsible for the same amount, and that it would ruin both if he should escape," and that if they "saw any attempt on his part to escape, he would be shot if it was necessary to prevent his escape." Snyder then said to Turner that "he thought it would not be necessary to put irons upon Thomas; that the latter would stay all right in a room, but that if he [Turner] had any fears, to go ahead and put irons on him."

We need not recite all that occurred. It is sufficient to say that Turner, under Snyder's directions, kept Thomas concealed—a part of the time in irons—until he was clandestinely removed, as hereinafter shown. During this detention he was frequently visited by Snyder, who, by disingenuous and false representations, continued to play upon his excited imagination, and aggravate his unfounded apprehensions, until he consented to part with his beard and don female attire as the best means of escaping his imaginary pursuers. This policy was persisted in until the remittances requested from his uncle and aunt arrived and were satisfactorily divided. Turner then, with Snyder's co-operation, took him to New York city, put him aboard a vessel, and shipped him to Liverpool, England. The job was so adroitly executed as to successfully evade the writ of *habeas corpus*, thwart the object contemplated by the counsel who procured its issuance, and leave Thomas' friends in utter ignorance of his whereabouts, until, by subsequent inquiries, they traced him to his hiding place in England, and undeceived and persuaded him to return and place himself under their guidance and protection.

Upon these facts the rule under consideration requiring the respondent to appear and show cause why he should not be disbarred and stricken from the roll of attorneys of this court was entered. To this rule the respondent has put in an answer. It is prolix and evasive. Instead of confessing or denying the charge that Thomas was manacled, in the manner hereinbefore stated, "with irons," he avers that "Thomas never, at any time, *stated to him* that he had been placed in irons." And in like manner, instead of confessing or denying the facts alleged, tending to establish collusion between Sloop and himself in the procurement of Thomas' release from prison, and his subsequent forcible and clandestine removal to Georgia, he contents himself with the averments that "when he (Thomas) was released from the jail he went away with Sloop and was taken into Georgia," and that "he (Snyder) met them on the way, when Thomas

indorsed a \$200 check which he had received, and gave it to him." And to the charge that Thomas had been disguised in female attire, he responds, "I learn that Thomas stated on the trial that I and Mr. Turner *arranged in his presence* to shave him and dress him in female attire," and adds that "this statement is wholly false and untrue."

It is easy to see that his answer in each of the particulars mentioned is and was intended to be evasive. The averment that "Thomas *never stated to him that he had been placed in irons*" is no denial of the charge that he had been so manacled, any more than his answer that Turner and he did not arrange in *Thomas' presence* to shave and dress him in female attire is a denial of the charge that he was so shaved and disguised.

These and other similar evasions, and respondent's failure to deny other and material and damaging imputations contained in the evidence epitomized above, authorize the most unfavorable inferences fairly deducible therefrom. But the court is under no necessity of resorting to inferences in order to reach a just determination of the question involved.

It must be kept in mind that the motive prompting the arrest was the hope of a pecuniary reward, which, it was supposed, had been offered for Thomas' apprehension, assumed by the parties to be \$500. The respondent, on several occasions, in terms more or less explicit, suggested that a payment of this amount would conciliate the officers making the arrest, and relax their vigilance, and prepare the way to his discharge. To this suggestion Thomas replied that "he would rather pay the officers the amount of any reward that had been offered than to be compelled to go where he was wanted;" and that, "if possible, he would rather compromise with the officers and have the prosecution quietly withdrawn." Thereupon the respondent proposed "if Thomas could get \$500 and give it to him, he would arrange with the officers, and take him out of jail under the appearance of taking him to Missouri, and would, as soon as they got out of Tennessee, release him;" and, acting upon the suggestion, the respondent proceeded, as he admits in his answer, to see Doty, one of the officers, and "told him that he had been employed by Thomas; that he did not think that he (Doty) could recover any reward; and gave him to understand that he would not lose anything if he did *not take too much interest in holding Thomas.*"

A further illustration of his methods in the defense of criminals is found in his proposition to unite with Humphries to induce Blount, a stranger in Chattanooga, and a friend of Humphries, "to personate an officer from Missouri, and pretend that he had come for Thomas," and that he would, in aid of the fraudulent suggestion, "get a country justice of the peace to order Thomas turned over to Blount, who could take him away and turn him loose."

These and other facts evince the respondent's groveling conceptions of professional duty, and manifest his unfitness for honorable

practice. He not only undertook, in his professional capacity, by the use of money, to corrupt the officers who made the arrest, and to induce another to personate a Missouri officer in order to effect his client's escape, but offered, in furtherance of his fraudulent suggestion, to personally commit the crime of forgery.

This conduct cannot be adequately characterized. A man capable of such action is unworthy the confidence of the court, and ought not to have his opportunities for wrong-doing enlarged by being permitted to continue to practice as an attorney at law. The respondent will therefore be stricken from the roll of attorneys of this court, and henceforward debarred the right to practice herein.

As to right to disbar attorney, see *Ex parte Wall*, 2 Sup. Ct. Rep. 569, and *In re Wall*, 13 Fed. Rep. 814, and note, 820.

BUSH v. UNITED STATES.

(*Circuit Court, D. Massachusetts.* September 15, 1885.)

INTERNAL REVENUE—FORFEITURE FOR VIOLATION OF STATUTE—ACTS OF AGENT, HOW FAR BINDING ON PRINCIPAL.

In an information for forfeiture of a distillery for violation of the statute, the acts and intents of the servants or agents of the claimant are to be imputed to the principal, in so far as that they may work the forfeiture of the property used for unlawful purposes.

Appeal from District Court.

Prentiss Cummings, for plaintiff in error.

C. Almy, Jr., Asst. Dist. Atty., for the United States.

CARPENTER, J. This is a writ of error to the district court for the district of Massachusetts to bring up the record of an information for the forfeiture of a distillery, and has been heard by Judge Colt and myself upon a bill of exceptions and motion in arrest of judgment, which appear in the record. We are of opinion that a mandate be returned directing judgment on the verdict.

The only exception to which it seems to us necessary to make reference arises in the following way. There was evidence in the case from which the jury might have inferred that the violations of law alleged in the information were committed on the premises of the claimant, and in the course of the prosecution of his business, by a servant or agent of the claimant, but without the personal knowledge or consent of the claimant himself. In this state of the proof, the learned judge who tried the case instructed the jury, in substance, that in an information for forfeiture the acts and intents of the servant or agent of the claimant are to be imputed to the principal, in so far as that they may work the forfeiture of the property so used for unlawful purposes.

Undoubtedly, in a criminal prosecution, this rule would not be applied; but, considering the scope and intent of the statute solely as it relates to forfeitures, we think the information was supported by proof of the unlawful use and of the intent to defraud, whether such use and intent were by the claimant personally, or by some person acting under his authority and control. This conclusion seems to us to be supported by the reasoning of the court in *Dobbins' Distillery v. U. S.*, 96 U. S. 395.

No error. Judgment of district court affirmed.

THE ORSINO.

ROBERTS and others v. GILL and others.

(District Court, D. Maryland. March 4, 1885.)

GRAIN CHARTER-PARTY—CONSTRUCTION OF WORDS "NOW ABOUT READY TO SAIL IN BALLAST."

Merchants in Baltimore, desiring a steamer for an August shipment of grain, signed a charter-party, in which it was stipulated that the steamer was "*now about ready to sail from the United Kingdom, in ballast.*" The steamer at the date of the charter-party, Friday, August 8th, was in the dry-dock at Shields for repairs. She was let out of the dock the next day, and commenced taking in ballast, coal, and stores for the voyage. She completed these preparations on the following Tuesday, when it was discovered that some of her valves had been misplaced while in the dock. This delayed her another day, and she sailed on Wednesday, 13th. She arrived in Baltimore one day too late for an August shipment of grain, and the charterers refused to load her. *Held*, that the steamer was not at the date of the charter-party about ready to sail in ballast, and that the charterers had a right to refuse her.

In Admiralty.

John H. Thomas and G. Leiper Thomas, for libelants.

Brown & Brune, for respondents.

MORRIS, J. This is a libel against the respondents for refusal to load the British steam-ship Orsino, which the libelants, through their agents, had chartered to the respondents in the city of Baltimore on the eighth day of August, 1884. The charter-party is the usual steam grain charter, and describes the Orsino as "*now about ready to sail from the United Kingdom, in ballast,*" and agrees that the steamer, being tight, staunch, strong, and in every way fitted for the voyage, shall, with all convenient speed, sail and proceed to *Baltimore*. It was provided that should the steamer not be ready for cargo at her loading port on or before the thirty-first of August, the charterers should have the option of canceling; also that they should have the option of loading the steamer at Newport News, order to be given at a port of call.

The circumstances attending the negotiation for the charter of the steamer were as follows: Mr. Crawford, a ship-broker of Baltimore, had been authorized by Messrs. Austin, Baldwin & Co., ship-brokers of New York, and agents for Messrs. Hugh Roberts & Son, of Newcastle-on-Tyne, the owners of the Orsino, to procure a charter for that steamer. Mr. Crawford's final instructions were contained in a telegram from New York, dated August 8th, as follows:

"We repeat offer of Orsino at four, four and a half, cancellation if not ready August 31st. She will probably sail Saturday next."

August 8th was Friday, so that Saturday meant the next day. About noon of August 8th, Crawford approached two of the partners of the firm of Gill & Fisher, who were at the produce exchange, and, handing them this telegram, said, "*Here is an August boat for you.*" Mr. Crawford also stated that the steamer was about ready to sail in ballast. Messrs. Gill & Fisher, after consultation, agreed to take the steamer, and said to Crawford, "Go telegraph at once to Austin, Baldwin & Co., New York, so that the steamer can get right off." Crawford replied, "She is not in the port of London," (which had been mentioned as her home port;) and the reply was, "Wherever she is, hurry her up." On Saturday, the 9th, a charter-party having been prepared and forwarded from New York by Austin, Baldwin & Co., it was presented by Crawford to Gill & Fisher for signature. It contained the words "the steamer is now in the United Kingdom;" but Gill & Fisher refused to sign it, as it did not sufficiently express the position in which the steamer had been represented, and the words, "now about ready to sail from the United Kingdom in ballast," were accepted as satisfactory. The charter-party, so worded, and dated "Baltimore, August 8, 1884," was signed by Gill & Fisher about 4 o'clock P. M. on Saturday, the 9th, and was forwarded to New York, and was there signed by Austin, Baldwin & Co., on behalf of the owners.

In the negotiations nothing had been said about the charterers having the option to load the steamer at Newport News upon giving orders at a port of call. This clause was in the charter-party prepared in New York and tendered to Gill & Fisher, and, as they accepted that clause, it became necessary to name the port of call, and at the signing of the charter-party they named Hampton Roads. It usually takes an hour to transmit a cable dispatch from Baltimore to an English port, and the difference in longitude is about five hours. The owners could not, therefore, have been advised of the port of call until after business hours on Saturday. Just before the charter-party was signed in Baltimore by Gill & Fisher, on the 9th, Crawford received from Austin, Baldwin & Co. a telegram in cipher, of which a translation is as follows:

"NEW YORK, August 9, 1884. *Orsino, where will captain call for orders? She will not sail before Tuesday. North Cambria sailing to-day for Breakwater. Can you induce shipper to allow substitute Cambria for Orsino, as it will give us chance on another boat?*"

Crawford did offer the North Cambria to Gill & Fisher as a substitute for the Orsino, stating that the North Cambria had sailed that day for the Delaware breakwater, but Gill & Fisher declined her as being too large for their purpose. Mr. Crawford testifies that he thinks he must have communicated at the same time the information contained in the telegram that the Orsino would not sail until Tuesday; but all of the partners of Gill & Fisher to whom the communication could have been made deny that they ever heard of it, and declare that they would not have signed the charter-party if they had been so informed. I find the fact to be that they were not so informed.

The Orsino did actually sail from the port of Shields on the morning of Wednesday, the 13th, and, having prosecuted the voyage with speed, she arrived at Hampton Roads at 8:30 A. M. on August 29th. Within an hour or two after the ship was at Hampton Roads, the charterers were notified that the Orsino had arrived there and was ready for cargo, and was awaiting their orders where to proceed to load. Gill & Fisher on the same day replied that they declined to accept the steamer, as she had failed to fulfill the charter; that they had no orders to give, and held themselves released, and refused to load her. They afterwards more definitely stated the particular in which she had failed to fulfill the charter-party was that she was not at its date "about ready to sail in ballast," and did not sail in fact until the 13th.

The facts with regard to the situation and preparations for sailing which delayed the sailing of the Orsino were as follows: Prior to the sixth of August, the Orsino had been for 10 weeks lying in the port of Shields, about 12 miles below Newcastle-on-Tyne, moored in the river. On the eighth of August, when Gill & Fisher agreed to take the steamer, she was in the dry-dock at Shields, having gone into the dock on the evening of Wednesday, the 6th, to have her bottom scraped and painted, her sea-valves overhauled, and some rivets put into her frame and different parts of the vessel, as required by Lloyd's surveyors. She came out of the dry-dock on Saturday, the 9th, in the morning, and until Tuesday (12th) was lying at Tyne dock, taking in sand ballast, bunker coal, and stores for the voyage. She began to load the sand ballast at 4 P. M. on Saturday, the 9th, and stopped at 8 P. M. She began again at 7 A. M. on Monday, the 11th, and finished at 7 P. M. She began to take in coal at midnight of Sunday, the 10th, and finished coaling at noon on Tuesday, (12th.) She got up steam as soon as she finished coaling, but then it was found that the sea-valves to the water-ballast tanks had been reversed by the machinists who had overhauled them in the dry-dock, and divers had to be sent down to plug the openings in the ship's bottom so that the sea-valves could be properly placed. This took about 14 hours, and the steamer sailed on Wednesday, the 13th, at about 6 o'clock in the morning.

Gill & Fisher, after signing the charter-party, several times inquired of Crawford to know on what day the steamer had sailed, but he could not inform them. Late in the month of August they got him to telegraph, and then, learning that the steamer had sailed on the 13th, came to the conclusion that she would not arrive in time for an August shipment, and made other arrangements for the grain which they had intended to ship by her. On the eighth of August the rates of vessels for August shipments were higher than for vessels for September shipments, and the rate agreed to be paid for the Orsino was the August rate. On September 1st the best rate which could be obtained for the Orsino was 1s. 10½d. per quarter less than the charter rate, making the loss in freight on the cargo which the ship actually carried out on a recharter £1,067 4s. 4d.

The master, before arriving at Hampton Roads, had thrown overboard all the sand ballast, and had put up the shifting-boards, and at the time the vessel anchored at Hampton Roads she was ready for a grain cargo. It was designed by the captain to use feeders, and they were not quite ready, but could have been made ready in about five hours. But these were not necessary to make the steamer ready for cargo. Feeders are wooden pipes passing through the hatches to the holds of the ship. They are filled with grain, and as fast as the settling of the grain in the holds leaves any vacancy the grain from the feeders runs in and fills up the vacant space, keeping the hold full and solid, and preventing shifting. It is optional, however, with the owners of the vessel whether feeders shall be used, or whether, in lieu thereof, a sufficient quantity of grain shall be put in bags and stowed on the top of the bulk grain. The feeders are less expensive to the ship, and are therefore preferred by the ship-owners, but the marine insurance inspectors do not require feeders if an equivalent amount of stowing in bags is substituted.

I therefore find, notwithstanding the feeders were not completed, that, as the vessel could have been loaded without them, she was, when tendered, ready for cargo. I find that if Gill & Fisher had given orders on the morning of the 29th, when they received notice that the Orsino was at Fortress Monroe, and was ready for cargo, she could have proceeded either to Baltimore or to Newport News in time to have been tendered on the thirtieth of August, but I find that she could not have reached Baltimore in time to have been loaded with grain before the close of the 30th, (Saturday,) which would have been necessary in order to make her cargo an August shipment.

The representation in the charter-party, "*now about ready to sail in ballast*," would seem necessarily to imply that, at the date of the charter-party, the steamer had begun preparations for sailing. In fact, on August 8th, when the contract was made, the steamer was in the dry-dock. She had then, it is true, nearly completed the repairs for which she was put there, and she did come out of the dry-dock on the next day. But it was then that she began her preparations to

sail in ballast. It appears to me, therefore, that it was not true on August 8th that she was then about ready to sail in ballast.

The difference in time between the earliest moment she could have sailed and her actual sailing was not great. The cable dispatch of the afternoon of Saturday, August 9th, naming the port of call, allowing one hour for transmission and five hours for difference of longitude, could not have been received by the managing owners during the business hours of Saturday. But if the steamer had been on Friday, the 8th, "about ready to sail," it was reasonable to expect that she would sail on Monday. She did not sail until Wednesday. This difference of two days made the difference in the port of Baltimore of a September instead of an August vessel. Sailing on the 13th, she could not, being an ordinary freight steamer, be expected to arrive at Fortress Monroe earlier than the 29th, and, arriving at Fortress Monroe on the 29th, she could not be in Baltimore until the 30th, and the 30th being Saturday, and Sunday (31st) not a working-day, she could not complete her loading in August. It was a delay which made a most essential difference to the charterers, and was a delay directly attributable to her not having begun her preparations for sailing until after the date of the charter-party. It was known to the owners' agent, when the contract was made, that what the charterers wanted was an August steamer, and the charterers agreed to pay the increased freight demanded for one. The stipulation as to the steamer's condition with regard to her readiness to sail was therefore a substantive part of the contract; and as in my view of the meaning of the language used that stipulation was broken, it follows that the respondents had a right to refuse to load the steamer, and that the libel must be dismissed.

THE ORANMORE.

MORRIS v. THE ORANMORE.

(District Court, D. Maryland. July 21, 1885.)

INSUFFICIENT FITTINGS OF CATTLE-SHIP—AGREEMENT TO BE GOVERNED BY ENGLISH LAW—EXCEPTIONS IN BILL OF LADING.

The libellant, a resident of Chicago, made with the agents of a line of British steamers a contract to carry cattle from Baltimore to Liverpool. By a clause of the contract it was agreed that any questions arising under the contract or the bill of lading against the steamer, or her owners, should be determined by English law in England. Cattle shipped under the contract received injuries by reason of the insufficient construction of stalls provided by the ship. The contract having been made in the United States with a British corporation, owner of a British ship, for the carriage of cattle to England, and the parties to the contract having expressly declared their intention that the contract and bill of lading should be governed by the law of England, the place of the performance of the contract of carriage, *held*, that the English law must govern

as to its validity, obligation, and interpretation. *Held, also*, that the exceptions contained in the bill of lading, stipulating that the shipper approved of the cattle fittings, and that the steamer should not be held responsible for any injury to the cattle occasioned by the wrongful acts, default, negligence, or error in judgment of the owner, pilot, master, officers, crew, stevedores, or other persons in the service of the ship, were sufficient, under the rulings of the English courts, to exempt the ship from liability for the injuries complained of.

In Admiralty.

Sebastian Brown and John C. Richberg, for libelant.

Brown & Brune, for respondent.

MORRIS, J. This libel is brought to recover for 67 head of cattle which died and were thrown overboard, and for the depreciation in the value of others, during a voyage on which they were being carried by the British steam-ship Oranmore from Baltimore to Liverpool in January, 1885.

The plaintiff, who is a citizen of the United States, residing in Chicago, shipped on the steamer 320 head of cattle, to be carried on the upper between-decks, and received therefor, through his agent in Baltimore, the bill of lading, dated January 10, 1885, given in evidence. The bill of lading recites that the shipment is made under and subject to the conditions of a "live-stock freight contract," dated at Baltimore, November 19, 1884, signed by the libelant for his father, by which the father had agreed, upon the terms therein expressed, to ship as many cattle as could be carried on the upper between-decks of five of the steamers of the Johnston line plying between Baltimore and Liverpool, of which the Oranmore was one, for two consecutive voyages of each of the five steamers, commencing with the voyage of the Oranmore now in question. The stipulations of this "live-stock freight contract" are much those usually found in similar contracts for carrying cattle across the Atlantic, except the sixteenth clause, which I have not met with before, and which is as follows:

"16. Any questions arising under this contract or the bill of lading against the steamer or her owners shall be determined by English law in England."

The libel alleges that the loss occurred by reason of the insufficient fittings of the stalls which the steamer contracted to provide for the cattle.

The defense is that the fittings were proper and sufficient, and that the cattle were injured and lost by the negligence of the cattle-men sent by the shipper to feed and care for them on the voyage, and by the insufficient amount of bedding put under them by the cattle-men, and by the weakness of the head-ropes furnished by the libelant.

The claimant of the steamer, under the sixteenth clause of the contract, denies the jurisdiction of this court, and also contends that if the court takes jurisdiction the exceptions contained in the bill of lading are to be interpreted according to English law, and that by the English courts these exceptions would be held to relieve the ship from liability, even though the losses happened by reason of the insufficiency of the cattle fittings.

I shall first consider the issue of fact as to whether the loss occurred by reason of defect in the construction of the cattle stalls. It must be conceded, although rough weather was experienced on the voyage, commencing soon after leaving the capes, and that the ship rolled very considerably from a high sea abeam, that this was not unusual January weather, and that the loss is attributable, not to any peril of the sea, but either to the insufficiency of the fittings of the cattle stalls, as contended by the libellant, or, as contended by the claimant of the ship, to the incompetency of the cattle-men, the want of proper head-ropes, and the insufficiency of bedding. The Oranmore is one of six British steamers which constitute what is known as the "Johnston Line," plying regularly between Liverpool and Baltimore, and which specially solicit and are intended for the carriage of live cattle across the Atlantic at all seasons of the year. They have, from time to time, improved the special fittings and facilities for that business, until what was some few years ago considered an extra-hazardous undertaking, has become reasonably certain and safe. The voyage of the Oranmore on which the cattle sued for were lost was the only voyage made by any steamer of the line for a long time on which all the cattle shipped, with the exception of one or two beasts, had not been carried safely at all seasons of the year.

The stalls on the between-decks on the Oranmore for the voyage in question were fitted up differently from any previous voyage, and were altered again before she attempted another. Prior to this voyage the stalls on the between-decks had been put up by erecting stanchions five feet apart, resting on and affixed to a false floor, laid on the iron deck, and at the top shored by braces stretching to the sides of the ship, and to other permanent objects against which they could be braced. While in the port of Baltimore, preparing for this voyage, the cattle fittings on the between-decks previously used having been all taken out on the voyage just made, she having carried no cattle on that voyage, it was determined by the captain and agents in Baltimore, in putting in new stalls, to fasten the stanchions by a new system which had been tried, in some of its features, on other ships of the line and had been found to work well. This was to have holes bored in the iron beams, supporting the deck overhead, and to clamp the stanchions to the beam by an iron clamp and screws, so as to bind the upper end of the stanchion firmly to the beam; the foot of the stanchion to be shored and braced as before. The only difference between this system as applied to the Oranmore, and the same system of clamping to the overhead beams which had been applied on some of the other ships, was that on the Oranmore the stanchions were clamped to every other beam instead of to every beam, and this brought them eight feet apart from center to center. As they had been fastened previously without the iron clamping, they had been five feet apart. Head-boards were used of the same thickness as before; that is to say, about two inches thick.

The contention of the libelant is that as the direct strain of the weight of the cattle when pitching and slipping in rough weather is against the head-board to which they are tied, and by which they sustain themselves, that although the tops of the stanchions were more securely fastened by being clamped to the iron beams overhead, the additional length of three feet between them, with a head-board of no greater thickness than had been sufficient when the stanchions were only five feet apart, produced such a strain that the two-inch head-boards were not strong enough, and broke in many places, letting the cattle get out of the stalls and fall over each other, and become wounded and helpless.

The testimony of the cattle-men is directly and strongly in support of this contention, and goes to show that the great strain and weight of the cattle on each eight-foot head-board caused many of these boards to give way, and also caused the shores at the foot of many of the stanchions to give way, and the stanchions to yield at the foot, and to sway from side to side, although the top remained fast. They also testify that this yielding of the head-boards let the weight of the cattle, in their efforts to keep up, come entirely against the cross cleats nailed to the floor to assist them to keep their footing, and that the cleats in many instances yielded to the weight and came loose, and left the beasts without means of maintaining their footing.

Patient consideration of the testimony leads me to the conclusion that the facts relied on by libelant are established by a preponderance of evidence and probability. The Oranmore appears to have been the only ship of this line on which it was attempted, with beams so far apart, to risk putting the wooden stanchions to every other beam, using a head-board only two inches thick. It is true that in the forward part of the ship there were some iron stanchions 10 feet apart, but with these the head-boards used were three inches thick,—in fact, what are called “joists.” Whether the owners intended to leave the fittings on this ship affixed to every other beam, or whether they intended as soon as they could to increase the number of stanchions, and were only prevented from doing so preparatory to the voyage in question by the shortness of the time and the haste to get the vessel off, is a matter which it is not now very easy to determine; the fact is, that immediately after this voyage, and before she made another with cattle, the stanchions were put to every beam, so that they were only four feet apart.

The weight of the testimony leads to the conclusion that placing the stanchions so far apart without increasing the strength of the head-boards was an experiment which no previous experience had justified, and which was made at the risk of the shipper of the cattle during one of the worst winter months, and that it was a negligence or error of judgment for which the ship should be held responsible, unless the shipper has, by the contract contained in the bill of lading, agreed to release the ship.

The bill of lading, among a great many other exceptions and stipulations, contains the following, which appear applicable to the loss sued for in this case:

"* * * The said animals, subject to the stipulations and exceptions hereinafter and before mentioned, are to be delivered from the steamer's deck, where the steamer's responsibility shall cease, at the port of Liverpool or at Birkenhead, unto Jas. Nelson & Sons, or to his or their assigns. Freight payable by consignees at the rate of sixty shillings Br. stg. per head, general average according to York and Antwerp rules."

The following are the exceptions and stipulations above referred to:

"* * * or any other perils of the sea, rivers, navigation, or of land transit, of whatsoever nature or kind, *and whether any of the perils, causes, or things above mentioned, or the loss or injury arising therefrom, be occasioned by the wrongful act, default, negligence, or error in judgment of the owners, pilot, master, officers, crews, stevedores, or other persons whomsoever, in the service of the ship, or for whose acts the ship-owner would otherwise be liable; or by unseaworthiness of the ship at the commencement of the voyage, (provided all reasonable means have been taken to provide against such unseaworthiness,) or otherwise, howsoever excepted.*

"The shipper provides fodder and attendance for the live-stock, and takes all responsibility in their shipping, carriage, and discharge, and for the accidents, damage, and mortality that may happen to them, from whatever cause arising, in loading, discharging, and during the voyage. * * *

"The steamer provides fittings as customary upon steamers of this line, and also provides a condenser for distilling water; but the steamer is not to be held responsible for any defect or insufficiency in said fittings, or in the condenser, or any of its appurtenances, or in the ventilation of the ship, *the same being hereby approved of by the shipper*; nor for any claim notice of which is not given before the delivery of the live-stock by the steamer."

From the above quotations from the bill of lading (which was similar to those constantly before used by the agents of this line of steamers in dealing with this libellant and his father) it appears that the ship-owners have contracted for exemption from the negligence and errors of their employes in putting up the cattle fittings, and have exacted the shipper's approval of them as a condition of issuing the bill of lading.

The embarking of the cattle at Baltimore was attended to by an agent of the libellant, who had for a long time frequently attended to this business for libellant and his father. There was nothing about the appearance of the stall fittings to attract his special attention, and as there was no insurance effected on this shipment, it became no one's special business to critically examine them on behalf of the shipper.

It is conceded that the exemptions of the bill of lading, so far as they are properly applicable to the loss sustained, are, by the English law relating to common carriers, valid and operative; but libellant contends that the bill of lading is to be interpreted by the American law, which, as declared by the federal courts, rejects the attempts of common carriers to exempt themselves from the consequences of want of care and diligence on the part of themselves, or their agents or em-

ployes, and holds such stipulations void as against public policy, and not to be enforced. Where a contract is made in one country to be performed in another, it is not always easy to determine whether the law of the place where the contract was made, or of the place where it is to be performed, is applicable. It seems, however, quite generally conceded that the question is to be determined by arriving at the intent of the parties to the contract, where that is possible. *Hutch. Carr.* 142; *Chartered Bank of India v. Netherlands Nav. Co.*, 10 Q. B. Div. 529. The presumption is that the parties enter into a contract with reference to the law of the place where it is made, but this presumption is easily overthrown by circumstances which show that this was not the intention of the parties. *Whart. Confl. Laws*, 434. In *Cox v. U. S.*, 6 Pet. 203, it is said by the supreme court:

"The law of the place where the contract is made is to govern in expounding and enforcing the contract, unless the parties have a view to its being executed elsewhere, in which case it is to be governed according to the law where it is to be executed."

The present question is not one which affects the capacity of the parties to make the contract. It is not a case in which, according to the American law, it could be said that there is no contract at all binding on the parties. It is merely a question of the extent and nature of the obligations and conditions of a contract. The law is thus stated in *Story, Confl. Laws*, 242:

"Generally speaking, the validity of a contract is to be decided by the law of the place where it is made, unless it is to be performed in another country; for, as we shall presently see, in the latter case the law of the place of performance is to govern."

And, at page 280:

"The rules already considered suppose the performance of the contract to be in the place where it is made, either expressly or by tacit implication. But where the contract is expressly or tacitly to be performed in any other place, there the general rule is, in conformity to the presumed intention of the parties, that the contract, as to its validity, nature, obligation, and interpretation, is to be governed by the law of the place of performance."

And the author cites, as clearly expressing the rule, the statement of Lord MANSFIELD:

"The law of the place can never be the rule where the transaction is entered into with an express view to the law of another country as the rule by which it is to be governed."

In *Whart. Confl. Laws*, 472, it is stated to be a rule fairly deducible from adjudged cases that where there are no other controlling circumstances a contract of carriage is to be interpreted by the law of the carrier's principal office. In this case, although the contract was made in the United States, it was made in the port of Baltimore by a resident of Chicago with a British corporation for carriage in a British ship to a port in Great Britain, and the express agreement of the parties, deliberately made two months before the shipment,

was that any question arising against the carrier under the contract or the bill of lading should be determined by English law. . .

Under all these circumstances it seems to me the court should give effect to this clause of the agreement. It leaves the intention of the parties beyond doubt of any kind, and that intention was to give to the provisions of the bill of lading such efficacy as the English courts would give to them. As I understand the facts of the case, and the rulings of the English courts upon similar bills of lading, I think the exceptions cover the injuries sustained by this libelant, and the libel must be dismissed.

END OF VOLUME 24.

